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THE
SUPREME COURT REPORTER

VOLUME 41

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1920

WITH KEY-NUMBER ANNOTATIONS

NOVEMBER, 1920 — JULY, 1921

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(41 Sup.Ct.)

6-1967

JUSTICES

OF THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1920

CHIEF JUSTICE:

Hon. EDWARD D. WHITE.[1]
Hon. WILLIAM HOWARD TAFT.[2]

ASSOCIATES:

Hon. JOSEPH McKENNA.
Hon. OLIVER WENDELL HOLMES.
Hon. WILLIAM R. DAY.
Hon. WILLIS VAN DEVANTER.
Hon. MAHLON PITNEY.
Hon. JAMES C. McREYNOLDS.
Hon. LOUIS D. BRANDEIS.
Hon. JOHN H. CLARKE.

ATTORNEY GENERAL:

Hon. A. MITCHELL PALMER.[3]
Hon. HARRY M. DAUGHERTY.[4]

SOLICITOR GENERAL:

Hon. WILLIAM L. FRIERSON.[5]
Hon. JAMES M. BECK.[6]

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[1] Died May 19, 1921.
[2] Appointed June 30, 1921.
[3] Resigned.
[4] Appointed March 4, 1921.
[5] Appointed June 1, 1920.
[6] Appointed June 21, 1921.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE MAHLON PITNEY, of New Jersey. Appointed March 13, 1912, by President Taft.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

JUSTICE EDWARD D. WHITE, of Louisiana. Appointed February 19, 1894, by President Cleveland; appointed Chief Justice December 12, 1910, by President Taft; died May 19, 1921.

JUSTICE WILLIAM HOWARD TAFT, of Connecticut. Appointed June 30, 1921, by President Harding.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE WILLIAM R. DAY, of Ohio. Appointed February 25, 1903, by President Roosevelt.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

JUSTICE JOHN H. CLARKE, of Ohio. Appointed July 24, 1916, by President Wilson.

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1920

(254 U. S. 1)

PIEDMONT & GEORGE'S CREEK COAL CO. v. SEABOARD FISHERIES CO.

(Argued March 16 and 17, 1920. Decided Oct. 11, 1920.)

No. 58.

1. Maritime liens 🔑27—No lien for coal sold to owner and furnished by him to vessel.

Where a coal company sold coal to the corporation owning a fleet of vessels and delivered it at the corporation's bins, from which some of it was taken to supply the vessels, the coal company did not furnish the coal to the vessels, though it understood part of the coal was to be used by the vessels, and was not entitled to a maritime lien therefor under Act June 23, 1910, § 1 (Comp. St. § 7783), giving a lien for supplies furnished the vessels at the owner's order.

2. Maritime liens 🔑23—Maritime liens are based on needs of vessel.

Maritime liens are based on the needs of the vessel for obtaining credit for necessary supplies during the voyages, and are not intended for the protection of persons furnishing supplies, as are mechanics' liens, and a maritime lien does not arise merely because the supplies furnished were appropriated to the vessel by its owner subsequent to their purchase.

3. Maritime liens 🔑28—Belief of parties does not create lien.

A belief of a coal company and a vessel owner that the former would have a lien upon the vessels for coal sold to the owner, at least to the extent that it was subsequently used by the vessels, does not create a lien in favor of the coal company.

4. Maritime liens 🔑24 — Lien may exist though owner is liable.

A vessel may be made liable in rem for supplies furnished to her though the owner is liable therefor in personam, since a dealer may rely on the credit of both.

5. Maritime liens 🔑35—Each vessel of fleet liable for its coal purchased under single contract.

The fact that coal which was supplied to the several vessels of a fleet had been purchased under a single contract does not prevent a lien upon each vessel for the amount of such coal received by it.

6. Maritime liens 🔑17—Lien act not intended to broaden scope of liens.

Act of June 23, 1910 (Comp. St. §§ 7783–7787), creating maritime liens for supplies furnished to vessels on the orders of their owners, was intended to remove certain limitations on the right to liens, and to substitute a single federal statute for the statutes of the various states, but not to change the general principles of the law of maritime liens so as to give liens for supplies not furnished to, but subsequently appropriated to, vessels.

7. Maritime liens 🔑33—Liens not to be extended by construction.

Since the maritime lien is a secret one which may operate to the prejudice of prior mortgagees or purchasers without notice, it is stricti juris, and will not be extended by construction, analogy, or inference.

8. Appeal and error 🔑1094(1) — Supreme Court accepts concurrent findings by lower courts.

The concurrent findings of fact by the District Court and Circuit Court of Appeals are accepted by the Supreme Court.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Libels by the Piedmont & George's Creek Coal Company to enforce maritime lien against the fisheries steamer Walter Adams and certain other steamers of which the Seaboard Fisheries Company was claimant. Decrees for the libelant in the District Court (The William B. Murray, 240 F. 147) were reversed by the Circuit Court of Appeals (The Walter Adams, 253 Fed. 20, 165 C. C. A. 40), and the libelant brings certiorari. Affirmed.

*2

*Messrs. John M. Woolsey, J. Parker Kirlin, and H. Brua Campbell, all of New York City, for petitioner.

*4

*Messrs. Philip L. Miller, and Royall Victor, both of New York City, for respondent.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

The Atlantic Phosphate & Oil Corporation owned a fleet of nineteen fishing steamers. It owned also factories at Promised Land, Long Island, and Tiverton, Rhode Island, to which the fish caught were delivered and at which its vessels coaled. When the fishing season of 1914 opened the company was financially embarrassed. Its steamers and factories had been mortgaged to secure an issue of bonds. Bills for supplies theretofore furnished remained unpaid. The company had neither money nor credit. It could not enter upon the season's operations unless some arrangement should be made to supply its vessels and factories with coal. After some negotiations, the Piedmont & George's Creek Coal Company, then a creditor for coal delivered during the year 1913, agreed to furnish the Oil Corporation such coal as it would require during the season of 1914—the understanding of the parties being that the coal to be delivered would be used by the factories as well as by the vessels, that the greater part would be used by the vessels, that the law would afford a lien on the vessels for the purchase price of the coal and that the Coal Company would thus have security. Shipments of coal were made under this agreement from time to time during the spring and summer as ordered by the Oil Corporation. In the autumn receivers for the corporation were appointed by the District Court of the United States for the District of Rhode Island, and later a suit was brought to foreclose the mortgage upon the vessels and factories. At the time the receivers were appointed five cargoes of coal shipped under the above agreement had not been paid for. The Coal Company libeled twelve of the steamers asserting maritime liens for the price and value of either all the coal or of such parts as had been used by the

*6

libeled vessels respectively. *Meanwhile, the vessels were sold under the decree of foreclosure. The Seaboard Fisheries Company became the purchaser and, intervening as claimant in the lien proceedings, denied liability. The District Court held that the Coal Company had a maritime lien on each vessel for the coal received by it. The William B. Murray (D. C.) 240 Fed. 147. The Circuit Court of Appeals reversed these decrees with costs and directed that the libels be dismissed. The Walter Adams, 253 Fed. 20, 165 C. C. A. 40. Then this Court granted the Coal Company's petition for a writ of certiorari. 248 U. S. 556, 39 Sup. Ct. 12, 63 L. Ed. 419.

As to the facts proved there is no disagreement between the two lower courts. The substantial question presented is whether these facts constitute a furnishing of supplies by the Coal Company to the vessels upon order of the owner within the provisions of the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. § 7783).[1]

That coal was furnished to the vessels to the extent to which they severally received it on board, is clear. The precise question, therefore, is: Was the coal furnished by the libelant, the Coal Company, or was it furnished by the Oil Corporation, the owner of the fleet? In determining this question additional facts must be considered:

[1] No coal was delivered by the Coal Company directly to any vessel; and it had no dealings of any kind concerning the coal directly with the officers of any vessel. All the coal was billed by the Coal Company to the Oil Corporation and there was no reference on any invoice, or on its books, either to

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the fleet or to any vessel. There *was no understanding between the companies when the agreement to supply the coal was made or when the coal was delivered that any part of it was specifically for any one of the several vessels libeled, or that it was for any particular vessel of the fleet, or even for the vessels then composing the fleet. Indeed, the first shipment was stated on the invoice to be "coal for factory." The negotiations of the Oil Corporation with the Coal Company did not relate to coal required at that time by the particular vessels subsequently libeled as distinguished from other vessels of the fleet.

The coal was sold f. o. b. at the Coal Company's piers which were at St. George, Staten Island, and Port Reading, New Jersey. At these piers it was loaded on barges which were towed either to the Oil Corporation's plant at Promised Land or to that at Tiverton. Some of these barges were supplied by the Oil Corporation, some by the Coal Company. If supplied by the latter, trimming and towing charges were added to the agreed price of the coal. Upon arrival of the coal at the factories it was placed in the Oil Corporation's bins. At Promised Land—which received four of the five shipments—the bins already contained other coal (1,068 tons) which had been theretofore purchased by the Oil Corporation and had been paid for. With this coal on hand that delivered by libelant was commingled. At each plant both the vessels and the factory were from time to time supplied with coal from the same bins; but the greater part of the coal supplied from each plant was used by the vessels. Weeks, and in some instances months, elapsed between placing the coal in the bins and the delivery of it by the corporation to the several vessels. When it made such deliveries it furnished coal to the vessels, as it did to the factories, not under direction of the Coal Company but in its discretion as owner of the coal and of the business.

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[1] Act of June 23, 1910, c. 373, section 1: Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

The quantity of coal delivered to each *8 vessel was *proved; but to what extent the coal supplied to the several vessels which bunkered at Promised Land came from the 1,068 tons previously purchased, and to what extent it came from the lots purchased from the Coal Company it was impossible to determine. In making the computations which formed the basis of the decrees in the District Court it was assumed, that of the coal supplied to the several vessels which bunkered at Promised Land, a proportionate part of that received by each had come from the coal purchased from libelant.

The Coal Company contends on these facts that it furnished necessary supplies to the several vessels within the meaning of section 1 of the Act of June 23, 1910. But the facts show that no coal was furnished by that company to any vessel "upon order of the owner." The title to the coal had passed to the Oil Corporation when it was loaded on board the barges at the Coal Company's piers. It was delivered to Promised Land and Tiverton as the Oil Corporation's coal and placed in its bins. As its coal the later distribution was made in its discretion to vessels and factories. A large part of the coal so acquired by the Oil Corporation for use in its business was subsequently appropriated by it specifically to the use of the several vessels of the fleet and this use of the coal by vessels of the fleet was a use which had been contemplated by the parties when it was purchased. But the fact that such a use had been contemplated does not render the subsequent appropriation by the owner a furnishing by the coal dealer to the several vessels.

[2] To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest and the substitution there- *9 for of the very different prin*ciple which underlies mechanics' and materialmen's liens on houses and other structures. The former had its origin in desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. The maritime lien developed as a necessary incident of the operation of vessels. The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others, of acting independently and of becoming responsible for her acts. Because the ship's need was the source of the maritime lien it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit. The mechanic's and materialman's lien, on the other hand, attaches ordinarily although the labor and material cannot be said to have been necessary; although at the time they were furnished there was no thought of obtaining security upon the building; and although the credit of the owner or of others had in fact been relied upon. The principle upon which the mechanic's lien rests is, in a sense, that of unjust enrichment. Ordinarily, it is the equity arising from assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workmen and others who, it is assumed, are especially deserving, would *10 ordinarily fail *to provide by agreement for their own protection and would often be unable to do so.[2]

[3] The fact found by the lower courts that the parties understood the law would afford a lien on the vessels for the coal is, in this controversy, without legal significance. If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels. Since the libelant did *not* furnish any coal to the vessels, the erroneous belief of the parties that the law would afford a lien either for all the coal furnished to the Oil Corporation or for that delivered by it to the several vessels could not create a lien under the statute. Clearly no maritime lien could arise therefrom valid as against the claimant which had acquired title to the vessels under a mortgage antedating the purchase. Astor Trust Co. v. E.

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[2] Compare Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 136, 12 Sup. Ct. 181, 35 L. Ed. 961. See O'Conner v. Warner, 4 Watts & S. (Pa.) 223, 226; Bolton v. Johns, 5 Pa. 145, 150, 47 Am. Dec. 404; Taggard v. Buckmore, 42 Me. 77, 81; Buck v. Brian, 2 How. (Miss.) 874, 881; Montandon v. Deas, 14 Ala. 33, 44, 48 Am. Dec. 84; Mochon v. Sullivan 1 Mont. 470, 473.

V. White & Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526.

[4, 5] The difficulty which confronts the Coal Company does not lie in the fact that the contract for the coal was made with the Oil Corporation. A vessel may be made liable in rem for supplies, although the owner can be made liable therefor in personam, since the dealer may rely upon the credit of both. The Bronx, 246 Fed. 809, 159 C. C. A. 111. Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract (The Columbus [D. C.] 65 Fed. 430; Id., 67 Fed. 553, *11 14 C. C. A. 522; The *Newport, 114 Fed. 713, 52 C. C. A. 415; The Alligator, 161 Fed. 37, 88 C. C. A. 201; Astor Trust Co. v. E. V. White & Co., 241 Fed. 57, 61, 154 C. C. A. 57, L. R. A. 1917E, 526), each vessel so receiving supplies may be made liable for the supplies furnished to it (The Murphy Tugs [D. C.] 28 Fed. 429). The difficulty which under the general maritime law would have blocked recovery by the Coal Company is solely that it did not furnish coal to the vessels upon which it asserts a maritime lien; and there is nothing in the Act of June 23, 1910 (Comp. St. §§ 7783–7787), which removes that obstacle.

[6, 7] It is urged by the Coal Company that it was the intention of Congress in passing the act to broaden the scope of the maritime lien and that the construction of the act adopted by the Circuit Court of Appeals renders the statute inoperative in an important class of cases which it was intended to reach. The language of the statute affords no basis for the latter assertion, and the Reports of the Committees of Congress (Senate Report, No. 831, Sixty-First Congress, Second Session) show that it is unfounded. Those reports state that the purpose of the act was this: First, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. The General Smith, 4 Wheat. 438, 4 L. Ed. 609. Second, to do away with the doctrine that when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence no lien arises. The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122. Third, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. Peyroux v. Howard, 7 Pet. 324, 8 L. Ed. 700. The reports expressly declare that the bill makes "no change in the general principles of the law of maritime liens, but merely *12 substitutes a single *statute for the conflicting state statutes." The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no ways lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore stricti juris and will not be extended by construction, analogy or inference. The Yankee Blade (Vandewater v. Mills) 19 How. 82, 89, 15 L. Ed. 554; The Cora P. White (D. C.) 243 Fed. 246, 248.

The Coal Company relies strongly upon The Kiersage, Fed. Cas. No. 7,762, 2 Curtis, 421, Berwind-White Coal Mining Co. v. Metropolitan Steamship Co. (C. C.) 166 Fed. 782, and American Trust Co. v. W. & A. Fletcher, 173 Fed. 471, 97 C. C. A. 477. The language of the state statutes there under consideration differs from that of the federal act. Furthermore, the state legislation creating liens for work and materials furnished in the repair and supply, as well as in the construction of vessels, are largely extensions of the local mechanic's lien laws applicable to buildings.[3]

The Coal Company also urges upon our attention The Yankee, 233 Fed. 919, 925, 927, 147 C. C. A. 593. There the court in sustaining a maritime lien declared that the supplies were delivered not to the charterer but to the vessel, holding that—

> "A materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an *13 actual delivery to the vessel *consistent with the instructions of the order and intentions of the parties giving and accepting it."

And in respect to the coal supplied the court there found specifically that—

> "The quantity to be supplied to and daily consumed by the Yankee, was mentioned and considered by the parties. * * *"

In the case at bar there was no understanding when the contract was made, or when the coal was delivered by the libelant, that any part of it was for any particular vessel or even for the vessels then composing the fleet. And it was clearly understood that the purchasing corporation would apply part of the coal to a nonmaritime use. The difficulty here (unlike that presented in Vigilancia [D. C.] 58 Fed. 698; The Cimbria [D. C.] 156 Fed. 378, 382; and The Curtin [D. C.] 165 Fed. 271) is not in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libelant.

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[3] See "Confusion in the Law Relating to Materialmen's Liens on Vessels," 21 Harvard Law Review, 332, and "The New Federal Statute Relating to Liens on Vessels," 24 Harvard Law Review, 182, both by Fitz-Henry Smith, Jr.

[8] It was also argued that the parties made an express agreement that the Coal Company should have a lien; that is, that they created by agreement a nonstatutory lien. The concurrent findings of fact by the lower courts, which we accept (Baker v. Schofield, 243 U. S. 114, 118, 37 Sup. Ct. 333, 61 L. Ed. 626; La Bourgogne, 210 U. S. 95, 114, 28 Sup. Ct. 664, 52 L. Ed. 973; The Germanic, 196 U. S. 589, 595, 25 Sup. Ct. 317, 49 L. Ed. 610) are to the contrary.

Affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(254 U. S. 658)

No. 3. ADAMS STATE BANK, plaintiff in error, v. The PEOPLE OF STATE OF ILLINOIS. Oct. 5, 1920. In error to the Supreme Court of the State of Illinois. For opinion below, see People v. Adams State Bank, 272 Ill. 277, 111 N. E. 989. Mr. Frank H. Bicek, of Chicago, Ill., for plaintiff in error. Messrs. Edward J. Brundage and James H. Wilkerson, both of Chicago, Ill., for the People of State of Illinois. Dismissed with costs, on motion of counsel for the plaintiff in error.

(254 U. S. 658)

No. 32. Harry Wronkow KEATLEY, petitioner, v. UNITED STATES TRUST COMPANY et al., as Executors, etc. Oct. 5, 1920. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 249 Fed. 296, 161 C. C. A. 304. Mr. W. Bourke Cockran, of New York City, for petitioner. Mr. Edward W. Sheldon, of New York City, for respondent. Dismissed with costs, on motion of counsel for the petitioner.

(254 U. S. 658)

No. 59. W. F. HARN et al., plaintiffs in error, v. MISSOURI STATE LIFE INSURANCE COMPANY. Oct. 5, 1920. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 173 Pac. 214. Mr. W. F. Harn, of Oklahoma City, Okl., in pro. per. Messrs. James R. Keaton and Frank Wells, both of Oklahoma City, Okl., for respondent. Dismissed with costs, per stipulation.

(254 U. S. 657)

No. 138. The UNITED STATES of America, plaintiff in error, v. PICHER LEAD COMPANY. Oct. 5, 1920. In error to the District Court of the United States for the Western District of Missouri. Mr. Solicitor General Frierson, for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(254 U. S. 658)

No. 153. William H. RIGGIE, plaintiff in error, v. GRAND TRUNK RAILWAY COMPANY. Oct. 5, 1920. In error to the Supreme Court of the State of Vermont. For opinion below, see 93 Vt. 282, 107 Atl. 126. Mr. Harry Burton Amey, of Island Pond, Vt., for plaintiff in error. Mr. J. W. Redmond, of Newport, Vt., for defendant in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(254 U. S. 657)

No. 230. The UNITED STATES of America, plaintiff in error, v. Jacob WICIBDEZA (Pleasant Man). Oct. 5, 1920. In error to the District Court of the United States for the District of North Dakota. Mr. Solicitor General Frierson, for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(254 U. S. 658)

No. 18. The NORTHERN PACIFIC RAILWAY COMPANY, appellant, v. John Barton PAYNE, Secretary of the Interior. Oct. 6, 1920. In error to the Court of Appeals of the District of Columbia. For opinion below, see Northern Pac. Ry. Co. v. Lane, 46 App. D. C. 434. Messrs. Alex. Britton, and F. W. Clements, both of Washington, D. C., and Charles Donnelly, of St. Paul, Minn., for appellant. Dismissed with costs, on motion of Mr. Charles Donnelly for the appellant.

(254 U. S. 659)

No. 42. Peter L. WHEELER et al., as trustees, etc., plaintiffs in error, v. CITY OF OAKLAND. Oct. 7, 1920. In error to the District Court of Appeals in and for the First Appellate District of the State of California. For opinion below, see City of Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23. Messrs. Garret W. McEnerney, William H. Orrick, and William B. Bosley, all of San Francisco, Cal., for plaintiffs in error. Dismissed with costs, on motion of counsel for the plaintiffs in error.

(254 U. S. 659)

No. 248. Sarah A. WHITTEMORE, plaintiff in error, v. Maud B. CRAWFORD. Oct. 7, 1920. In error to the Court of Appeals of the District of Columbia. For opinion below, see 266 Fed. 1024. Messrs. L. A. Bailey and J. William Shea, both of Washington, D. C., for plaintiff in error. Mr. Thomas M. Baker, of Washington, D. C., for defendant in error. Dismissed, per stipulation, and mandate granted.

(254 U. S. 607)

No. —, Original. Ex parte In the matter of Thomas WELSH, petitioner. Oct. 11, 1920. For opinion below, see 267 Fed. 819. Motion for leave to file petition for a writ of mandamus herein denied.

(254 U. S. 659)

No. 208. The UNITED STATES of America, plaintiff in error, v. Dimitrios J. THEOPHILATOS et al. Oct. 11, 1920. In error to the District Court of the United States for the Southern District of New York. Mr. Solicitor General Frierson, for the United States. Messrs. William Harmon Black, of New York City, and William W. Spalding, of Washington, D. C., for defendant in error. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(254 U. S. 659)

No. 316. EL PASO & SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, v. Robert L. LOVICK. Oct. 11, 1920. For opinion below, see (Tex.) 218 S. W. 489. Mr. William R. Harr, of Washington, D. C., for plaintiff in error. Messrs. Winbourn Pearce, of Temple, Tex., and A. L. Curtis, of Belton, Tex., for defendant in error. Dismissed with costs, per stipulation.

(254 U. S. 629)

No. 319. Gordon L. DUTCHER, petitioner, v. Louis N. SANDERS. Oct. 11, 1920. For opinion below, see Sanders v. Dutcher, 187 Pac. 51. Mr. Marvin W. Conkling, of El Centro, Cal., for petitioner. Petition for a writ of certiorari to the District Court of Appeal, Third District, of the State of California, denied.

(254 U. S. 629)

No. 328. Rosanna McDOUGALL, administratrix, etc., petitioner, v. The ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY. Oct. 11, 1920. For opinion below, see 106 Kan. 135, 186 Pac. 1028. Mr. L. W. Keplinger, of Kansas City, Kan., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(254 U. S. 622)

No. 333. Herbert L. HILDRETH, petitioner, v. Jim M. MASTORAS. Oct. 11, 1920. For opinion below, see Mastoras v. Hildreth, 263 Fed. 571. Messrs. Frederic D. McKenney, of Washington, D. C., and George P. Dike, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 629)

No. 336. The VIRGINIAN RAILWAY COMPANY, petitioner, v. A. L. MILLS, administrator, etc. Oct. 11, 1920. For opinion below, see Mills v. Virginian Ry. Co., 102 S. E. 604. Messrs. Harvey T. Hall and G. A. Wingfield, both of Roanoke, Va., for petitioner. Petition for writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied.

(254 U. S. 629)

No. 343. GRAND TRUNK WESTERN RAILWAY COMPANY, petitioner, v. Mahlon H. WINGET, etc. Oct. 11, 1920. For opinion below, see Winget v. Grand Trunk Western Ry. Co., 210 Mich. 100, 177 N. W. 273. Mr. James L. Parrish, of Des Moines, Iowa, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(254 U. S. 607)

No. 345. NORTHERN TRUST COMPANY et al., trustees, etc., plaintiffs in error, v. Adolph H. EILERS, et al. Oct. 11, 1920. In error to the District Court of the United States for the District of Oregon. Mr. John Taylor Booz, of Chicago, Ill., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Courtney v. Pratt, 196 U. S. 89, 91, 25 Sup. Ct. 208, 49 L. Ed. 398; Farrugia v. Philadelphia & Reading Ry. Co., 233 U. S. 352, 353, 34 Sup. Ct. 591, 58 L. Ed. 996; Louisville & Nashville Ry. Co. v. Western Union Tel. Co., 234 U. S. 369, 371–372, 34 Sup. Ct. 810, 58 L. Ed. 1356; Male v. Atchison, Topeka & Santa Fé Ry. Co., 240 U. S. 97, 99, 36 Sup. Ct. 351, 60 L. Ed. 544.

(254 U. S. 630)

No. 351. HENRY CHING, petitioner, v. The UNITED STATES of America. Oct. 11, 1920. For opinion below, see United States v. Henry Ching, 264 Fed. 639. Mr. Asa V. Call, of Los Angeles, Cal., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 630)

No. 360. Frank MOORE et al., petitioners, v. The STATE OF ARKANSAS. Oct. 11, 1920. For opinion below, see Hicks v. State, 220 S. W. 308. Mr. Scipio A. Jones, of Little Rock, Ark., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(254 U. S. 630)

No. 361. Frank HICKS, petitioner, v. The STATE OF ARKANSAS. Oct. 11, 1920. For opinion below, see 220 S. W. 308. Mr. Scipio A. Jones, of Little Rock, Ark., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(254 U. S. 630)

No. 368. Isaac S. DEMENT et al., petitioners, v. James T. NEWTON, Commissioner of Patents. Oct. 11, 1920. For opinion below, see In re Dement, 263 Fed. 813. Mr. Reeve Lewis, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(254 U. S. 622)

No. 371. FIRST NATIONAL BANK OF JASPER, FLORIDA, petitioner, v. STATE BANK OF ROME, GEORGIA; and

No. 372. FIRST NATIONAL BANK OF JASPER, FLORIDA, petitioner, v. The FIRST NATIONAL BANK OF ROME, GEORGIA. Oct. 11, 1920. For opinions below, see First Nat. Bank of Rome, Ga., v. First Nat. Bank of Jasper, Fla., 264 Fed. 83, 88. Mr. William Wade Hampton, of Gainesville, Fla., for petitioner. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

(254 U. S. 631)

No. 373. Jesse S. PHILLIPS et al., receivers, etc., petitioners, v. NOEL CONSTRUCTION COMPANY et al. Oct. 11, 1920. For opinion below, see 266 Fed. 603. Mr. Chapman W. Maupin, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(254 U. S. 631)

No. 380. The PEOPLE OF THE STATE OF NEW YORK, petitioner, v. The HUDSON RIVER CONNECTING RAILROAD CORPORATION. Oct. 11, 1920. For opinion below, see 228 N. Y. 203, 126 N. E. 801. Mr. Claude T. Dawes, of Albany, N. Y., for people of State of New York. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(254 U. S. 631)

No. 382. ERIE RAILROAD COMPANY, petitioner, v. May PINKNEY, administratrix, etc. Oct. 11, 1920. For opinion below, see Pinkney v. Erie R. Co., 266 Pa. 566, 109 Atl. 790. Mr. Henry A. Knapp, of Scranton, Pa., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(254 U. S. 622)

No. 383. The BANK OF JASPER, petitioner, v. The FIRST NATIONAL BANK OF ROME, GEORGIA; and

No. 384. The BANK OF JASPER, petitioner, v. The STATE BANK OF ROME, GEORGIA. Oct. 11, 1920. For opinion below, see First Nat. Bank of Rome, Ga., v. Bank of Jasper, 264 Fed. 88. Mr. F. P. Fleming, of Jacksonville, Fla., for petitioner. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

(254 U. S. 631)

No. 385. Speed MANKIN, petitioner, v. James BARTLEY. Oct. 11, 1920. For opinion below, see 266 Fed. 466. Mr. S. H. Sutherland, of Clintwood, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 631)

No. 386. Speed MANKIN, petitioner, v. G. C. SAUNDERS. Oct. 11, 1920. For opinion below, see 266 Fed. 466. Mr. S. H. Sutherland, of Clintwood, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 622)

No. 387. Gertrude M. REED, administratrix of the estate of Lee C. Reed, deceased, petitioner, v. DIRECTOR GENERAL OF RAILROADS, United States Railroad Administration, operating Philadelphia & Reading Railroad. Oct. 11, 1920. For opinion below, see 267 Pa. 86, 110 Atl. 254. Mr. Frederick S. Tyler, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted.

(254 U. S. 632)

No. 390. NEWLIN HAINES COMPANY, petitioner, v. Edward E. GROSSCUP, trustee, etc. Oct. 11, 1920. Messrs. Edward L. Katzenbach, of Trenton, N. J., and D. Howard Evans, of Philadelphia, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 632)

No. 403. KANSAS CITY MOTION PICTURE MACHINE OPERATORS, LOCAL NO. 170, et al., plaintiffs in error, v. John E. HUGHES et al., etc. Oct. 11, 1920. For opinion below, see Hughes v. Kansas City Motion Picture Machine Operators, Local No. 170, 221 S. W. 95. Mr. William J. Hughes, of Washington, D. C., for plaintiffs in error. Petition for a writ of certiorari herein denied.

(254 U. S. 632)

No. 404. James F. BISHOP, administrator, etc., petitioner, v. Frederick A. DELANO et al., receivers of the Wabash Railroad Company. Oct. 11, 1920. For opinion below, see 265 Fed. 263. Mr. Fred W. Bentley, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 632)

No. 411. S. NAKANO, Petitioner, v. The UNITED STATES of America. Oct. 11, 1920. For opinion below, see 262 Fed. 761. Mr. Marshall B. Woodworth, of San Francisco, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 623)

No. 412. John GOOCH, jr., petitioner, v. OREGON SHORT LINE RAILROAD COMPANY. Oct. 11, 1920. For opinion below, see 264 Fed. 664. Mr. J. H. Peterson, of Pocatello, Idaho, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 632)

No. 414. Louis SINGER, doing business as L. Singer Produce Company, petitioner, v. AMERICAN EXPRESS COMPANY. Oct. 11, 1920. For opinion below, see 219 S. W. 662. Mr. Albert S. Marley, of Kansas City, Mo., for petitioner. Mr. Cyrus Crane, of Kansas City, Mo., for respondent. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied.

(254 U. S. 633)

No. 415. Benjamin C. ALLEN, on behalf of himself, etc., petitioner, v. PHILADELPHIA COMPANY et al. Oct. 11, 1920. For opinion below, see 265 Fed. 817. Mr. Robert Woods Sutton and H. F. Stambaugh, both of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 633)

No. 416. LIM CHAN, petitioner, v. Edward WHITE, as commissioner of immigration for the port of San Francisco. Oct. 11, 1920. For opinion below, see 262 Fed. 762. Messrs. Jackson H. Ralston and George W. Hott, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 633)

No. 423. DU PONT ENGINEERING COMPANY, petitioner, v. EVANSVILLE ICE & STORAGE COMPANY. Oct. 11, 1920. Mr. Thomas J. Tyne, of Nashville, Tenn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(254 U. S. 607, 629)

No. 426. VOGT BROTHERS MANUFACTURING COMPANY, petitioner, v. ELLICOTT MACHINE CORPORATION. Oct. 11, 1920. Petition for writ of error to the United States Circuit Court of Appeals for the Sixth Circuit. For opinion below, see 267 Fed. 945. Messrs. Helm Bruce and Alexander Galt Barret, both of Louisville, Ky., for petitioner.

PER CURIAM. The petition for writ of error is denied. See section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214). Petition for a writ of certiorari and for a writ of mandamus denied.

(254 U. S. 633)

No. 428. W. R. FELKER et al., etc., petitioners, v. The SOUTHERN TRUST COMPANY, as trustees, etc., et al. Oct. 11, 1920. For opinion below, see 264 Fed. 798. Mr. Dick Rice, of Miami, Okl., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 634)

No. 431. Pasquale CIAFIRDINI, petitioner, v. The UNITED STATES of America. Oct. 11, 1920. For opinion below, see 266 Fed. 471. Mr. A. B. Quinton, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 634)

No. 432. Seton C. BENS, petitioner, v. James M. POWER, United States marshal, etc. Oct. 11, 1920. For opinion below, see 266 Fed. 152. Mr. George R. Rubin, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 634)

No. 436. Mrs. Camilla Davis PUTNAM, widow, etc., et al., petitioners, v. Mrs. Louise Stone BORST. Oct. 11, 1920. For opinion below, see Parkerson v. Borst, 264 Fed. 761. Mr. Edwin T. Merrick, of New Orleans, La., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 634)

No. 437. Fred BLACKSTOCK, petitioner, v. The UNITED STATES of America. Oct. 11, 1920. For opinion below, see 261 Fed. 150. Mr. M. K. Cruce, of Oklahoma City, Okl., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 635)

No. 438. GULF COMPRESS COMPANY et al., petitioners, v. MERCHANTS' COTTON PRESS & STORAGE COMPANY. Oct. 11, 1920. For opinion below, see 265 Fed. 199. Mr. Thomas A. Evans, of Memphis, Tenn., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 635)

No. 447. Eugene W. MENTE, petitioner, v. Mark EISNER, collector of internal revenue, etc. Oct. 11, 1920. For opinion below, see 266 Fed. 161. Mr. Frederic H. Cowden, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 635)

No. 455. ROSS LUMBER COMPANY, petitioner, v. HUGHES LUMBER COMPANY. Oct. 11, 1920. For opinion below, see 264 Fed. 757. Messrs. John E. Hall, Warren Grice, and Charles J. Bloch, all of Macon, Ga., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 635)

No. 456. **EMPIRE GAS & FUEL COMPANY**, petitioner, v. John G. WETSEL et al. Oct. 11, 1920. For opinion below, see Wetsel v. Empire Gas & Fuel Co., 264 Fed. 865. Mr. T. F. Garver, of Ft. Worth, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 623)

No. 462. The UNITED STATES, petitioner, v. M. RICE & COMPANY et al. Oct. 11, 1920. For opinion below, see 10 Ct. Cust. App. 165. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Court of Customs Appeals granted.

(254 U. S. 635)

No. 463. William J. DANTE, collector, etc., petitioner, v. Rose Keeling HUTCHINS. Oct. 11, 1920. For opinion below, see 265 Fed. 988. Mr. George E. Sullivan, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals for the District of Columbia denied.

(254 U. S. 636)

No. 464. LOS ANGELES & SALT LAKE RAILROAD COMPANY, petitioner, v. The CITY OF LOS ANGELES. Oct. 11, 1920. For opinion below, see City of Los Angeles v. San Pedro, L. A. & S. L. R. Co., 189 Pac. 449. Messrs A. S. Halsted, of Los Angeles, Cal., and Oscar Lawler, Alex. Britton and Evans Browne, all of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

(254 U. S. 636)

No. 465. LOS ANGELES & SALT LAKE RAILROAD COMPANY et al., petitioners, v. The CITY OF LOS ANGELES. Oct. 11, 1920. For opinion below, see City of Los Angeles v. San Pedro, L. A. & S. L. R. Co., 189 Pac. 449. Messrs. A. S. Halsted, of Los Angeles, Cal., and Oscar Lawler, Alex. Britton, and Evans Browne, all of Washington, D. C., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

(254 U. S. 623)

No. 467. WHITE OAK TRANSPORTATION COMPANY, petitioner, v. BOSTON, CAPE COD & NEW YORK CANAL COMPANY. Oct. 11, 1920. For opinions below, see 265 Fed. 538; 267 Fed. 176. Mr. Edward E. Blodgett, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(254 U. S. 660)

No. 468. Benjamin F. BUSH, receiver for the Missouri Pacific Railway Company, petitioner, v. Albert J. BRUNSWIG. Oct. 11, 1920. On petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri. For opinion below, see Brunswig v. Bush, 221 S. W. 759. Mr. Edward J. White, of St. Louis, Mo., for petitioner. Petition dismissed with costs, on motion of counsel for the petitioner.

(254 U. S. 624)

No. 469. The PULLMAN COMPANY, petitioner, v. The STATE INDUSTRIAL COMMISSION. Oct. 11, 1920. For opinion below, see Bryant v. Pullman Co., 228 N. Y. 579, 127 N. E. 909, which affirmed order 188 App. Div. 311, 177 N. Y. Supp. 488. Certiorari dismissed 254 U. S. 666, 41 Sup. Ct. 217, 65 L. Ed. —. Mr. Maurice C. Spratt, of Buffalo, N. Y., for petitioner. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York, granted.

(254 U. S. 636)

No. 471. Wesley M. SMITH, petitioner, v. W. T. APPLE. Oct. 11, 1920. For opinions below, see Apple v. Smith, 105 Kan. 732, 185 Pac. 903; Id., 106 Kan. 717, 190 Pac. 8. Messrs. John S. Dean and Thomas F. Doran, both of Topeka, Kan., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(254 U. S. 636)

No. 474. George F. AUF DER HEIDE, petitioner, v. Anna W. KISKADDON et al. Oct. 11, 1920. For opinion below, see 190 Pac. 859. Messrs. Benjamin B. Blakeney and James H. Maxey, both of Tulsa, Okl., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 476. UNITED SHOE MACHINERY CORPORATION et al., appellants, v. The UNITED STATES of America; and

No. 550. The UNITED STATES of America, appellant, v. UNITED SHOE MACHINERY CORPORATION et al. Oct. 11, 1920. For opinion below, see 264 Fed. 138. Messrs. Frederick P. Fish and Charles F. Choate, Jr., both of Boston, Mass., and Cordenio A. Severance, of St. Paul, Minn., for appellants. The Attorney General, for the United States. Motion to suspend the operation of an injunction in these cases, ordered by the District Court of the United States for the Eastern District of Missouri, granted.

(254 U. S. 637)

No. 477. HOUK MANUFACTURING COMPANY, petitioner, v. COWEN COMPANY. Oct. 11, 1920. For opinion below, see 267 Fed. 787. Mr. Melville Church, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 637)

No. 478. CLINTON MINING & MINERAL COMPANY, petitioner, v. J. S. BEACOM. Oct. 11, 1920. For opinion below, see 266 Fed. 621. Mr. Arthur O. Fording, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 637)

No. 479. Thomas WELSH, petitioner, v. The UNITED STATES of America. Oct. 11, 1920. For opinion below, see 267 Fed. 819. Mr. Martin Conboy, of New York City, for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 623)

No. 487. **NORTHERN COAL COMPANY,** petitioner, v. **BOSTON, CAPE COD & NEW YORK CANAL COMPANY.** Oct. 11, 1920. For opinions below, see Boston, Cape Cod & New York Canal Co. v. T. A. Scott Co., 265 Fed. 538; White Oak Transp. Co. v. Boston, Cape Cod & New York Canal Co., 267 Fed. 176. Mr. John G. Palfrey, of Boston, Mass., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(254 U. S. 660)

No. 554. The **SECOND NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA,** et al., appellants, v. **UNITED STATES FIDELITY & GUARANTY COMPANY.** Oct. 11, 1920. Appeal to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 266 Fed. 489. Dismissed with costs, per stipulation.

(254 U. S. 660)

No. 50. The **ATLANTIC COAST ELECTRIC RAILWAY COMPANY,** plaintiff in error, v. **BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY** et al. Oct. 15, 1920. For opinion below, see 92 N. J. Law, 168, 104 Atl. 218. Mr. Robert H. McCarter, of Newark, N. J., for plaintiff in error. Mr. L. Edward Herrmann, of Jersey City, N. J., for defendant in error. In error to the Court of Errors and Appeals of the State of New Jersey. Dismissed with costs, pursuant to the nineteenth rule.

(254 U. S. 14)

No. 13, Original. The **STATE OF MINNESOTA,** complainant, v. The **STATE OF WISCONSIN.** Oct. 11, 1920. Messrs. Lyndon A. Smith, of St. Paul, Minn., Charles R. Pierce, of Washington, D. C., and Clifford L. Hilton and Frank B. Kellogg, both of St. Paul, Minn., H. B. Fryberger and William D. Bailey, both of Duluth, Minn., and C. Louis Weeks, of St. Paul, Minn., for the State of Minnesota. Messrs. Walter C. Owen, of Maiden Rock, Wis., Walter Drew, of Milwaukee, Wis., M. B. Olbrich, of Madison, Wis., and John J. Blaine, of Boscobel, Wis., for the State of Wisconsin. The motion to appoint commissioners to run the boundary line between the respective States, pursuant to the order (252 U. S. 273, 40 Sup. Ct. 313, 64 L. Ed. 558,) entered herein on March 8, 1920, is granted, and, in pursuance of the stipulation of counsel for the respective parties, Mr. Samuel S. Gannett, of Washington, D. C., Mr. William D. Patton, of Duluth, Minnesota, and Mr. G. D. Mack, of Madison, Wisconsin, are hereby appointed commissioners to run and mark the boundary line between the respective States.

The decree in its entirety is as follows:

It is ordered, adjudged, and decreed as follows:

1. That the true boundary line between the complainant and the defendant in and through Lower St. Louis Bay, Upper St. Louis Bay, and the St. Louis river, from Upper St. Louis Bay to the "Falls" in the said river, is as hereinafter specified.

2. That said boundary line must be ascertained upon a consideration of the situation existing in 1846 and accurately described by the Meade chart, more specifically hereinafter referred to.

3. "That said boundary line runs from a point midway between Rice's Point and Connor's Point through the middle of Lower St. Louis Bay to and with the deep channel leading to Upper St. Louis Bay and to a point therein immediately south of the southern extremity of Grassy Point, thence westward along the most direct course through water not less than eight feet deep eastward of Fisherman's Island, as indicated by the red trace A, B, C, on Minnesota's Exhibit No. 1 (said Exhibit 1 being the Meade chart offered and received in evidence in this suit and now a part of the record), approximately one mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big Island up stream to the 'Falls.' "

4. A commission, consisting of Samuel S. Gannett, of Washington, D. C., William B. Patton, of Duluth, Minnesota, and John G. D. Mack, of Madison, Wisconsin, competent persons, is here and now appointed by the court to run, locate and designate the boundary line between said states along that portion of said bay and river heretofore described in this decree, and to locate said boundary line by proper monuments, courses and distances, as fixed by the court in this decree.

5. Before entering upon the discharge of their duties each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias, the duties herein imposed, said oaths to be taken before the clerk of this court or before the clerk of any District Court of the United States or before an officer authorized by law to administer an oath in the state of Minnesota or the state of Wisconsin, and returned with their report. Said commission is authorized and empowered to make examination of the territory in question and to adopt all ordinary and legitimate methods of survey in the designation of the true location of said boundary line fixed by the decree, to examine and consider carefully the opinion of this court delivered on March 8, 1920, the said Minnesota's Exhibit 1, being the Meade chart, or a certified copy thereof; and said commission shall do all other matters necessary to enable it to discharge its duties and to obtain the end to be accomplished conformably to this decree.

6. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is thereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies; the Chief Justice acting upon such information in the premises as may be satisfactory to him.

7. It is further ordered that said commissioners proceed with all convenient dispatch to discharge their duties conformably to this decree.

8. It is further ordered that the clerk of this court shall forward at once to the Governor of each of said states of Minnesota and Wisconsin and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 8, 1920, duly authenticated.

9. Said commissioners shall make a report of their proceedings under this decree as soon as practicable on or before the 1st day of May, 1921, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

10. All other matters are reserved until the coming in of said report or until such time as matters pertaining to this cause shall be properly presented to this court for its consideration.

(254 U. S. 17)

WESTERN UNION TELEGRAPH CO. v. SPEIGHT.

(Argued Oct. 12, 1920. Decided Oct. 25, 1920.)

No. 241.

1. **Commerce 🔑28—Transmission of telegram is interstate, though it passes through other state unnecessarily.**

The course by which a message was transmitted in the ordinary course of business by a telegraph company between two points within the state determines its character as an interstate or intrastate transaction, and it is interstate where it actually was sent through a portion of another state, though it was not necessary to send it across the state boundaries.

2. **Telegraphs and telephones 🔑66(1)—Burden is on plaintiff to show interstate transmission was to evade liability.**

If the motive of a telegraph company in transmitting a message between two points in the same state by way of points outside the state is material, the burden is on plaintiff, seeking to recover as for an intrastate message, to prove that the company's practice was for the purpose of evading the jurisdiction of the state.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

Action by Addie Speight against the Western Union Telegraph Company. A nonsuit directed by the presiding judge was set aside by the Supreme Court of the State of North Carolina (178 N. C. 146, 100 S. E. 351), and defendant brings certiorari. Reversed.

See, also, 252 U. S. 576, 40 Sup. Ct. 344, 64 L. Ed. 724.

Messrs. Rush Taggart, of New York City, Charles W. Tillett, of Charlotte, N. C., and Francis R. Stark, of New York City, for petitioner.

Mr. Murray Allen, of Raleigh, N. C., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought in a state court by the respondent against the petitioner, the *18 Telegraph Company, to re*cover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was "Father died this morning. Funeral tomorrow, 10:10 a. m.," and was dated January 24. As delivered to the plaintiff on January 24 it was dated January 23 and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina, to Rosemary in the same State and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the Company for years, and the Company defends on the ground that the message was sent in interstate commerce, and that therefore a suit could not be maintained for mental suffering alone. Southern Express Co. v. Byers, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the law of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law" and ordered a nonsuit. But on appeal the Supreme Court of the State set aside the nonsuit and directed that a judgment be entered on the verdict.

[1] We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the Telegraph Company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. The fact must be tested by the actual transaction. Kirmeyer v. Kansas, 236 U. S. 568, 572, 35 Sup. Ct. 419, 59 L. Ed. 721.

[2] As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Rich- *19 mond was the relay point from *Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business also was. It would have been possible, physically, to send direct from Weldon but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the Company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same State the business was intrastate unless it was necessary to cross the territory of another State in order to reach the final point. This, as we have said, is not the law. It did however lay down that the burden was on the Company to show that what was done "was not done to evade the jurisdiction of the State." If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place but for the unwarranted conduct and the resulting loss.

Judgment reversed.

Mr. Justice PITNEY concurs in the result.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(254 U. S. 608)

No. —, original. Ex parte In the matter of UNION TOOL COMPANY, petitioner. Oct. 18, 1920. For opinion below, see Union Tool Co. v. United States (C. C. A.) 262 Fed. 431. Motion for leave to file petition for a writ of mandamus denied.

(254 U. S. 609)

No. 23, original. The STATE OF OKLAHOMA, Complainant, v. The STATE OF TEXAS. Oct. 18, 1920. See, also, 40 Sup. Ct. 585. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, Asst. Atty. Gen., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas.

Order. The motion of E. Everett Rowell for leave to intervene is granted, but with the restriction that such intervention shall not delay the approaching hearing on general questions in the cause and that as respects that hearing this intervenor must rely upon the evidence already taken and reported to the court. Other parties to the cause are granted ten days within which to answer the petition of this intervenor.

(254 U. S. 660)

No. 56. James A. PETERSON, plaintiff in error, v. The UNITED STATES of America. Oct. 18, 1920. In error to the District Court of the United States for the District of Minnesota. Mr. Frank D. Larrabee, of Minneapolis, Minn., for plaintiff in error. Mr. Solicitor General Frierson, for the United States. Reversed, on confession of error; and cause remanded for further proceedings on motion of Mr. Solicitor General Frierson for the defendant in error.

No. 131. AMERICAN STEEL FOUNDRIES, petitioner, v. James T. NEWTON, Commissioner of Patents. Oct. 18, 1920. See, also, 250 U. S. 655, 40 Sup. Ct. 10, 63 L. Ed. 1192. Mr. George L. Wilkinson, of Chicago, Ill., for petitioner. Robert White, Commissioner of Patents, substituted as the party respondent herein in place of James T. Newton, resigned, on motion of Mr. George L. Wilkinson in that behalf.

(254 U. S. 608)

No. 192. Mary L. Greer CONKLIN, appellant, v. George H. CONKLIN et al. Oct. 18, 1920. Appeal from the District Court of the United States for the Southern District of Georgia. Mary L. Greer Conklin, in pro. per. Messrs. William H. Barrett, Bryan Cumming, and C. Henry Cohen, all of Augusta, Ga., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; United Surety Co. v. American Fruit Produce Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(254 U. S. 608)

No. 353. Mary L. Greer CONKLIN, appellant, v. The AUGUSTA CHRONICLE PUBLISHING COMPANY. Oct. 18, 1920. Appeal from the District Court of the United States for the Southern District of Georgia. See, also, 253 U. S. 496, 40 Sup. Ct. 587, 64 L. Ed. 1031. Mary L. Greer Conklin, in pro per.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; United Surety Co. v. American Fruit Produce Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(254 U. S. 637)

No. 475. MOHAWK MINING COMPANY, petitioner, v. Harry H. WEISS, collector, etc. Oct. 18, 1920. For opinion below, see Weiss v. Mohawk Min. Co., 264 Fed. 502. Mr. Alton C. Dustin, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 637)

No. 484. AMERICAN SOCIALIST SOCIETY, petitioner, v. The UNITED STATES OF AMERICA. Oct. 18, 1920. For opinion below, see 266 Fed. 212. Mr. Walter Nelles, of New York City, for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 638)

No. 485. PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Elizabeth SWANK, administratrix, etc. Oct. 18, 1920. For opinion below, see Swank v. Pennsylvania R. Co., 111 Atl. 44. Messrs. George A. Bourgeois and Harry R. Coulomb, both of Atlantic City, N. J., for petitioner. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.

(254 U. S. 638)

Nos. 488 and 489. Frederick B. LYNCH, petitioner, v. D. DARNELL et al., partners as Hazel-Darnell Mule Company. Oct. 18, 1920. For opinion below, see 265 Fed. 913. Mr. Edward T. Young, of St. Paul, Minn., for petitioner. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 638)

No. 490. Harry C. WILSON and Cleo Wilson, petitioners, v. The UNITED STATES of America. Oct. 18, 1920. For opinion below, see Hockett v. United States, 265 Fed. 588. Mr. Thomas Ball, of Los Angeles, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 624)

No. 491. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. ESTEVE BROTHERS & COMPANY. Oct. 18, 1920. For opinion below, see 268 Fed. 22. Messrs. Rush Taggart, of New York City, W. B. Spencer, of New Orleans, La., and Francis R. Stark, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

(254 U. S. 638)

No. 494. Charles B. MUNDAY, petitioner, v. The PEOPLE OF THE STATE OF ILLINOIS. Oct. 18, 1920. For opinion below, see People v. Munday, 293 Ill. 191, 127 N. E. 364. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(254 U. S. 638)

No. 498. Laforest L. SIMMONS, petitioner, v. Joe DUART. Oct. 18, 1920. For opinion below, see Duart v. Simmons, 128 N. E. 32. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

(254 U. S. 639)

No. 500. REPETTI, Inc., petitioner, v. WALLACE & COMPANY. Oct. 18, 1920. For opinion below, see Wallace & Co. v. Repetti, 266 Fed. 307. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 639)

No. 501. CHARLEY TOY and Lee Gip, petitioners, v. The UNITED STATES of America. Oct. 18, 1920. For opinion below, see 266 Fed. 326. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 639)

No. 503. Tiburcio VALVERDE, petitioner, v. The UNITED STATES. Oct 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(254 U. S. 639)

No. 504. Roy C. MEGARGEL et al., etc., petitioners, v. Herman B. GATES et al. Oct. 18, 1920. For opinion below, see Gates v. Megargel, 266 Fed. 811. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 640)

No. 506. DIRECTOR GENERAL OF RAILROADS, petitioner, v. Mrs. B. M. MOORE, administratrix, etc. Oct. 18, 1920. For opinion below, see Moore v. Director General of Railroads, 103 S. E. 444. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(254 U. S. 640)

No. 507. BLUEFIELDS FRUIT & STEAMSHIP COMPANY, petitioner, v. WESTERN ASSURANCE COMPANY OF TORONTO. Oct. 18, 1920. For opinion below, see 265 Fed. 221. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 640)

No. 510. Julius BLOCK, petitioner, v. Louis HIRSH. Oct. 18, 1920. For opinion below, see Hirsh v. Block, 267 Fed. 614. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(254 U. S. 624)

No. 511. Edward S. ATWATER, petitioner, v. Stephen G. GUERNSEY et al., Trustees, etc., et al. Oct. 18, 1920. For opinion below, see In re Atwater, 266 Fed. 278. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(254 U. S. 640)

No. 513. George HOLMES et al., petitioners, v. The UNITED STATES of America. Oct. 18, 1920. For opinion below, see 267 Fed. 529. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 640)

No. 514. NEW YORK SANITARY UTILIZATION COMPANY, petitioner, v. AMERICAN ENGINEERING COMPANY et al. Oct. 18, 1920. For opinion below, see American Engineering Co. v. Metropolitan By-Products Co., 267 Fed. 90. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 641)

No. 515. Miley JOHNSON et al., petitioners, v. Seth SALMON et al. Oct. 18, 1920. For opinion below, see Salmon v. Johnson, 78 Okl. 182, 189 Pac. 537. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(254 U. S. 641)

No. 516. SMITH BELL & COMPANY, Limited, petitioner, v. Wenceslao TRINIDAD, collector, etc. Oct. 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(254 U. S. 641)

No. 517. MACLEOD & COMPANY, Inc., petitioner, v. Wenceslao TRINIDAD, collector, etc. Oct. 18, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(254 U. S. 641)

No. 518. John J. DIMMITT, petitioner, v. Glenn L. BREAKEY. Oct. 18, 1920. For opinion below, see 267 Fed. 792. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 624)

No. 521. UNION TOOL COMPANY, petitioner, v. Elihu C. WILSON. Oct. 18, 1920. For opinion below, see Wilson v. Union Tool Co., 265 Fed. 669. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 642)

No. 522. EMPIRE VOTING MACHINE COMPANY, petitioner, v. CITY OF CHICAGO et al. Oct. 18, 1920. For opinion below, see 267 Fed. 162. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 661)

No. 64. Louis B. NAGLER, plaintiff in error, v. The UNITED STATES of America. Oct. 20, 1920. In error to the District Court of the United States for the Western District of Wisconsin. See, also, United States v. Nagler, 252 Fed. 217. Messrs. Gilbert E. Roe, of New York City, and Herman L. Ekern, of Madison, Wis., for plaintiff in error. Mr. Solicitor General Frierson, for the United States. Judgment reversed, on confession of error and cause remanded for further proceedings in conformity with law, on motion of Mr. Solicitor General Frierson for the defendant in error.

No. 375. H. W. CARGILL, as assessor, etc., et al., petitioners, v. The UNITED STATES ex rel. Frank PIERCE. Oct. 25, 1920. For opinion below, see United States v. Cargill, 263 Fed. 856. Mr. U. S. Bratton, of Little Rock, Ark., for petitioners. Motion to dismiss for want of prosecution denied without prejudice.

(254 U. S. 645)

No. 381. Andrew P. LOCKHART, petitioner, v. The UNITED STATES of America. Oct. 25, 1920. For opinion below, see 264 Fed. 14. Messrs. C. S. Littleton and Jesse M. Littleton, both of Chattanooga, Tenn., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 642)

No. 527. LEE U. ONG, petitioner, v. The UNITED STATES of America. Oct. 25, 1920. For opinion below, see 264 Fed. 315. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 642)

No. 528. Frederick C. TAXIS et al., petitioners, v. UNIVERSAL FORM CLAMP COMPANY. Oct. 25, 1920. For opinion below, see Universal Form Clamp Co. v. Taxis, 267 Fed. 578. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 642)

No. 529. Marcelino LONTOK, petitioner, v. The UNITED STATES. Oct. 25, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(254 U. S. 642)

No. 533. The EGRY REGISTER COMPANY, petitioner, v. The STANDARD REGISTER COMPANY. Oct. 25, 1920. For opinion below, see 267 Fed. 186. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 642)

No. 534. Rene ARBIB, petitioner, v. The UNITED STATES of America. Oct. 25, 1920. For opinion below, see Feathers of Wild Birds v. United States, 267 Fed. 964. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 643)

No. 535. GALVESTON, HOUSTON & HENDERSON RAILROAD COMPANY, petitioner, v. The UNITED STATES of America. Oct. 25. 1920. For opinion below, see 265 Fed. 266. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 645)

No. 536. Frederick KERR, petitioner, v. Frederick Tanini TAGLIAVIA. Oct. 25, 1920. For opinion below, see 129 N. E. 907, which dismisses appeal 186 App. Div. 893, 172 N. Y. Supp. 901. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(254 U. S. 643)

No. 537. Elizabeth L. HUGHES, petitioner, v. Sara E. TECHT, also known as Sarah E. Techt. Oct. 25, 1920. For opinion below, see Techt v. Hughes, 128 N. E. 185, which affirms judgment, 188 App. Div. 743, 177 N. Y. Supp. 420. Petition for a writ of certiorari to the Court of Appeals of the State of New York denied.

(254 U. S. 646)

No. 538. HARTMAN-BLANCHARD COMPANY, petitioner, v. Kittie TEN EYCK et al. Oct. 25, 1920. For opinion below, see 267 Fed. 974. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 643)

No. 539. Catherine K. NEWTON et al., petitioners, v. William A. RHEA et al. Oct. 25, 1920. For opinion below, see Rhea v. Newton, 262 Fed. 345. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 644)

No. 540. LUCKENBACH STEAMSHIP COMPANY (Inc.) et al., petitioners, v. W. R. GRACE & COMPANY (Inc.). Oct. 25, 1920. For opinion below, see 267 Fed. 676. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 625)

No. 541. The FIRST NATIONAL BANK OF GULFPORT, MISSISSIPPI, petitioner, v. Wirt ADAMS, revenue agent, etc. Oct. 25, 1920. For opinions below, see 84 South. 707, 85 South. 308. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted.

(254 U. S. 644)

No. 542. James F. BISHOP, administrator, etc., et al., petitioners, v. GREAT LAKES TOWING COMPANY. Oct. 25, 1920. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 625)

No. 543. Ephraim LEDERER, Collector, etc., petitioner, v. Alexander J. STOCKTON, Sole Surviving Trustee. Oct. 25, 1920. For opinion below, see 266 Fed. 676. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(254 U. S. 625)

No. 547. Elliott FREDERICK, trustee, etc., v. The FIDELITY MUTUAL LIFE INSURANCE COMPANY, OF PHILADELPHIA. Oct. 25, 1920. Petition for a writ of certiorari to the Superior Court of the State of Pennsylvania granted.

(254 U. S. 644)

No. 549. F. M. HATHAWAY et al., petitioners, v. FORD MOTOR COMPANY. Oct. 25, 1920. For opinion below, see 264 Fed. 952. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 626)

No. 552. COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2, etc., petitioners, v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY. Oct. 25, 1920. For opinion below, see 265 Fed. 524. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(254 U. S. 625)

No. 555. The TEXAS COMPANY, petitioner, v. HOGARTH SHIPPING CORPORATION, Limited, owner, etc., et al. Oct. 25, 1920. For opinion below, see 267 Fed. 1023. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(254 U. S. 644)

No. 556. The CENTRAL RAILROAD COMPANY OF NEW JERSEY, petitioner, v. Edna May KNORR. Oct. 25, 1920. For opinion below, see Knorr v. Central Railroad of New Jersey, 110 Atl. 797. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(254 U. S. 644)

No. 557. Sherwood S. MATTOCKS, petitioner, v. GREAT LAKES TOWING COMPANY. Oct. 25, 1920. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 646)

No. 561. SOUTHERN RAILWAY COMPANY, petitioner, v. Alma R. MILLER, administratrix, etc. Oct. 25, 1920. For opinion below, see 267 Fed. 376. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 646)

No. 563. LEWISTON MILLING COMPANY (Limited), petitioner, v. Ira D. CARDIFF et al., etc. Oct. 25, 1920. For opinion below, see 266 Fed. 753. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 646)

No. 564. ATLANTIC COAST LINE RAILROAD COMPANY, petitioner, v. Emma RAULERSON. Oct. 25, 1920. For opinion below, see 267 Fed. 694. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(254 U. S. 645)

No. 565. E. HAMILTON et al., petitioners, v. The UNITED STATES of America. Oct. 25, 1920. For opinion below, see 268 Fed. 15. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 645)

No. 567. Morris LEVINSON, appellant, v. The UNITED STATES of America et al. Oct. 25, 1920. For opinion below, see United States v. Levinson, 267 Fed. 692. Petition for a writ of certiorari herein denied.

(254 U. S. 647)

No. 569. Elizabeth S. PRENTISS, petitioner, v. Mark EISNER, collector, etc. Oct. 25, 1920. For opinion below, see 267 Fed. 16. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 625)

No. 570. CHICAGO & NORTH WESTERN RAILWAY COMPANY, petitioner, v. C. C. WHITNACK PRODUCE COMPANY. Oct. 25, 1920. For opinion below, see C. C. Whitnack Produce Co. v. Chicago & N. W. Ry. Co., 178 N. W. 177. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska granted.

(254 U. S. 647)

No. 573. Harry S. MECARTNEY, petitioner, v. Bainbridge COLBY, Secretary of State of the United States et al. Oct. 25, 1920. Motion to be heard orally on petition for a writ of certiorari refused, and petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(254 U. S. 647)

No. 576. J. E. BREWER et al., petitioners, v. POSTAL TELEGRAPH CABLE COMPANY. Oct. 25, 1920. For opinion below, see 223 S. W. 949. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied.

(254 U. S. 51)

JOHNSON v. STATE OF MARYLAND.

(Argued Oct. 18, 1920. Decided Nov. 8, 1920.)

No. 289.

Licenses 🔑5—State cannot require driver of government motor truck to procure license.

A state cannot require the driver of a government motor truck carrying the mails over its post roads to procure a license after satisfying its officials of his competence and paying a fee therefor, though it could hold him responsible for violation of its general laws including perhaps its laws of the road, since the requirement of a license is an attempt to regulate the doing of the act he was employed by the government to do, which is beyond the power of the state.

Mr. Justice Pitney and Mr. Justice McReynolds, dissenting.

In Error to the Circuit Court of Frederick County, State of Maryland.

William E. Johnson was convicted of driving a government motor truck over a post road in Maryland without having obtained a license from the state and he brings error. Reversed.

Mr. W. C. Herron, of Washington, D. C., for plaintiff in error.

*54

*Messrs. Alexander Armstrong and J. Purdon Wright, both of Baltimore, Md., for the State of Maryland.

*55

*Mr. Justice HOLMES delivered the opinion of the Court.

The plaintiff in error was an employee of the Post Office Department of the United States, and while driving a government motor truck in the transportation of mail over a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted and fined for so driving without having obtained a license from the State. He saved his constitutional rights by motion to quash, by special pleas which were overruled upon demurrer and by motion in arrest of judgment. The facts were admitted and the naked question is whether the State has power to require such an employé to obtain a license by submitting to an examination concerning his competence and paying three dollars, before performing his official duty in obedience to superior command.

The cases upon the regulation of interstate commerce can not be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the States as well as the general government have an interest and which would be wholly under the control of the States but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the *States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430, 4 L. Ed. 579; and that is the law today. Farmers' & Mechanics' Savings Bank v. Minnesota, 232 U. S. 516, 525, 526, 34 Sup. Ct. 354, 58 L. Ed. 706. A little later the scope of the proposition as then understood was indicated in Osborn v. Bank of the United States, 9 Wheat. 738, 867 (6 L. Ed. 204)—

*56

> "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

In more recent days the principle was applied when the governor of a soldier's home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the Federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority." Ohio v. Thomas, 173 U. S. 276, 283, 19 Sup. Ct. 453, 455 (43 L. Ed. 699). It seems to us that the foregoing decisions establish the law governing this case.

Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in United States v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316; 5 Op. Attys. Gen. 554. It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. Commonwealth v. Closson, 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C, 939. This might stand on much the same footing as liability under the common law of a state to a person injured by the driver's negligence. But even the most unquestionable and most universally applicable of state laws, such as those concern*ing murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States. Ex parte Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

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It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed. Keim v. United States, 177 U. S. 290, 293, 20 Sup. Ct. 574, 44 L. Ed. 774.

Judgment reversed.

Mr. Justice PITNEY and Mr. Justice McREYNOLDS dissent.

(254 U. S. 47)

PEOPLE OF STATE OF NEW YORK ex rel. TROY UNION R. CO. v. MEALY et al.

(Submitted Oct. 21, 1920. Decided Nov. 8, 1920.)

No. 63.

Constitutional law 🔑137—Statute limiting taxable value held repealable privilege.

New York Laws of 1853, c. 462, limiting the assessment of a union terminal company within a city to the capitalization of the company according to the contract between the company and the city, merely granted a privilege of exemption and could be repealed as it was by Acts 1909, c. 201, without impairing the obligations of the contract in view of a subsequent contract between the city and the corporation showing that the parties did not consider that they had an irrevocable grant and the provisions of the New York Constitution in force in 1853 (article 8, § 1) that all general laws of special acts pursuant to that section might be altered or repealed.

In Error to the Supreme Court of the State of New York.

Certiorari by the People of the State of New York, on the relation of the Troy Union Railroad Company, against G. Frank Mealy and others, Assessors, and Hiram W. Gordinier, as Comptroller, of the City of Troy, to set aside an assessment of city taxes. A judgment denying relief prayed for (88 Misc. Rep. 649, 152 N. Y. Supp. 435) was affirmed by the Appellate Division of the New York Supreme Court (179 App. Div. 951, 165 N. Y. Supp. 1106) and again affirmed by the Court of Appeals (224 N. Y. 187, 120 N. E. 155), and petitioner brings error. Affirmed.

Messrs. William L. Visscher and Lewis E. Carr, both of Albany, N. Y., for plaintiff in error.

Mr. George B. Wellington, of Troy, N. Y., for defendants in error.

*48

*Mr. Justice HOLMES delivered the opinion of the Court.

This was a proceeding in the Supreme Court of New York seeking by certiorari to review and set aside an assessment of city taxes upon the relator's property at a valuation of one million dollars; the relator contending that it had a contract by virtue of which the City of Troy and the State were limited to a valuation of $30,000 for the purposes of the tax. A referee, a single judge, the Appellate Division of the Supreme Court and the Court of Appeals successively have decided against the relator's claim, but it brings the case here on the ground that an attempt to repeal the statute upon which it bases its immunity impairs the obligation of contracts and is void. 88 Misc. Rep. 649, 152 N. Y. Supp. 435; 179 App. Div. 951, 165 N. Y. Supp. 1109; 224 N. Y. 187, 120 N. E. 155.

The case is this. In 1851 it was desired to establish a common terminal station and common tracks passing through a portion of the City for four railroads then having termini in Troy. An act of that year, c. 255, authorized the City and the four roads to subscribe for the stock of a new corporation to be formed for that purpose, and the City to issue bonds when secured by a mortgage of the new road to be built and by contract of the four subscribing roads. In July, 1851, the contemplated corporation was formed with a stock of $30,000; it is the relator in this suit. Then on December 3, 1852, an agreement was made by the City of Troy, the Troy Union Railroad Company, and the four other railroads, providing for carrying out the plan, and therein the City covenanted to join in an application to the Legislature of New York that the new road should be exempt from taxation upon an amount exceeding the present amount of its capital stock, and, if such law should not be passed, to refund the amount of the city taxes for any valuation exceeding said present stock. The above mentioned mortgage was executed, the four roads gave the City their covenant of

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indemnity and *thereafter on June 24, 1853, the desired act of the Legislature was passed. Laws of 1853, c. 462. It provided that—

> "for the purposes of taxation in the City of Troy, and in the County of Rensselaer, the property of the Troy Union Railroad Company shall be estimated and assessed (as the common council of said City of Troy, by its contract with said Company, * * * agreed that the same should be) at the amount of the capital stock of said Company, and no more."

The above mentioned covenant of the City and this provision of the statute are the grounds upon which the relator founds its claim.

After 1853 there was a default in the payment of the interest on the bonds that had been issued by the City under the agreement and the City began an action to foreclose the mortgage given by the road to secure it. Thereupon in 1858 a new contract was made between the parties concerned in which they "for the purpose of reforming the contract [made in 1852] adopt this instead and in place of the said contract, which is hereby annulled." The City of Troy agreed that if the Act of 1853 should be repealed at any time it would join in an application to the Legislature, as in the former contract, and covenanted again that if the desired law should not be passed it would refund as before. The other arrangements do not need mention here.

In 1886 and 1887 the Assessors of Troy assessed the Troy Union Railroad Company for $783,984 instead of the agreed $30,000, but it was held that the Company's property above $30,000 was exempt. People ex rel. Troy Union R. R. Co. v. Carter, 52 Hun, 458, 5 N. Y. Supp. 507; 117 N. Y. 625, 22 N. E. 1128. In 1909, however, the Act of 1853 was repealed. Acts of 1909, c. 201. The assessment complained of in this case was made since this repeal.

The Court of Appeals held that the concession in the Act of 1853 was spontaneous and belonged to the class of privilegia favorabilia, as it is put in Christ Church v. *50 *Philadelphia County, 24 How. 300, 16 L. Ed. 602, and therefore was subject to repeal. This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation. It may be that too much stress was laid upon the absence of a consideration for the exemption (Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, 385-387, 24 Sup. Ct. 107, 48 L. Ed. 229), and that a fairly strong argument could be made for interpreting the grant of 1853 as purporting to be coextensive with the contract recited in that grant, whether correctly recited or not. It may be, if it were material, that the contract of 1858 should be construed as a continuance of that of 1852 as reformed notwithstanding the habitually inaccurately used word "annulled." United States v. McMullen, 222 U. S. 460, 471, 32 Sup. Ct. 128, 56 L. Ed. 269. But taking into consideration the general attitude of the Courts toward claims of exemption, adverted to by the Court of Appeals, the fact that the agreement of 1858 shows that the parties concerned did not suppose that they had an irrevocable grant, and especially the fact that the Constitution of New York in force in 1853, provided in Article VIII, § 1, that all general laws and special acts passed pursuant to that section might be altered or repealed, we are not prepared to say that the decision below was wrong. We are dealing, of course, only with the contract supposed to be embodied in the Act of 1853. The liability of the City on its covenant to refund taxes upon an assessment exceeding $30,000 was not passed upon below and is not before us in this case.

Judgment affirmed.

(254 U. S. 24)

NEW YORK SCAFFOLDING CO. v. LIEBEL-BINNEY CONST. CO.

(Argued Oct. 7 and 8, 1920. Decided Nov. 8, 1920.)

No. 22.

Patents ⟹328—Henderson patent No. 959,008, for scaffold-supporting means, held void as lacking invention.

The Henderson patent, No. 959,008, for scaffold-supporting means, is a substantial imitation of the scaffold-supporting device of the prior Murray patent, the variations being only mechanical, and is void for lack of patentable invention.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit by the New York Scaffolding Company against the Liebel-Binney Construction Company. Decree for defendant was affirmed (243 Fed. 577, 156 C. C. A. 275), and complainant brings certiorari. Affirmed.

Messrs. Frederick P. Fish, of Boston, Mass., and Frank Chase Somes and C. P. Goepel, both of New York City, for petitioner.

Messrs. Robert H. Parkinson, and Wallace R. Lane, both of Chicago, Ill., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit for infringement by the Construction Company of a patent dated May 10, 1910, and numbered 959,008, for new and useful improvements in "scaffold-supporting *25 *means," granted to Elias H. Henderson. Petitioner is assignee of the patent.

An injunction was prayed, accounting of profits, and damages.

The patent is in the usual form, but a special manner of use of the invention is alleged. It is alleged that, since the acquisition of the patent, petitioner has been largely engaged in different cities of the United States in putting the invention into practice, and the manner thereof has been to construct and lease for use to builders and others, at a specified royalty or price per week, the scaffolds embodying the invention—petitioner retaining the ownership of and title to the scaffolds; they being returned to petitioner upon the completion by the lessees of the work for which the scaffolds had been required.

The answer of the Construction Company directly put in issue certain of the allegations of the petition. It admitted, however, the use of scaffolds which it purchased from the Eclipse Scaffolding Company of Omaha, Neb., but alleged that such scaffolds did not contain or embody the invention protected by patent No. 959,008, in any way or manner.

It is also alleged that petitioner, some time prior to February 21, 1914, brought suit in equity in the United States District Court for the District of Nebraska, against one Egbert Whitney, predecessor in title of the Eclipse Scaffolding Company, to the scaffolds sold by the latter company to the Construction Company, in which suit infringement of patent No. 959,008 was alleged.

In that suit a patent of one William J. Murray was pleaded, but the Scaffolding Company withdrew its case as to that patent, and relied on claims 1 and 3 of the patent to Henderson, and the court decreed that the claims were void for want of invention, and it is alleged that the Construction Company "is entitled to the protection of said decree."

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*On the issues thus made by bill and answer proofs were taken, and the court decreed against the patent, saying in its opinion that—

> "The Henderson patent has not supplanted others, nor has the influence of its owner been exerted to that end. It barely represents a step in the art. It does not disclose invention."

And further:

> "In view of the conclusion reached by this court that claims 1 and 3 of the patent in suit are invalid, it is unnecessary to do more than touch upon the matter of infringement. The evidence of infringement is meager, and yet, if the claims of patent in suit were to be held valid, with a range of equivalents, infringement would be found." 243 Fed. 577, 156 C. C. A. 275.

The decree was affirmed by the Circuit Court of Appeals. 243 Fed. 577, 156 C. C. A. 275.

The Construction Company pleaded in defense, as we have said, the decree of the District Court of Nebraska in the suit of petitioner against Egbert Whitney; but that decree was reversed by the Circuit Court of Appeals. 224 Fed. 452, 140 C. C. A. 138. The reversal and the opinion of the Circuit Court of Appeals thereon are much relied on in this suit, and we may say constituted the inducement to issue certiorari. It is seemingly antithetical to the opinion and judgment under review, and the Circuit Court of Appeals for the Third Circuit felt and expressed the embarrassment of "disturbing the force of a decision of a court of co-ordinate jurisdiction," "formed upon precisely the same issue and upon substantially the same facts." The court, however, felt constrained to an "opposite judgment," and decided that Henderson made but "formal changes" in the prior art, which involved no invention, and affirmed the decree of the District Court.

Necessarily for an estimate of Henderson's patent we must consider the prior art. It is detailed by witnesses, explained by counsel, and illustrated. Specific descriptions are not necessary. We may refer to our own observation of the first forms of scaffolding.

*27

To quote *District Judge Orr:

> "Originally, scaffolding was made to rest upon the ground and was increased in height as the building of the structure demanded."

The first forms of scaffolding which constituted the prior art are described by a witness as—

> "the thrust-out scaffold, the pull scaffold, the timber scaffold; that they were built right up to the front of the building."

In 1900, he testified:

> "A new device came on the market, or a new structure, and in place of building up from the ground, they hung a rigid iron frame from the upper stories of the building; that could be used on three or four stories sometimes. It was heavy, inconvenient to handle, and did not meet with very great success, although it did seem an improvement over the old poles. Then there came another form of scaffolding, which was a suspended wire platform scaffold, suspending the wires from the top of the building. * * * Then there came the Cavanagh overhead scaffolding machine. * * * That machine became fairly well used, after being introduced, and was apparently a great improvement over any other. Then Murray came in the market with his platform machine; a machine operated from the platform, the fastening of the wire that supported the platform being from above, the wire being secured to the outriggers from the upper part of the building. Then the Henderson machine, supported by cables from the upper part of the building, and similar in a great many respects, except that the machines were placed in the opposite position, enabling you to make a scaffold any width, which would seem to be the latest."

The Murray patent, therefore, is the step in the prior art preceding that made by Henderson, and a comparison of the latter's patent with it, the Murray patent, is immediately indicated.

Murray describes his invention to be of "new and useful improvements in adjustable scaffolds." The object of it, he said, was to

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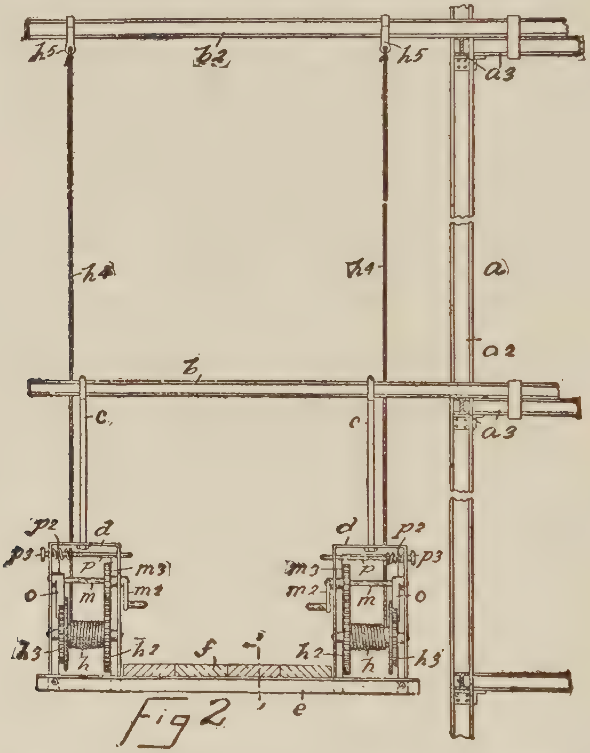
provide such a scaffold as would *"permit of adjustment at any height during the construction of a building or the repair thereof." And he claimed:

> "The combination, with two bars having means for detachably securing them to a building, of a platform, frames on said platform carrying means operable from the platform, and having connections adapted to be connected to one of said bars for raising the platform, and support-

ing means on said frames extending above the said bar, when the platform has been fully raised and adapted to detachably engage said bar and rigidly support the platform therefrom, whereby the platform may be connected to one bar by the raising means and raised to a level to engage the supporting means with said bar, and may then remain supported by said bar, while the other bar is placed at a higher level and the raising means secured to the latter; the bars thus becoming alternately points of raising support and of rigid support for the platforms."

The following is the illustrative diagram of the claim:

(This cut appears on page 29 of 254 U. S. Reports)



so much for itself as for what it permits. It permits, according to counsel, a "hinged or loose jointed connection between the putlog (called in the claims "crossbeams") and the *29 *frames that support the putlog and the hoisting mechanism," and counsel say that this is a "separate and distinct entity from the elements of the Murray patent, differing in structure, function, and result produced." And of this it is insisted there was no suggestion in the Murray patent; it containing but a single claim and a single idea, "the idea of supporting the scaffold to outriggers by means of auxiliary bars or rods," so that the platform or scaffold by the lengthening of the cables can be raised to a greater height than before. In other words, the assertion is that Murray invented nothing and saw nothing in his device but means of raising the scaffold, and, to use counsel's *30 word, all other "functions" were *beyond his vision. Or again, and to bring out clearly counsel's contention:

> "Henderson did not do what Murray did. Murray provided means for supporting a platform temporarily on one set of outriggers while the cables were being adjusted to a higher set of outriggers. That is all Murray did, and that was embodied in the one claim of the patent, and that is what Henderson did not do. Murray, on the other hand, never suggested the idea of making a hinge or flexible connection between the putlogs and their supporting frames."

Henderson describes his invention as "certain new and improved scaffold-supporting means," and further says it relates "to an improved means for supporting scaffolds used in connection with the construction of buildings and their repair." In other words, the patent is, as the Murray patent is, for improvement of scaffold-supporting means. And the details given by Murray, or necessarily implied by him, and the inevitable adjuncts "of crossbeam and floor piece" are made elements in the combinations claimed in three claims. There is a change from the Murray hoisting device, and it is described to consist—

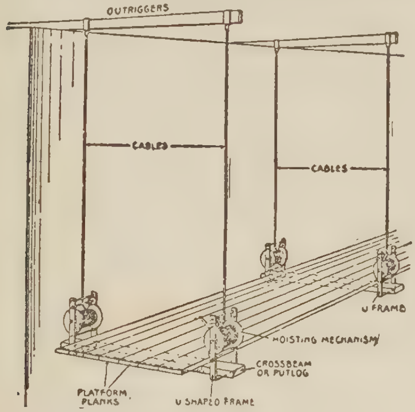
> "of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam. * * *"

The continuity of metal is the novel element asserted. Counsel emphasize it, not

The utility of this construction is the final assertion, and that the continuity of metal of the stirrup adds strength, and the loose jointed connection of the putlogs with it gives "flexibility longitudinally and transversely of the platform" and "enables the operator to raise the scaffold machines one at a time, allowing the putlogs to tip or hinge over the support of the U-frame, leaving the machine to stand erect at all times." The advantage of this is emphasized in various ways, and the construction, it is insisted, quoting the patent "secures the greatest possible amount of security."

Claims 1 and 3 are inserted in the margin.[1] The following is an illustration of them taken from brief of counsel:

(This cut appears on page 31 of 254 U. S. Reports)



It is further contended that the arrangement of the hoisting device parallel to a *31 building, instead of at right angles *to it, as in the Murray patent, gives more room to the working masons and mechanics, and therefore contributes to their security. This advantage was asserted in the patent; the others were not, nor displayed or counted on. They, however, may be conceded. The fact of non-display in the patent while it does not militate against his claims for the advantages, causes surprise at least, considering the emphasis that is now put upon them, and the assertion that they distinguish and make superior his mechanisms to all that preceded them. However we may concede to counsel, for the sake of the argument, all of the uses and excellencies of the patent, even though not discerned by Henderson; but his pretensions, whether at first hand or second, his or those of his counsel, must be subjected to the test and estimate of the prior art, and, so subjecting them, we can discern no exercise of invention. The changes were simply mechanical, easy to discern and as easy to make, incidental entirely to the main idea of Murray which was as was declared by him to provide a scaffold that would "permit of adjustment at any height during the construction of a building or the repairing thereof"—a scaffold which might "be *32 readily moved from one *position to another by the workmen thereon without interfering materially with the work being performed," and one "in which different supports are employed," and "in which the shifting from one set of supports to another set" might "be accomplished without interfering in any degree with the workmen thereon, or their work." A glance at the diagram which we have given will show that he accomplished his purpose and the way he accomplished it; a glance at the diagram we have given of the Henderson device will show that it is a substantial imitation of Murray's scaffold, the variations being only mechanical. The chief difficulty we have found in the case is the plausibility of the arguments of counsel, and that it secured the assent of the Circuit Court of Appeals for the Eighth Circuit and other courts, and strength from such assent.

Decree affirmed.

(254 U. S. 32)

NEW YORK SCAFFOLDING CO. v. CHAIN BELT CO. et al.

(Argued Oct. 7 and 8, 1920. Decided Nov. 8, 1920.)

No. 23.

Patents 🔑172—Patentee entitled to benefit of formal changes.

A patentee is entitled to all of the benefit that he claimed for his device or that can be given to it by formal changes.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the New York Scaffolding Company against the Chain Belt Company and Egbert Whitney. Decree for complainant was reversed (245 Fed. 747), and complainant brings certiorari. Decree of District Court reversed, and case remanded.

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*Messrs. Frederick P. Fish, of Boston, Mass., Frank Chase Somes, of Washington, D. C., and C. P. Goepel, of New York City, for petitioner.

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[1] "1. A scaffold consisting in the combination of crossbeams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

"3. A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a crossbeam laid in and extending between each pair of such U-shaped bars, a floor laid upon said crossbeam, a drum rotatably supported between the upwardly extending side members of each of said U-shaped bars, and means of controlling the rotation of said drum."

Messrs. Robert H. Parkinson and Wallace R. Lane, both of Chicago, Ill., for respondents.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit by petitioner against Chain Belt Company et al. for infringment of a patent considered in No. 22. The bill contains the usual allegations, and prays for an accounting, for damages, and injunctions, preliminary and final.

A copy of the opinion of the Circuit Court of Appeals for the Eighth Circuit in the suit of the Scaffold Company against Egbert Whitney, expressing the judgment of the court sustaining the validity of the patent and adjudging Whitney to be an infringer of it, is attached to the bill.

The answer denied invention and sets forth a number of patents as anticipations, among others, a patent to William Murray. A dismissal of the suit was prayed.

A trial was had upon the issues thus made, which resulted in an interlocutory decree awarding an injunction, adjudging infringement, and an accounting.

The injunction decreed is as follows:

> "That an injunction be issued under the seal of this court unto the said Chain Belt Company, and the said Egbert Whitney, *34 *enjoining them, and each of them, their several agents, officers, employés, and all persons in privity with them, and each of them, from making or selling, or causing to be made or sold, the machine known as 'Whitney Scaffold Hoist Machines' and 'Little Wonder' machines, to be used in the combinations of claims 1 and 3 of said U. S. patent No. 959,008, or from using or causing said machines to be used in the combinations of said claims, or from infringing upon said claims in any manner whatsoever."

The Circuit Court of Appeals agreed with the District Court that the Henderson patent exhibited invention, expressing the view, however, that, while its advance was slight, it was "not so wholly wanting in invention or novelty as to justify a finding contrary to the presumptive validity of the grant to him." The court fortified its views by the decision of the Circuit Court of Appeals of the Eighth Circuit in New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138, citing, however, to the contrary, the decision of the Circuit Court of Appeals of the Third Circuit, in New York Scaffolding Co. v. Liebel-Binney Construction Co., 243 Fed. 577, 156 C. C. A. 275, the decision we have just affirmed. 254 U. S. 32, 41 Sup. Ct. 21, 65 L. Ed. ——.

The court, however, decided that the decree was "erroneous in finding infringement in the manufacture or sale or in any use of the Little Wonder machine." The decree of the District Court was reversed, with directions to enter a decree in accordance with the views expressed.

The Henderson patent was made the basis of recovery in New York Scaffolding Co. v. Liebel-Binney Construction Co., No. 22, just decided, and there we estimated its inventive quality as tested by the prior art, and as representative of that we took the patent of William Murray, accepting it as an advance upon the prior art.

We need only add to what was there said that our conclusion is confirmed by Henderson's testimony, which *35 *we insert in the margin somewhat fully, as it cannot be adequately represented in condensation or by paraphrase.[1] *36 *From his testimony it is cer-

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[1] After stating the schools and colleges he had attended, and that he was admitted to the bar in 1910, he testified as follows:

"Q. 3. Will you state when you first acquired any knowledge of the scaffolding business and how it came about?

"A. The first time I had any occasion to consider scaffolding on buildings was about in February, 1910—February, 1909. I was having dinner with Mr. Merrill, then president of the Noel Construction Company, and I explained to Mr. Merrill a certain gas engine I was designing, attempting to get a patent at that time, and Mr. Merrill, whom I had known while I was at the Academy at Annapolis, put up to me a proposition of scaffolding on the city hall, which the Noel Construction Company was then building in Chicago, and explained to me the great expense of building up a scaffold from the ground, and stated that it was much more convenient and cheaper to scaffold by swinging the scaffold from an overhead outrigger. He said there was such a scaffold in use and being put up by a New York concern, but that the rental charged by the New York concern was prohibitory of its use on the city hall, and said with my mechanical training I ought to be able to devise a means of swinging a scaffold, and instructed me to go ahead and see what I could do.

* * * * * * * * *

"A. This was in February, 1909."

He further testified that Mr. Merrill called his attention to devices that were then in use in Chicago at the Blackstone Hotel and that shortly after he went down to the hotel.

He further testified:

"A. On the north side of the building there was a scaffold suspended by overhead outriggers, cables led down to a drum, the cable passed over a little pulley wheel on the top cross member of the scaffold down to a drum, and the drums were in pairs opposite at right angles to the building. These drums were supported above a U-frame which was held in place, bolted, with two angle irons, the bolts passed through the U-frame, and then the planking were laid along the scaffold on top of the angle irons which was bolted to the U-frames and the drums were operated by means of the ratchet lever, to which the men put a pipe, making an extension, and pumped it up and down.

"Q. 13. Just how were the putlogs supported relative to the U-frame concerning which you have testified?

"A. The putlogs were bolted alongside of the U-frame and the bolts passed through the U-frame.

"Q. 14. Did you see the machines operate?

"A. Yes; the men were laying brick along the scaffold; a couple of laborers hoisted one end of the scaffold.

"Q. 15. So you saw it raised during the time you were there?

"A. Yes, sir.

"Q. 16. At that time had you done any work on what later developed into your patent in suit?

"A. I had not."

And further:

"A. I didn't do anything further until about the tain that his scaffold did not cause him sleepless nights or laborious days. He was not experienced in the art of which it is an example. It may be that the conceptions of invention cannot be tested by such, or by moments of time, and that originality does *37 not *need the aid or delay of drudgery; but one is forced to think that, where a change is readily made in any composite instrumentality, the change is not the prompting or product of invention. Indeed, it is a common experience in patent cases that mere mechanical facility can alter or change the form in which originality and merit expressed themselves, and assert for it the claim of invention. This case is an example of such pretension. We may repeat counsel's question, and ask: What did Henderson do that Murray did not do? He made the U-frame which supported the hoisting device of continuous metal, instead, as Murray did, of several pieces riveted together, and in the stirrup which it formed he rested the putlogs or beams, loosely making a hinged joint connection between the stirrup and the hoisting machines, with a resulting flexibility. This consequence and its advantage, if it have such,[2] it is admitted he did not discern, and naturally. His purpose was evasion. To evasion he was prompted. Beyond what was necessary to that he exerted no vision or conception. He had had no experience in the art, and what knowledge of the Murray scaffolding he had was obtained by a 30 minutes' observation of it in operation. We yield to the assertion of counsel that he cannot be deprived of an advantage because he did not discern it, but the same concession must be given to Murray. He was entitled to all of the benefit that he claimed for his device, or that can be given to it by formal changes.

It will be observed that the Circuit Court of Appeals and the District Court disagreed *38 in their views of the re*lation of the Little Wonder machine to the Henderson device—the latter considering it an infringement; the former determining otherwise, and to that extent reversing the decree of the District Court. Both courts, however, concurred in ascribing invention to the Henderson device. In this both courts erred, and the decree of the District Court is therefore reversed, and the case remanded to that court, with directions to dismiss the bill of complaint, on the ground that the Henderson patent is invalid; it exhibiting no invention.

So ordered.

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middle of May. Mr. Merrill called me up and asked me to come down to the office. I went down, and he asked me if I had a scaffold ready for him, or had any ideas. I told him, 'No; that I had not.' He said, 'I have been depending upon you to design something, and I have got to have something. So he called in Mr. Peterson, the superintendent, took me over to the city hall, and showed me the wall he wanted to scaffold in the court there, and I then went over to Carpenter & Co. and inspected some winches he had there, to see if it was practicable to bolt the winches to wooden putlogs. And, owing to the fact that Carpenter & Co. wanted more money than Merrill could pay, for scaffold, didn't make a deal with him. Then I went home and made up the design for the scaffold that I subsequently applied for a patent on, and took it down to Brown & Williams' attorneys, and asked them if I could get a patent on it. They thought I could. Mr. Merrill said he would have Parker & Carter investigate if there would be no infringement on the winch, and instead of bolting the windlass to the putlog, I found I could utilize pieces of 2x10 around the building for putlogs and place them in the U-frame, and would make the scaffolds easier to put into the building and much simpler to dismantle—to take off.

"Q. —. Where did you get your knowledge of the U-frame being used in this line of work?

"A. I saw U-frames on the Blackstone Hotel. It was just an ordinary stirrup."

[2] There is a denial of advantage, and it was admitted at the argument that rigidity of the putlog and frame was sometimes resorted to. Counsel tried to minimize the necessity or practice by saying that it was accomplished by a tenpenny nail. Manifestly it was the effect and its necessity or advantage which were important, not the means of their accomplishment, and the necessity or advantage cannot be estimated by the size of the nail.

(254 U. S. 57)

SEABOARD AIR LINE RY. CO. et al. v. UNITED STATES et al.

(Argued Oct. 8 and 11, 1920. Decided Nov. 8, 1920.)

No. 27.

1. Carriers 🔑32(2)—Free switching on shipments only from competitive points to industries on competitive lines unlawful.

The practice of three carriers as to traffic from points south of Richmond, whereby each absorbed, for shipments from competitive points only, switching charges to industries in Richmond on the lines of such carriers and similarly located with regard to the interchange tracks of the three carriers, but refused to absorb the switching charge on deliveries to similarly located industries on noncompetitive lines, *held* a violation of Interstate Commerce Act, § 2 (Comp. St. § 8564), not being a like and contemporaneous service of a like kind of traffic under similar circumstances and conditions.

2. Commerce 🔑95 — Findings of Interstate Commerce Commission as to what is discrimination binding, if not arbitrary.

The findings of the Interstate Commerce Commission on questions of discrimination in service can be disturbed by judicial decree only where its action is arbitrary or transcends the legitimate bounds of its authority.

3. Commerce 🔑88 — Ruling by Interstate Commerce Commission as to discrimination held not beyond its authority.

The condemnation by the Interstate Commerce Commission of a practice of certain competing carriers of absorbing switching charges only when the line-haul carrier competes with the switching line, and refusing to absorb such charges when there is no such competition, as being a violation of Act to Regulate Commerce, § 2 (Comp. St. § 8564), *held* not arbitrary in character or beyond the commission's authority; the ruling being limited to cases in which, or to the extent to which, the service is similar.

Appeal from the District Court of the United States for Eastern District of Virginia.

Petition by the Seaboard Air Line Railway Company and others against the United States and others, to enjoin an order of the Interstate Commerce Commission. From a denial of the petition, and dismissal of the bill (249 Fed. 368, 162 C. C. A. 140), petitioners appeal. Affirmed.

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*Messrs. Claudian B. Northrop, of Chevy Chase, Md., and Frank W. Gwathmey and R. Walton Moore, both of Washington, D. C., for appellants.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Charles W. Needham, of Washington, D. C., for Interst. Com. Com'n.

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*Mr. Justice DAY delivered the opinion of the Court.

In this case a petition was filed in the District Court of the United States for the Eastern District of Virginia to enjoin an order of the Interstate Commerce Commission concerning the absorption of switching charges on the lines of the Seaboard Air Line Railway Company, the Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railway Company, within the switching limits of these roads as established at Richmond, Va.

[1] The Commission's order was made upon a petition of the Richmond Chamber of Commerce, averring that the practice of the railroads was discriminatory and unlawful, and violative of section 2 of the Act to Regulate Commerce. From the facts found by the Commission it appears that the appellant railroad companies bring freight from the South to Richmond, Va., where the same is delivered to industries in the switching limits of that city. If the freight is received at a point served by any two or more of the carriers, the switching charge is absorbed if the freight be delivered on the line of either; but if the delivery is to an industry served only by a noncompetitive carrier the switching charge is not absorbed. The Commission illustrated the point by an example:

> "Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is a local point on the Seaboard. Assume that industries A, B, and C [referring to a diagram] on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's *60 switching *charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

The order complained of directed the three carriers to cease and desist, on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions; such practices having been found in a supplemental report to be unjustly discriminatory and unlawful within section 2 of the Act to Regulate Commerce, and—

> "to establish, on or before August 1, 1917, * * * and thereafter to maintain and apply uniform regulations and practices for the ab-

> sorption of charges for the switching of interstate carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions." 44 Interst. Com. Com'n R. 455.

The District Court denied the application for an injunction, and ordered that the petition be dismissed. 249 Fed. 368.

The contention of the appellants is that the carriage is not a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Section 2 of the Act to Regulate Commerce provides:

> "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, *61 or to be rendered, *in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 24 Stat. 379 (Comp. St. § 8564).

Upon this controversy the Commission in its report said:

> "Complainant insists that, when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul; that is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern, and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. * * *
>
> "Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a 'like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination,' a discrimination which is prohibited and declared to be un- *62 law*ful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment."

We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, and Interstate Commerce Commission v. Alabama Midland Railway Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.

[2] Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority. I. C. C. v. L. & N. R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; Precooling Case, 232 U. S. 199, 34 Sup. Ct. 291, 58 L. Ed. 568; Los Angeles Switching Case, 234 U. S. 294, 311, 312, 34 Sup. Ct. 814, 58 L. Ed. 1319, and cases cited; Penn. R. R. Co. v. United States, 236 U. S. 351, 361, 35 Sup. Ct. 370, 59 L. Ed. 616.

[3] The Commission did not hold that switching charges must be always the same, but did hold that they must be alike where the service was rendered under substantially similar circumstances and conditions. The Commission's report says:

> "We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond, if they choose to absorb the switching charges to any one industry off their rails. *63 *The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the diagram. Suppose industry C were five miles distant from the interchange tracks of the Seaboard, while industry B were only two miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would

probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio."

The practice condemned by the Commission, as its report and order show, was that of absorbing switching charges only when the line-haul carrier competes with the switching line, and refusing to absorb such charges when the switching line does not compete with the line-haul carrier; this, the Commission held was discrimination within the meaning of section 2 of the Act to Regulate Commerce. We find no occasion to disturb this ruling as arbitrary in character or beyond the authority of the Commission.

We find no merit in the contention that the order of the Commission was too vague and uncertain to be enforced.

Affirmed.

(254 U. S. 71)

ARNDSTEIN v. McCARTHY, U. S. Marshal.

(Argued Oct. 21, 22, 1920. Decided Nov. 8, 1920.)

No. 575.

1. **Bankruptcy 🔑242(2) — Filing schedules does not waive privilege as a witness.**

The voluntary filing of bankruptcy schedules, which, standing alone, did not amount to an admission of guilt or furnish clear proof of crime, did not waive the bankrupt's privilege to refuse to answer questions concerning the schedules, when he could fairly claim that such answers might tend to incriminate or disgrace him.

2. **Bankruptcy 🔑242(2) — Provision against use of testimony does not remove privilege as witness under Fifth Amendment.**

The protection given by Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, which must be given a broad construction to secure the right to refuse testimony which might tend to show that the witness had committed a crime, was not removed by the provision of Bankruptcy Act, § 7 (Comp. St. § 9591), that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, since that section does not prevent the use of the testimony to search out other testimony to be used in evidence against him.

Appeal from the District Court of the United States for the Southern District of New York.

Habeas corpus proceeding by Jules W. Arndstein against Thomas D. McCarthy, United States Marshal for the Southern District of New York, to procure the discharge of petitioner from imprisonment for contempt. Writ refused, and petitioner appeals. Reversed and remanded.

Messrs. Rufus S. Day, of Washington, D. C., and William J. Fallon, of White Plains, N. Y., for appellant.

Mr. Solicitor General Frierson, for appellee.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Holding that the petition failed to disclose adequate grounds therefor, the court below

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denied appellant's *application for a writ of habeas corpus, through which he sought release from confinement for contempt. The cause is here by reason of the Constitutional question involved.

The petition alleges:

That, having been adjudged an involuntary bankrupt, Arndstein was called before special commissioners for examination under section 21a, Bankruptcy Act (Comp. St. § 9605). He refused to answer a long list of questions, claiming that to do so might tend to degrade and incriminate him. The District Judge upheld this contention, and denied a motion to punish for contempt.

That subsequent to such examination, and under the direction of the court, the bankrupt filed schedules under oath, which purported to show his assets and liabilities. When interrogated concerning these, he set up his constitutional privilege, and refused to answer many questions, which are set out. Thereupon he was committed to jail.

[1] The writ was refused upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege, and could not thereafter refuse to reply when questioned in respect of them. This view of the law we think is erroneous. The schedules, standing alone, did not amount to an admission of guilt or furnish clear proof of crime, and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. See Brown v. Walker, 161 U. S. 591, 597, 16 Sup. Ct. 644, 40 L. Ed. 819; Foster v. People, 18 Mich. 266, 274; People v. Forbes, 143 N. Y. 219, 230, 38 N. E. 303; Regina v. Garbett, 2 C. & K. 474, 495. It is impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued.

[2] "No person * * * shall be compelled in any criminal case to be a witness against himself." Fifth Amendment. "This

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provision must have a broad construction *in favor of the right which it was intended to secure." "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." Counselman v. Hitchcock, 142 U. S. 547, 562, 12 Sup. Ct. 195, 197 (35 L. Ed. 1110).

The protection of the Constitution was not removed by the provision in section 7 of the Bankruptcy Act (Comp. St. § 9591): "No testimony given by him shall be offered in evidence against him in any criminal proceeding." "It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property." Counselman v. Hitchcock, 142 U. S. 564, 12 Sup. Ct. 198, 35 L. Ed. 1110.

The judgment below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice DAY took no part in the consideration or decision of this cause.

(254 U. S. 64)

TURNER et al. v. WADE, Sheriff of Brooks County, Ga.

(Argued Nov. 14, 1919. Restored to Docket for Reargument Jan. 5, 1920. Reargued Oct. 11, 1920. Decided Nov. 8, 1920.)

No. 29.

1. **Constitutional law 🔑284(2) — Due process requires notice and hearing to taxpayer before assessment is fixed.**

The due process of law clause of the Fourteenth Amendment requires notice to a taxpayer and an opportunity to him to be heard as to the validity of the tax and the amount thereof at some stage of the proceedings before the tax becomes irrevocably fixed.

2. **Constitutional law 🔑284(2)—Taxation 🔑319(1)—Georgia statute held to provide no hearing before board of assessors.**

Tax Equalization Act Ga. 1913, § 7, empowering the board of tax assessors to investigate the value of the property, subpœna witnesses, and require the production of documents, does not provide for an opportunity for the taxpayer to be heard, after notice, before the assessment is made by the tax board.

3. **Constitutional law 🔑284(2)—Taxation 🔑452—Hearing before arbitrators, who could not agree, insufficient to constitute due process of law.**

The right given by Tax Equalization Act Ga. 1913, § 6, to a taxpayer to require arbitration after notice of his assessment, with the further provision that a majority of the arbitrators can fix the assessment, but that, unless they change the assessment within 10 days, the assessment of the county board shall stand, does not afford due process of law to a taxpayer, who demanded an arbitration, but who was assessed the amount fixed by the county board, because the arbitrators, though agreeing that the assessment was excessive, could not agree on the correct assessment.

In Error to the Supreme Court of the State of Georgia.

Suit by H. Turner and another, as executors of the estate of J. O. Morton, deceased, against J. P. Wade, sheriff of Brooks County, Ga., to restrain the enforcement of execution for taxes. Judgment for defendant was affirmed by the Supreme Court of Georgia (147 Ga. 666, 95 S. E. 220), and plaintiffs bring error. Reversed and remanded.

Messrs. Arthur G. Powell, John D. Little, Marion Smith, and Max F. Goldstein, all of Atlanta, Ga., for plaintiffs in error.

Messrs. Graham Wright, of Rome, Ga., Clifford Walker, of Monroe, Ga., and Bennet & Harrell, of Quitman, Ga., for defendant in error.

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*Mr. Justice DAY delivered the opinion of the Court.

This case involves the constitutional validity under the due process clause of the Fourteenth Amendment of certain provisions of the Georgia Tax Equalization Act. Laws Ga. 1913, p. 123.

The facts stated in the petition and amended petition are not disputed, and show that plaintiffs in error returned property for taxation at the value of $44,225. The county board of tax assessors, without hearing, raised the assessment to $80,650. Notice was then given to the plaintiffs in error of the increase. Following the statute, plaintiffs in error demanded arbitration, and named an arbitrator, the board selected an arbitrator, and the two selected a third. Upon meeting of the arbitrators, all agreed that the value assessed by the board was excessive. The arbitrator named by the plaintiffs in error fixed the valuation at $50,000. The arbitrator named by the board fixed the valuation at $66,000. The third arbitrator fixed the valuation at $63,000. The arbitrators could not agree; each adhering to his own view. All the arbitrators believed the assessment too high, but for lack of agreement the arbitration failed, and after 10 days from the date of naming of the arbitrator designated by the board had expired, the statutory requirement that the valuation of the board of assessors should stand affirmed was followed, and the collector demanded payment of the taxes in the sum of $80,640, the valuation fixed by the assessors. The tax collector issued execution for the taxes upon this valuation, and plaintiffs in error filed a petition in equity to prevent the enforcement of the execution, setting up the constitutional objection to which we have referred.

The superior court of Georgia, on interlocutory hearing, granted an ad interim injunction. This action was reversed by the Supreme Court of Georgia. Upon a second

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*writ of error from the Supreme Court of

Georgia, the act was again held constitutional.

The assessment by the board of assessors was made under section 6 of the act, which provides that the board of county assessors shall meet each year, within 10 days of the date of the closing of the tax returns, to receive and inspect the same. It is made the duty of the board to examine the returns of both real and personal property, and if at any time, in the opinion of the board, any taxpayer has omitted from his return any property which should be returned, or has failed to return property at its fair valuation, the board is authorized to correct such returns and assess and fix the fair valuation upon the property. When the corrections, changes, and equalizations have been made by the board, it is then its duty to give notice to any taxpayer of any changes made in his return, either personally or by leaving the same at his residence or place of business, or, in case of nonresidents by mail. The section further provides that, if the taxpayer is dissatisfied with the action of the board, he may within 10 days from the giving of said notice, give notice to the board that he demands an arbitration, giving at the same time the name of his arbitrator. Whereupon the board shall name its arbitrator within 3 days thereafter and the two shall select a third, a majority of whom shall fix the assessment upon the property upon which the taxpayer shall pay taxes, except so far as the same may be affected by the findings and orders of the state tax commissioner as in the act provided. Provision is made for qualification of arbitrators, and that they shall render their decision within 10 days from the date of naming of the arbitrator by the board of assessors; otherwise, the decision of the board of assessors shall stand and be binding in the premises. (The pertinent part of section 6 is given in the margin.[1])

[1] *In considering certain sections of the Georgia tax laws this court held, in Central of Georgia v. Wright, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, that due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of a tax and the *amount thereof, by giving him the right to appear for that purpose at some stage of the proceedings. This case, with others, was cited with approval in Londoner v. Denver, 210 U. S. 373, 385, 28 Sup. Ct. 708, 52 L. Ed. 1103, wherein we said that if the Legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount, and upon whom the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this court cited on page 386, 28 Sup. Ct. 708, 52 L. Ed. 1103. See, also, Coe v. Fertilizer Co., 237 U. S. 413, 425, 35 Sup. Ct. 625, 59 L. Ed. 907.

[2] As we have understood the argument of the Attorney General, it is admitted that the provision for arbitration, under the facts herein shown, does not of itself afford due process of law. But it is now contended that section 7 saves the statute and provides for notice and hearing. Section 7 provides:

> "That it shall be the duty of the county board of tax assessors to diligently investigate and inquire into the property owned in the county for the purpose of ascertaining what property, real and personal, is subject to taxation in the county and to require its proper return for taxation.
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> "The said board shall have authority to issue subpœnas for the attendance of witnesses and to require the production by any person of all

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[1] "Sec. 6. Be it further enacted by the authority aforesaid, that the said board of county tax assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the tax receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each taxpayer, and if in the opinion of the board any taxpayer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its just and fair valuation and that valuations as between the individual taxpayers are fairly and justly equalized so that each taxpayer shall pay as near as may be, only his proportionate share of taxes. When any such corrections, changes and equalizations shall have been made by said board, it shall be the duty of the board to immediately give notice to any taxpayer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of nonresidents of the county, by sending said notice through the United States mails to his last known place of address.

"If any taxpayer is dissatisfied with the action of said board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of nonresidents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator; the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said taxpayer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the state tax commissioner as hereinafter provided. The said arbitrators shall be freeholders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises."

his books, papers and documents which may throw any light upon the question of the existence or liability of property of any class for taxation. If any witness, so subpœnaed, shall fail or refuse to answer questions propounded or shall fail or refuse to produce any such books, papers, or documents, such person shall be cited by said board to appear before the ordinary of the county," etc. (Punishment as for a contempt is provided.)

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*This case was twice before the Supreme Court of Georgia. See 146 Ga. 600, 91 S. E. 690, in which the court held that when any change is made in the valuation of the property the taxpayer must be given notice of such change, and, if dissatisfied, may demand an arbitration, and have a hearing before arbitrators as provided for in the act, and that such hearing gave due process of law. In 147 Ga. 666, 95 S. E. 220, the previous decision is affirmed, and it was again held that, where any change is made in the valuation of the property of a taxpayer, he must be given notice of the change, and, if dissatisfied, demand arbitration and a hearing before arbitrators, as provided in the act, and the opinion refers to Vestel v. Edwards, 143 Ga. 368, 85 S. E. 187, wherein it was said that section 6 of the act was attacked as violative of the due process of law clause of the Constitution, for the reason, among others that the act requires the arbitration to be made within 10 days from the date of selection of the arbitrator by the tax assessors, and without making allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of property and the ascertainment of its value, or for any other cause which might render the arbitration impossible within the time specified in the act. The court said that this part of the act was not obnoxious to the state or federal Constitutions.

In Vestel v. Edwards the court held that the appointment of a brother of one of the assessors as arbitrator disqualified him from acting as arbitrator, and in considering the statute we find no suggestion from the Georgia Supreme Court that a hearing was provided before the board of assessors. The court said that the provisions of a previous act (Acts 1910, p. 22), read in connection with the statute of 1913, provided that the ordinary might appoint the third arbitrator in event of inability to agree to such arbitrator by the two already selected. But this case presents no such situation. The arbitrators were agreed

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*upon. The arbitration failed because within the 10-day period fixed neither of the three arbitrators would recede from the valuation fixed by himself upon the property, and hence no majority award could be made. We are, therefore, unable to find in the decisions of the Supreme Court of Georgia that that court understood section 7 to provide for the notice and hearing required by due process of law. Therefore, looking to the sections of the statute for ourselves, we are forced to the conclusion that, reading the provisions together, being parts of one and the same act, they clearly show that the board of assessors was not required to give any notice to the taxpayer, nor was opportunity given him to be heard as of right before the assessment was finally made against him. But provision was made for notice of the assessment to the taxpayer after it was made, and in event of his dissatisfaction the arbitration was to afford a hearing to him. Such hearing was all that the statute contemplated that the taxpayer should have.

[3] In the present case, as the facts already stated show, the taxpayer is subject to an assessment made without notice and hearing. In that situation we are clear that the case comes within the decision of this court in Central of Georgia v. Wright, supra, and kindred cases, and not within that line of cases wherein the statute has fixed the time and place of hearing with opportunity to the taxpayer to appear and be heard upon the extent and validity of the assessment against him.

Entertaining this view, it follows that the assessment of the board of assessors ought to have been enjoined, because section 6 of the act, as construed and applied in this case, denies to the complaining taxpayer due process of law. It follows that the judgment of the Supreme Court of Georgia must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

(254 U. S. 73)

UNITED STATES v. NATIONAL SURETY CO. (two cases).

(Submitted Oct. 13, 1920. Decided Nov. 8, 1920.)

Nos. 271, 272.

Subrogation 🔑33(3)—United States 🔑76—Surety for bankrupt government contractor not entitled to share assets on equality with government.

Rev. St. § 3468 (Comp. St. § 6374), giving the surety of a government contractor, who pays the United States the amount due on the bond, a priority for the moneys like that secured to the United States, gives such surety the priority enjoyed by the United States over other claimants of an insolvent under section 3466 (Comp. St. § 6372), but does not entitle the surety to share equally with the United States in the assets of the bankrupt contractor, where the amount of the bond was insufficient to pay the government's loss under the contract, and the assets of the bankrupt were less than the claim of the United States, which construction is in harmony with the rule of subrogation that a surety, liable only for part of the debt, does not become subrogated to remedies available to the creditor, unless he pays the whole debt or it is otherwise satisfied.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Claims by the United States and by the National Surety Company in bankruptcy proceedings against the Bald Eagle Mining Company. An order of the District Court, allowing the claim of the Surety Company an equal priority with that of the government, was affirmed by the Circuit Court of Appeals (262 Fed. 62), and the United States brings certiorari. Reversed.

*Messrs. Assistant Attorney General Spellacy and Leonard B. Zeisler, of Chicago, Ill., for the United States.

Messrs. S. W. Fordyce, Jr., and Thomas W. White, both of St. Louis, Mo., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The National Surety Company executed as surety two bonds given to secure contracts entered into with the United States. The contractor defaulted, and was later adjudicated a bankrupt. The loss to the government was about $13,000. The Surety Company paid to it on account of this loss $3,150, the full amount of the liability on the bonds. Thereupon the government proved its claim in bankruptcy for the balance, claiming, under Revised Statutes, § 3466 (Comp. St. §

6372),[1] priority therefore over all other *creditors. The Surety Company proved for the $3,150, and claimed that under Revised Statutes, § 3468 (Comp. St. § 6374),[2] it was entitled to a share in the distribution of the estate pro rata on an equality with the government. The net assets of the estate were less than the amount of the government's claim. The referee sustained the contention of the Surety Company, and his order was affirmed both by the District Judge and by the Circuit Court of Appeals for the Eighth Circuit, 262 Fed. 62. The case comes here on writ of certiorari. 252 U. S. 577, 40 Sup. Ct. 396, 64 L. Ed. 724. The single question presented is whether in the distribution of the bankrupt's estate the United States has priority over the Surety Company.

Section 3468 applying an established rule of the law of subrogation, Lidderdale v. Robinson, 12 Wheat. 594, 596, 6 L. Ed. 740, declares that when "a surety pays the United States the money due upon * * * [a] bond, such surety * * * shall have the like priority for the recovery * * * of the moneys * * * as is secured to the United States." Section 3466, embodying the common-law rule by which the sovereign has priority over other creditors of an insolvent, United States v. State Bank of North Carolina, 6 Pet. 29, 35, 8 L. Ed. 308, declares that "the debts due to the United States shall be first satisfied." There is no conflict between the two sections, which are substantially a reenactment and extension of the provisions of

section 65 of the Act of March 2, *1799, c. 22, 1 Stat. 627, 676 (Comp. St. §§ 6372, 6374). The priority secured to the United States by section 3466 is priority over all other creditors; that is, private persons and other public bodies. This priority the surety obtains upon discharging its obligation. But what the surety asks here is not to enjoy like priority over such other creditors, but equality with the United States, a creditor whose debt it partly secured. To accord such equality would abridge the priority expressly conferred upon the government. While the priority given the surety by the statute attaches as soon as the obligation upon the bond is discharged, it cannot ripen into enjoyment unless or until the whole debt due the United States is satisfied. This result is in harmony with a familiar rule of the law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied.[3]

The judgment of the Circuit Court of Appeals is

Reversed.

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[1] Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate or effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

[2] Sec. 3468. Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

[3] Sheldon on Subrogation (2d Ed.) § 127; Pomeroy, Equity Jurisdiction (4th Ed.) § 2350; 25 R. C. L. 1318; Peoples v. Peoples Bros. (D. C.) 254 Fed. 489, 491, 492; United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. 448, 455, 143 C. C. A. 30; National Bank of Commerce v. Rockefeller, 174 Fed. 22, 28, 98 C. C. A. 8.

(254 U. S. 88)

STREET v. LINCOLN SAFE DEPOSIT CO. et al.

(Argued April 26, 1920. Decided Nov. 8, 1920.)

No. 278.

1. Intoxicating liquors 🔑13—Purpose of Volstead Act was to prohibit transactions in liquors, not to confiscate.

The purpose of Volstead Act, tit. II, was to enforce the Eighteenth Amendment to the Constitution, section 1 of which prohibits the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, but not to confiscate liquors lawfully owned at the time the amendment became effective, and which the owner intended to use in a lawful manner, and such purpose is of importance in determining the meaning of the act.

2. Intoxicating liquors 🔑139—Prohibition of possession for unlawful use does not prohibit storing in warehouse.

Volstead Act, tit. II, § 25, making it unlawful to possess liquor intended for use in violating that act, does not make unlawful possession in a storage warehouse by one who intends to use the liquor in his own home for his family and guests, which is permitted by section 33 of the title.

3. Intoxicating liquors 🔑143—Prohibition against keeping liquors applies to liquors for sale.

Volstead Act, tit. II, § 21, declaring any place where intoxicating liquor is manufactured or kept in violation of the title, and all liquor kept and used in maintaining it, a common nuisance, applies to the keeping of liquor only when it is kept for sale or barter, or other commercial purpose, not to the keeping of intoxicating liquor in a storage warehouse for private consumption by the owner.

4. Intoxicating liquors 🔑138, 139—Warehouseman does not "possess" or "deliver" liquors.

Within Volstead Act, tit. II, § 3, providing that no person shall deliver or possess intoxicating liquor, except as authorized in the act, a storage warehouseman, who merely leased a room in which the owner of liquor stored it, does not "possess" the liquor, nor does he "deliver" it to the owner, by permitting the owner to remove it from the warehouse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver; Possess.]

5. Intoxicating liquors 🔑138—Transportation of privately owned liquor from warehouse to residence not prohibited.

The prohibition of Volstead Act, tit. II, § 3, against transporting intoxicating liquor, except as authorized by the act, does not prohibit transportation of liquor from a storage warehouse, where it was stored by the owner, to his residence, for the private use of himself and his family and guests, which is a use permitted by the act, especially since it has not been construed by the Internal Revenue Bureau to prohibit the transportation of liquor from one residence to another.

6. Intoxicating liquors 🔑139—Volstead Act permits storage of liquors in warehouse for private use.

Under Volstead Act, tit. II, § 33, which permits the possession of liquor lawfully acquired before the Eighteenth Amendment took effect for the personal use of the owner and his family and guests, and provides that the possession of liquors by any person not legally permitted to possess it shall be prima facie evidence that it is kept for sale, an owner of liquor lawfully acquired before the amendment became effective might store it in a storage warehouse, and thereafter remove it from the warehouse to his own home, for the personal use of himself, his family, and his guests.

7. Intoxicating liquors 🔑245—Intention to confiscate will not be implied.

An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law having an ample field for operation in effecting a purpose clearly indicated and declared.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by William G. Street against the Lincoln Safe Deposit Company and another. From a decree dismissing the bill (267 Fed. 706), complainant appeals. Reversed.

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*Messrs. Joseph S. Auerbach and Charles H. Tuttle, both of New York City, for appellant.

Mr. Assistant Attorney General Frierson, for appellees.

Mr. Justice CLARKE delivered the opinion of the court.

By the motion to dismiss the bill filed in this suit it is admitted: that the defendant Lincoln Safe Deposit Company is a corporation, organized under the laws of the state of New York, and authorized to engage in the warehousing business; that prior to the effective date of the National Prohibition (Volstead) Act (41 Stat. 305) the appellant was the lessee of a room in the warehouse of the defendant Deposit Company, in which he had stored wines and liquors lawfully acquired by him which "are in his exclusive possession and control and are intended to be and will be used only for personal consumption by the plaintiff and the members of his family or bona fide guests"; that the defendant Daniel L. Porter is an agent of the Commissioner of Internal Revenue, charged with the duty of enforcing the Volstead Act, who in his official capacity has publicly declared and threatened that such storage of liquor by the defendant Deposit Company would be unlawful after the Volstead Act became effective, and would expose plaintiff and the Deposit Company to the penalties of that act, which

*90 would be enforced against them; that *the appellant desired to continue to store his liquors in said rented room after the Volstead Act should become effective, and intended to report the same to the Commissioner of Internal Revenue, as therein required; and that the Deposit Company, moved wholly by the notices and threats of defendant Porter, had notified plaintiff that he must remove his liquors from its warehouse, or that it would remove and deliver them to Porter as outlawed property, to be dealt with under the Volstead Act after it became effective.

Averring as a matter of law that such possession of liquors in a warehouse is not forbidden by the Eighteenth Amendment or the Volstead Act, the appellant prayed that an injunction should issue, restraining the defendants from interfering with his possession of the room in the warehouse and from removing or disposing of his liquors.

The motion to dismiss was sustained, and a constitutional question being involved, appellant brought the case by direct appeal to this court.

Thus is presented for decision the question:

May a warehousing corporation lawfully permit to be stored in its warehouse, after the effective date of the Volstead Act, liquors admitted to have been lawfully acquired before that date and which are so stored, solely and in good faith, for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or bona fide guests?

Since the Volstead Act has been held by this court to be a valid law, the answer to this question must be found in its provisions, and the sections of it which it is argued sustain the negative anwer to the question given by the court below, are 3, 21, and 25 of title II.

[1] Since here, as always, the purpose of Congress in enacting a law is of importance in determining the meaning of it, it is noteworthy that title II of the Volstead Act was passed under the grant of power to enforce the first section *91 *of the Eighteenth Amendment to the Constitution of the United States, which prohibits the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, but does not indicate any purpose to confiscate liquors lawfully owned at the time the amendment should become effective and which the owner intended to use in a lawful manner.

Section 33 of the act is the only one which deals specifically with liquors lawfully acquired before it should take effect and it is therefore of first importance in the consideration of the case before us. That section declares:

> "It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein."

The admissions of fact under which this case is considered bring the liquors here involved precisely within these immunity provisions of section 33, except that they are stored in a public warehouse instead of in a private dwelling. They were lawfully acquired and were intended for a lawful use and thus the question is narrowed to, whether such custody by the warehouse company as is shown by the admissions was forbidden by the act.

Coming now to the sections relied upon as rendering the custody or possession of the liquors by the warehouse company unlawful:

[2] Section 25 declares that—

> "It shall be unlawful to have or possess any liquor * * * intended for use in violating this title. * * *"

But since section 33 declares that the uses to which it is admitted the plaintiff intends to devote his liquors are not unlawful, obviously this section does not apply to the *92 case, *for the unlawfulness declared by it is conditioned upon the intended use in violating the act.

[3] Section 21 declares that—

> "Any room, house, building * * * or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance,"

and for the maintaining of such a place penalties are provided.

The word "kept" in this section is the only one of possible application to the case at bar, and the words with which it is immediately associated are such that, as here used, it plainly means kept for sale or barter or other commercial purpose. Its inapplicability to this case is apparent. Noscitur a sociis. United States v. Louisville & Nashville R. R. Co., 236 U. S. 318, 334, 35 Sup. Ct. 363, 59 L. Ed. 598.

[4] Section 3, which is the omnibus section of the act, provides that—

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

It is argued that the declaration herein that no person shall "possess," "transport" or "deliver" intoxicating liquors is applicable to this case, because the warehouse company is not "authorized" by the act to "possess" them, and because they cannot be used, even lawfully, by the plaintiff unless delivered and taken away from the warehouse.

By the admissions the appellant is lessee of the room in which the liquors are stored and he "is in the exclusive possession and control of them." Thereby the relation of the warehouse company to the liquors is restricted to the *public function of furnishing such police, fire, and other protection to its buildings and their contents as the law or its lease requires on the part of such company and to allowing the plaintiff to have access to his property in order that he may remove it for an admittedly lawful purpose. The company could not sell, give away or otherwise transfer the liquors to any one other than in this limited way to the plaintiff owner.

The purpose of the Eighteenth Amendment and of this act considered, we cannot bring ourselves to the conclusion that such a relation to the liquors on the part of the storage company as is here disclosed constitutes a possession of them within the meaning of this section of the act.

It is equally clear that to permit the owner to have access to the liquors to take them to his dwelling for lawful use is not a delivery of them within the meaning of this third section.

[5] That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of the many provisions of the act inconsistent with a construction which would render such removal unlawful, and that the act is understood by the officers charged with its execution as permitted such transportation is shown by the provision of the regulations of the Bureau of Internal Revenue authorizing permits for the transportation of liquors from one permanent residence of an owner to another in case of his removal, although no such transfer is in terms provided for by the act.

Clearly there is like administrative power under the act to so regulate the transfer of such stored liquors from a warehouse to the dwelling of the owner as to prevent their being used to evade the prohibitions of the act or to substantially interfere with its effective enforcement.

Thus it is plain that in the sections of the act relied upon *there is no specific prohibition against the storage of liquors, under the circumstances admitted to exist in this case, and we find no other provisions by which such a custody is rendered unlawful.

[6] The implication from another provision of section 33, than the one quoted above, confirms this conclusion. It reads:

> "After February, 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

Assuming that the unexplained presence of the liquors in the company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing, or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful, even though it be by a person "not legally permitted"—that is by a person not holding a technical permit to possess it, such as is provided for in the act.

Without saying that there may not be other cases, the one at bar seems to be fairly within the scope of this obvious implication of section 33.

It may be that the custody of liquors by a warehouse company was thus not declared to be unlawful because the writers of the act did not have such a case in mind, but it was more probably because Congress would not consent to allow lawful possession and use of liquors in dwellings having storage facilities for them, while denying the only possible means of preserving and protecting such liquors to persons with less commodious homes. The Congress was concerned with the great problem of preventing the manu*facture and sale of intoxicating liquors for beverage purposes in the future, and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the amendment and the act should take effect.

[7] An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared.

It results that the decree of the District Court must be

Reversed.

Mr. Justice McREYNOLDS concurring.

I concur in the judgment of the court, but do not assent to the reasoning advanced to support it. I think the Volstead Act was properly interpreted by the court below (267 Fed. 706); but to enforce it as thus construed would result in virtual confiscation of lawfully acquired liquors by preventing or unduly interfering with their consumption by the owner. The Eighteenth Amendment gave no such power to Congress. Manufacture, sale and transportation are the things prohibited; not personal use.

(254 U. S. 83)

WELLS BROS. CO. OF NEW YORK v. UNITED STATES.

(Submitted April 30, 1920. Decided Nov. 8, 1920.)

No. 75.

United States 🔑74 — Government building contractor held not entitled to damages for delays.

A government building contractor, whose contract authorized the United States to suspend the whole or any part of the work, and allowed additional time to the contractor for such suspension, but provided that no claim for damages on account of such delays should be made or allowed, cannot make claims for delays ordered until additional legislation affecting the building was enacted by Congress, especially where the first and longest delay was ordered before the contractor became bound by the approval of his bond.

Appeal from the Court of Claims.

Claim by the Wells Bros. Company of New York against the United States. A general demurrer to the amended petition was sustained, and the amended petition dismissed by the Court of Claims, and claimant appeals. Affirmed.

Messrs. A. R. Serven and Burt E. Barlow, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims, sustaining a general demurrer to and dismissing the amended petition.

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*The allegations of this amended petition, admitted by the demurrer and essential to be considered, are:

The appellant, a corporation organized under the laws of New York, and engaged in the general building and construction business, entered into a written contract with the United States for the construction of a post office and courthouse building in New Orleans, dated September 30, 1909, for which it was to be paid $817,000, but its bond for performance was not approved until 9 days later, on October 9; on the day after the contract was signed the United States "ordered and directed" appellant to delay ordering limestone (as specified in the contract) for the exterior of the street fronts of the building "for the reason, as stated, that a change was contemplated in said exterior face stonework, which would require an additional appropriation by Congress"; the appellant assented to a delay of two weeks only, but, although protesting that further delay would result in its damage, it refrained from purchasing limestone until August 19, 1910, when, the required appropriation by Congress having been obtained, a supplemental agreement was entered into by the parties to the contract, by which marble was substituted for limestone for the street fronts of the building, the compensation of the appellant was increased $210,500, and the time for completion of the building was extended from April 1, 1911, to February 5, 1912; during this delay the contractor proceeded with other work under the contract, and prior to August 19, 1910, it had completed all the required excavation, foundation, and structural steel work; after the "modification and addition of August 19, 1910, to the contract work" the appellant so proceeded with the performance of the contract that by February 1, 1912, the building was substantially completed except the interior partitions, and thereupon the United States, again over the protest of appellant, "ordered and directed" a delay, which continued to Au*gust 24, 1912, until congressional legislation was obtained authorizing the parcel post, whereupon the plans for the interior arrangements of the building were adapted to that service and the building was completed.

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The claim is wholly for damages occasioned by the two delays thus described, and the question for decision is whether the terms of the contract authorized the government to require such delays without becoming liable to the contractor for damages which may have been caused to it thereby.

The contract involved contains this provision:

> "It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the architects of the building, or of the supervising architect, it may be necessary for the purpose or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather, or otherwise, and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the supervising architect; and a similar allowance of extra time will be made for such other delays as the supervising architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within

> ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

The contract further declares that the contractor—

> "will make any omissions from, additions to or changes in the work or material herein provided for whenever *86 *required by said first party * * * and that no claim for damages on account of such changes or for anticipated profits shall be made or allowed."

It would be difficult to select language giving larger discretion to the United States to suspend the performance "of the whole or any part of the work" contracted for, or to change the work or materials, than that here used. The provision for the protection of the work shows that long interruptions were contemplated with a compensating extension of time for performance provided for, and it is admitted that, eight days before its bond was approved and it became bound, the appellant received its first order to delay, for the reason that "a change was contemplated in said exterior stonework which would require an additional appropriation by Congress."

Such a delay as was thus ordered was certain to be an indefinite and very probably a long-continued one; but the appellant, experienced contractor that it was, did not hesitate to submit to it by permitting the approval of its bond, which rendered its obligation under the contract complete, more than a week after notice had been received of the order. Thus, with much the longest delay complained of ordered and actually entered upon, the appellant consented to be bound by the language quoted, which vested such comprehensive discretion over the work in the government. That this confidence of the contractor was not misplaced is shown by the fact that this first delay resulted in the substitution of marble for limestone for the street fronts of the building and in a supplemental agreement by which it received additional payments, aggregating $210,500, and an extension of ten months for the completion of the work.

In addition to all this it must be noted that the first paragraph above quoted, concludes with this independent proviso:

> "Provided further, that no claim shall be *87 made or allowed *to the contractor for any damages which may arise out of any delay caused by the United States."

Here is a plain and unrestricted covenant on the part of the contractor, comprehensive as words can make it, that it will not make any claim against the government "for any damages which may arise out of any delay caused by the United States" in the performance of the contract, and this is emphasized by being immediately coupled with a declaration by the government that if such a claim should be made it would not be allowed.

Such language disassociated as it is from provisions relating to "omissions from," the making of "additions to or changes in," the work to be done, or "material" to be used, cannot be treated as meaningless and futile and read out of the contract. Given its plain meaning it is fatal to the appellant's claim.

Men who take $1,000,000 contracts for government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.

We are dealing with a written contract, plain and comprehensive in its terms and the case is clearly ruled in principle by Day v. United States, 245 U. S. 159, 161, 38 Sup. Ct. 57, 62 L. Ed. 219, Carnegie Steel Co. v. United States, 240 U. S. 156, 164, 165, 36 Sup. Ct. 342, 60 L. Ed. 576, Dermott v. Jones, 2 Wall. 1, 7, 17 L. Ed. 762, and Chouteau v. United States, 95 U. S. 61, 67, 68, 24 L. Ed. 371. The judgment of the Court of Claims dismissing the petition must be

Affirmed.

(254 U. S. 43)

PRYOR et al. v. WILLIAMS.

(Argued Oct. 8, 1920. Decided Nov. 8, 1920.)

No. 26.

1. **Master and servant ⟹204(1)—Risk from using defective clawbar assumed under federal act.**

A railroad employé, who uses a clawbar with a defect obvious on the most cursory inspection, assumes the risk of injury from such use, so that he cannot recover under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), on the theory that such use was contributory negligence, which only diminished the amount of recovery.

2. **Commerce ⟹8(6)—Federal act prevails over state law.**

In an action for injuries to servant employed in interstate commerce, which is within the provisions of federal Employers' Liability Act (Comp. St. §§ 8657–8665), the requirements of that act prevail over any state law.

3. **Master and servant ⟹295(1)—Instructions on assumption of risk held erroneous under federal act.**

Where the trial court, in an action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), modified a requested instruction on assumption of risk, so as to authorize consideration thereof by the jury in determining the amount of plaintiff's recovery, if any, under all the instructions, the employer was deprived of his right under that act to assert assumption of risk as a complete bar to recovery.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

Action for personal injuries under the federal Employers' Liability Act by Allega Williams against Edward B. Pryor and another, as receivers of the Wabash Railroad Company. Judgment for plaintiff was affirmed by the Supreme Court of Missouri (272 Mo. 613, 200 S. W. 53), and defendants bring certiorari. Reversed and remanded.

Messrs. Frederic D. McKenney, of Washington, D. C., and James L. Minnis, of St. Louis, Mo., for petitioners.

Mr. Roy W. Rucker, of Sedalia, Mo., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Action for personal injuries based on Employers' Liability Act (Comp. St. §§ 8657–8665). Negligence is charged against petitioners as receivers of the Wabash Railroad Company.

Respondent Williams, plaintiff in the action, was engaged in tearing down a bridge on the

*44

line of the railroad, *and a defect in a clawbar, which he was directed to use, caused the bar to slip while he was attempting to draw a bolt; in consequence he lost his balance and fell to the ground, a distance of 12 feet. The defect, it is alleged, Williams did not know.

Negligence, however, was charged against him, and assumption of risk and contributory negligence.

He recovered a verdict in the sum of $5,000. Motion for new trial and arrest of judgment were denied, and the case was appealed to the Kansas City Court of Appeals.

The facts, as recited by the court, are that Williams was 21 years old, and had been reared on a farm. He entered the service of the railroad as a common laborer in August, 1915, and worked for it until his injury in November of that year; his work being that of "helping build steel bridges and taking down old ones." He was ordered by the foreman in charge of the work to use a clawbar which was defective, in that the claws—

> "had become so rounded and dull by long usage that they could not be made to grab the shank securely, and slipped from their hold when plaintiff (Williams) pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground."

The plaintiff stated that to discover the defect required an inspection of the underside of the tool, and that, in obeying the order of the foreman, he did not pause to make such inspection, but used the tool without any but casual inspection of its top surface, which did not reveal the defect.

The railroad was engaged in interstate commerce and the cause of action, under the case as made, fell within the purview of the federal Employers' Liability Act (Comp. St. §§ 8657-8665).

The conclusion of the court was that—

> "The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff."

And further:

*45

> "The risk was just as obvious as the *defect. This was a simple tool, which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it."

The court reversed the judgment. It denied a motion for rehearing, but considered and adjudged:

> "That on account of one of the judges deeming the decision to be in conflict with Fish v. Railway, 263 Mo. 106, 123, 172 S. W. 340, Ann. Cas. 1916B, 147, it is without jurisdiction, and therefore orders said cause certified to the Supreme Court for its determination."

The Supreme Court, upon considering Fish v. Railway and other cases, decided that—

> "It was the duty of the master to furnish the servant a reasonably safe clawbar with

which to do the work. The failure to furnish that character of a clawbar was negligence upon the part of the master. If the defects were so glaring, and the clawbar so patently defective that an ordinarily prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the federal statute."

In other words, the court held that Williams' assumption of the risk did not have the consequence assigned to it by the Kansas City Court of Appeals, but, if it existed, amounted in legal effect only to contributory negligence, and that such negligence under the federal statute worked a reduction of damages, and not a defeat of the action, and, applying these elements of decision, adjudged that the "case was well tried by the court nisi, and its judgment should be affirmed." It was so ordered.

[1] In its view of the federal statute and the defense under it, the court erred. Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Jacobs v. Southern Railway Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970; Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016; Erie Railroad Co. v. Purucker, Administratrix, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166; Boldt, Administratrix, v. Pennsylvania Railroad Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385.

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[2] *And the requirement of the act prevails over any state law. Seaboard Air Line v. Horton, supra; Atchison, Topeka & Santa Fé Ry. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050; New York Central Railroad Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; New Orleans Railroad Co. v. Harris, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.

[3] Counsel for respondent, however, insists that the views of the Supreme Court upon the ruling of the assumption of risk is "of purely academic interest and of no practical importance" in the consideration of the legality of the verdict and judgment in the trial court. That court, it is said, submitted the fact to the jury, and also submitted the relative contribution of Williams' negligence and the negligence of defendants to his injury. But this is an underestimate of the action of the trial court. The court was requested to instruct the jury that the effect of the assumption of risk by Williams incident to the use of the clawbar, and the circumstances under which it was used, was to relieve defendants from liability "for the injury resulting therefrom." The court refused the instruction as it was requested, and amended it by adding thereto:

> "And such fact [the assumption of risk] will be considered by you in determining the amount of plaintiff's recovery, if any, under all of the instructions."

The refusal and modification were assigned as error, and the Supreme Court considered and decided, as we have seen, that the fact was of no determining importance, and, if it existed, only constituted contributory negligence, and could operate only in reduction of the amount of recovery, not defeat recovery. This was error, as we have seen.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

(254 U. S. 38)

UNITED STATES v. BUTT.

(Submitted Oct. 18, 1920. Decided Nov. 8, 1920.)

No. 275.

Aliens 🔑35—Illegally aiding entry of Chinese punishable under Immigration Act; Chinese Exclusion Act not being exclusive.

Where, on a previous prosecution of accused under Chinese Exclusion Act, § 11, as amended by Act July 5, 1884 (Comp. St. § 4298) for the unlawful landing of Chinese laborers in the United States, a verdict of not guilty was directed on the ground of failure to prove that the Chinese were actually landed in the United States, it was error, in a subsequent prosecution for the same acts under Immigration Act, § 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼dd) to quash the indictment on the ground that persons bringing Chinese laborers into the United States should be prosecuted, not under the Immigration Act, but under the Chinese Exclusion Act.

In Error to the District Court of the United States for the Northern District of California.

James Butt, alias Wong Sing, was indicted for violation of the Immigration Act, the indictment was quashed, and the United States brings error. Ruling reversed.

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*Messrs. Assistant Attorney General Stewart and Harry S. Ridgely, of Washington, D. C., for the United States.

*41

*Mr. Justice McKENNA delivered the opinion of the Court.

Error to review a judgment of the District Court quashing an indictment against defendant in error, Butt, which charged him with feloniously bringing four Chinese aliens into the United States in violation of Immigration Act Feb. 5, 1917, c. 29, 39 Stat. 874, 880 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 959, 960, 4289¼a et seq.).

The legality of the ruling depends upon the coexistence of that act with Chinese Exclusion Act July 5, 1884, 23 Stat. 117 (Comp. St. §§ 4295, 4298, 4299).

We may use in exposition of the case the memorandum of the District Court (Judge Rudkin). It appears therefrom that an earlier indictment was presented against Butt charging him in three counts with having brought the same four Chinese aliens into the United States. The first two counts were based on section 8 of the Immigration Act of February, 1917, and the third count on section 11 of the Chinese Exclusion Act (22 Stat. 61, as amended by Act July 5, 1884 [Comp. St. § 4298]). All of the counts were based on the unlawful landing of four Chinese laborers into the United States. A motion to quash the first and second counts on the grounds of misjoinder, and on the further ground that the several acts did not state facts sufficient to constitute a crime was granted. The ruling was based on a decision of the Circuit Court of Appeals for the Eighth Circuit. Stoneberg v. Morgan, 246 Fed. 98, 158 C. C. A. 324.

Upon the trial of the third count a verdict of not guilty was directed by the court (Judge Farrington) the government having failed to prove that the Chinese were actually landed in the United States.

On June 11, 1919, the indictment in controversy was found. As we have said, it charged Butt with bringing the same Chinese aliens into the United States, and all of its counts were based on the Immigration Act. A motion to quash was made, accompanied by the record in the former case, in the nature

*42

of a plea of former jeopardy. *To this procedure the government consented, but contended that, inasmuch as defendant did not proceed far enough to violate section 11 of the Exclusion Act, he was subject to prosecution under section 8 of the Immigration Act, it being broader and more comprehensive in its terms. To this contention the court replied, and we quote its language:

> "In my opinion Congress did not intend that the courts should indulge in any such refinement as this. In other words Congress either intended that persons bringing Chinese laborers into the United States should be prosecuted under the immigration act or that they should not. Such was manifestly the view of the Circuit Court of Appeals for the Eighth Circuit in the case already cited."

The court considered that it was its duty to follow that decision until the question should be decided by the Circuit Court of Appeals for the Ninth Circuit or by this court. The motion to quash was sustained.

This ruling is attacked and that of the case adduced in its support, by the citation of United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, and United States v. Woo Jan, 245 U. S. 552, 557, 38 Sup. Ct. 207, 62 L. Ed. 466.

The cases support the contention, for which they are cited, and it follows therefore that the ruling of the District Court in the case at bar, sustaining the motion to quash the indictment, was error, and it is reversed.

So ordered.

(254 U. S. 611)

LEMAN et al. v. EASTMAN et al.

(Decided Nov. 8, 1920.)

No. 306.

1. **Constitutional law ⊂⇒316—Due process of law does not include right to review.**

The requirement of due process of law in Const. Amend. 14, does not require a review of the decision by the Supreme Court of a state after proper proceedings by a court having jurisdiction either by appeal, writ of error, or certiorari.

2. **Courts ⊂⇒394(10)—Decision as to state court's jurisdiction cannot be questioned as denial of due process of law.**

A decision by the Illinois Supreme Court that the state Certiorari Act, denying review by that court as a matter of right, was not void under the Constitution and laws of Illinois, cannot be reviewed by the United States Supreme Court, on the contention that such decision thereby denied due process of law.

In Error to the Supreme Court of the State of Illinois.

Bill by Sidney C. Eastman, as trustee, against Sheldon Dole Leman and others, for approval of his accounts, and for leave to resign. A decree of the circuit court, approving the accounts and assessing the expenses of the litigation against the objecting beneficiaries, was affirmed by the Appellate Court of the First District of Illinois (213 Ill. App. 684), and a petition for writ of certiorari was denied by the Supreme Court of Illinois, and the objecting beneficiaries bring error. Writ of error dismissed for want of jurisdiction.

This writ of error was brought to the October term, 1920, of the Supreme Court of the United States, to review a judgment of the Supreme Court of Illinois dismissing a writ of error to the Appellate Court, First District, in the case of Eastman, Trustee, v. Dole et al., decided at the February term, 1919. Eastman v. Dole et al., 213 Ill. App. 684. The judgment of the Appellate Court affirmed the decree of the circuit court, approving the account of the trustee and permitting the trustee to resign.

This litigation was begun in July, 1911, on the bill of the trustee for approval of his accounts and for leave to resign. The trust was created by the will of James H. Dole, deceased, a prominent Board of Trade man, who founded the business of J. H. Dole & Co.

about 1852. Sidney C. Eastman was appointed testamentary trustee. The Lemans were beneficiaries of the trust, and opposed the accounts, and filed a cross-bill for the removal of the trustee. Other beneficiaries of the trust approved the accounts and consented to the resignation of the trustee.

The decree of the circuit court approved the accounts and all the actions of the trustee, assessing all the expenses of the litigation, including solicitors' fees for the trustee, against the Lemans. Leman appealed to the Appellate Court for the First District, where the decree of the circuit court was affirmed. A petition for writ of certiorari to the Supreme Court of Illinois was filed by Leman, and this was denied at the June term, 1919.

The Leman beneficiaries sued out a writ of error in the Illinois Supreme Court to review the judgment of the Appellate Court. The theory of the writ of error was that the Certiorari Act, under which certiorari was denied, was void and a denial of due process of law. This writ of error was dismissed by the Illinois Supreme Court, on motion of Eastman, trustee. On Leman's petition the Chief Justice of the Supreme Court of Illinois granted a writ of error to the Supreme Court of the United States.

The assignment of errors by plaintiffs in error raised the following points:

(1) That the Certiorari Act (Laws Ill. 1909, p. 304), denying plaintiffs in error review by the state Supreme Court as a matter of right, was void under the Constitution and laws of Illinois, under which Constitution and laws, it was contended, a writ of error was writ of right; (2) that the Certiorari Act was void under the provisions of the Ordinance for the Government of the Northwest Territory; (3) that the Certiorari Act, and the dismissal of the writ of error by the Illinois Supreme Court, was a denial of due process of law and of the equal protection of the laws secured to plaintiffs in error under the Fourteenth Amendment to the federal Constitution.

Henry W. Leman, of Chicago, Ill. (Frank H. Culver, of Chicago, Ill., of counsel), for plaintiffs in error.

Carl V. Wisner, of Chicago, Ill. (Wisner & Walsh, of Chicago, Ill., of counsel), for defendant in error Eastman.

Levinson, Becker & Schwartz, of Chicago, Ill. (John Peter Barnes and Irving Gilruth, both of Chicago, Ill., of counsel), for defendant in error Northern Trust Co.

PER CURIAM. [1, 2] Dismissed for want of jurisdiction, upon the authority of (1) Reetz v. Michigan, 188 U. S. 505, 508, 23 Sup. Ct. 390, 47 L. Ed. 563; United States v. Heinze, 218 U. S. 532, 545, 546, 31 Sup. Ct. 98, 54 L. Ed. 1139; Lott v. Pittman, 243 U. S. 588, 591, 37 Sup. Ct. 473, 61 L. Ed. 916; Ex parte Abdu, 247 U. S. 27, 30, 38 Sup. Ct. 447, 62 L. Ed. 966; (2) Castillo v. McConnico, 168 U. S. 674, 683, 18 Sup. Ct. 229, 42 L. Ed. 622; Standard Oil Co. v. Missouri, 224 U. S. 270, 281, 32 Sup. Ct. 406, 56 L. Ed. 760; McDonald v. Oregon Navigation Co., 233 U. S. 665, 669, 670, 34 Sup. Ct. 772, 58 L. Ed. 1145; Gasquet v. Lapeyre, 242 U. S. 367, 369, 370, 37 Sup. Ct. 165, 61 L. Ed. 367.

(254 U. S. 77)

NILES-BEMENT-POND CO. v. IRON MOULDERS' UNION, LOCAL NO. 68, et al.

(Argued Oct. 22, 1920. Decided Nov. 8, 1920.)

No. 69.

1. Equity 🔑94—Person having interest which must be determined to settle controversy is "indispensable party."

Though there is no prescribed formula for determining whether a person or corporation is an indispensable party, all persons who have an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or without leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience, are "indispensable parties."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indispensable Party.]

2. Injunction 🔑114(2)—Plaintiff's subsidiary corporation held necessary party in suit against its striking employés.

In a suit by a foreign corporation to restrain interference by the striking employés of a domestic corporation, which was subsidiary to plaintiff, and which had contracts with plaintiff, whose performance was prevented by the acts complained of, the subsidiary corporation is an indispensable party, since it is the contracts between the subsidiary corporation and its employés that are to be protected from interference.

3. Courts 🔑317—Plaintiff's subsidiary corporation held interested as plaintiff in suit against striking employés.

In a suit to restrain interference by striking employés of plaintiff's subsidiary corporation with the operations of the subsidiary corporation, the subsidiary has the same interest as plaintiff in the controversy, and should be considered as plaintiff, though joined as defendant, so that there is no diversity of citizenship, where the subsidiary corporation was a citizen of the same state as the other defendants.

4. Courts 🔑299 — Allegations of government contracts and interstate commerce held not to show controversy under United States laws.

Allegations, in a bill to restrain striking employés from interfering with the operations of plaintiff's subsidiary corporation, that the contracts between plaintiff and the United States government, which could only be performed by the continued operation of the subsidiary corporation, were entitled to priority under National Defense Act June 3, 1916, § 120 (Comp. St. §§ 3115g, 3115f, 3115h), and that they involved interstate commerce, are insufficient to support a claim, first made after dismissal for want of diversity of citizenship, that the cause of action arose under the laws of the United States.

Mr. Justice Pitney and Mr. Justice McReynolds dissenting.

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the Niles-Bement-Pond Company against the Iron Moulders' Union, Local No. 68, and others. On appeal from grant of a temporary injunction by the District Court, the Circuit Court of Appeals ordered the dismissal of the case for want of jurisdiction (Iron Moulders' Union, Local No. 68, v. Niles-Bement-Pond Co., 258 Fed. 408, 169 C. C. A. 424), and complainant brings certiorari. Decree of the Circuit Court of Appeals affirmed.

Messrs. Lawrence Maxwell and Murray Seasongood, both of Cincinnati, Ohio, for petitioner.

Messrs. W. B. Rubin, of Milwaukee, Wis., and Robert J. Shank, of Hamilton, Ohio, for respondent.

*Mr. Justice CLARKE delivered the opinion of the Court.

The controversy involved in this suit originated in a strike by employés of the defendant the Niles Tool Works Company, hereinafter designated the Tool Company, and the sole question presented for decision is one of jurisdiction.

The petitioner, a corporation of New Jersey, filed its bill in the District Court for the Southern District of Ohio, making the Tool Company, an Ohio corporation, several local labor unions, and many of the striking employés of the Tool Company (in the bill and hereinafter designated "former employés") parties defendant; it being averred that all of the defendants were citizens of Ohio and residents of the Southern district. The jurisdiction of the court was thus invoked on the ground of diverse citizenship.

The relief prayed for was an injunction, restraining the striking former employés of the Tool Company from molesting workmen employed by that company to take their places, upon the ground that petitioner had contracts with the Tool Company the performance of which was being delayed by such interference. No case was stated, or relief asked for, against the Tool Company.

The District Court overruled a motion to dismiss for want of jurisdiction, and granted a preliminary injunction as prayed for, but, on appeal the Circuit Court of Appeals found that the Tool Company was so essentially a subsidiary of the petitioner, and its interest in the controversy was so certainly on the same side, that it should be treated as a plaintiff; that any decision of the case must necessarily so involve rights of the Tool Company as to render it an indispensable party to the case; and that, giving that company its proper classification as a plaintiff resulted in the disappearance of the jurisdictional diversity of citizenship and required the dismissal of the bill, which

was *ordered. The case was brought here for review by writ of certiorari.

The facts essential to be considered, which were stipulated or sufficiently proved on the hearing of the application for an injunction, may be epitomized as follows:

The petitioner was a corporation of New Jersey, the defendant Tool Company a corporation of Ohio, the petitioner owned a controlling interest in the capital stock of the Tool Company, and the same men were president and vice president, respectively, of both companies. The president was invested with authority to fix prices for the two companies, three of the five directors of the Tool Company were directors of the petitioner, and more than 95 per cent. of the business of that company was obtained through the petitioner, acting as its general sales agent. The customary mode of transacting business between the two companies was for the petitioner to make contracts for machinery, which it passed to the Tool Company for manufacture and delivery.

Before the filing of the bill the petitioner had entered into many contracts with the United States government to furnish it, as quickly as possible, with machinery, tools, and equipment for arsenals and for navy and ship yards, all of which contracts were necessary for the successful prosecution of the war, and were to be given priority over other work. These contracts had been passed to the Tool Company for manufacture; the petitioner remaining liable for their performance. It was averred, and sufficiently proved, that the defendants other than the Tool Company had conspired together, for the purpose of hindering, delaying, and preventing the petitioner from performing, through the Tool Company, the contracts thus obtained by it from the government, and for the purpose of intimidating workmen in the employ of the Tool Company by threats, violence, and coercion, when going to and from their places of work and

when at their homes. *Such defendants, assembled about the plant of the Tool Company, had at times by threats and violence prevented employés from entering its factory to work, and had threatened to prevent, and unless restrained would have prevented, that company from freely carrying forward its business, and thereby the petitioner from fulfilling its contracts with the government and with others.

On this record the questions presented for decision are: Was the Tool Company an indispensable party to the suit? and, properly classified, should it be treated as a plaintiff? If these questions are both answered in the affirmative, the decree of the Circuit Court of Appeals must be affirmed; otherwise, it must be reversed.

[1] There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not; but a rule early announced and often applied by this court is sharply applicable to the case at bar. In Shields v. Barrow, 17 How. 130, 139, 15 L. Ed. 158, this language —quoted with approval in Barney v. Baltimore City, 6 Wall. 280, 284, 18 L. Ed. 825, and again in Waterman v. Canal-Louisiana Bank, &c. Co., 215 U. S. 33, 48, 30 Sup. Ct. 10, 54 L. Ed. 80—was used to describe parties so indispensable that a court of equity will not proceed to final decision without them, viz.:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

[2] The case we are considering is essentially one on the part of the petitioner to protect from interference by striking former employés of the Tool Company the contract which that company had with the men employed by it to take their places. Petitioner's claim of right, the validity of which we are not called upon to determine, is rested wholly upon the contract of the Tool Company with its *81 *employés, and the character and construction of that contract of employment must inevitably be passed upon in any decision of the case, and obviously, if the petitioner should fail in such a suit as this, with the Tool Company not a party, any decree rendered would not prevent a relitigating of the same questions in the same or in any other proper court, and it would settle nothing.

Thus, if the Tool Company be considered as having any corporate existence whatever separate from that of the petitioner, it must have an interest in the controversy, involved in such a case as we have here, of a nature such that a final decree could not be made without affecting that interest, and perhaps not without leaving the controversy in a condition wholly inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice, and therefore it must be concluded that it was an indispensable party, within the quoted long-established rule.

[3] Plainly the appellant was not mistaken when it made the Tool Company a party to the suit. But making it a party defendant could not give to the District Court jurisdiction against the objection of another party, or over the court's own scrutiny of the record, unless there existed a genuine controversy between it and the plaintiff, the petitioner. Judicial Code, § 24 (Comp. St. § 991). That there was not and could not be any substantial controversy, any "collision of interest," between the petitioner and the Tool Company, is of course obvious from the potential control which the ownership of stock by the former gave it over the latter company, and from the actual control effected by the membership of the boards of directors and by the selection of executive officers of the two companies, which have been described.

Looking, as the court must, beyond the pleadings, and arranging the parties according to their real interest in the dispute involved in the case, Dawson v. Columbia, &c., *82 Trust *Co., 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713, Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74, it is clear that the identity of interest of the Tool Company with the petitioner required that the two be aligned as plaintiffs, and that, with them so classified, the case did not present a controversy wholly between citizens of different states, within the jurisdiction of the District Court. Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049.

[4] The allegations of the bill that the contracts which the petitioner had with the United States government were of a character which must be given priority under section 120 of the National Defense Act, approved June 3, 1916 (39 Stat. pp. 166, 213 [Comp. St. §§ 3115g, 3115f, 3115h]), and that they involved interstate commerce, are much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the United States. The contention is an afterthought, and plainly was not in the mind of the writer of the bill of complaint.

It results that the decree of the Circuit Court of Appeals must be affirmed.

Appeal dismissed, petition for writ of certiorari granted, and decree of the Circuit Court of Appeals affirmed.

Mr. Justice PITNEY and Mr. Justice McREYNOLDS dissent.

(254 U. S. 20)

HEALD et al. v. DISTRICT OF COLUMBIA.

(Argued Oct. 18, 1920. Decided Nov. 8, 1920.)

No. 300.

1. **Courts 🔑388—Court of Appeals of District of Columbia cannot certify questions in case otherwise reviewable.**

The Court of Appeals of the District of Columbia cannot certify questions to the Supreme Court in any case where its judgment or decree would be susceptible to review in the Supreme Court on error or appeal.

2. **Courts 🔑388—Supreme Court can review cases in Court of Appeals of District of Columbia involving constitutionality of local acts.**

Under Judicial Code, § 250 (Comp. St. § 1227), authorizing the Supreme Court to review on error or appeal decrees of the Court of Appeals of the District of Columbia in cases involving the constitutionality of any law of the United States, the court can review on appeal or writ of error cases involving the constitutionality of a local act of Congress, applying only to the District of Columbia, though under paragraph 6 of that section authorizing review of cases involving the construction of acts of Congress, it can review only cases involving the construction of general laws.

3. **Statutes 🔑225¾—Re-enactment adopts established construction, in absence of contrary implication.**

The re-enactment of a statute which has acquired a settled significance adopts that meaning, in the absence of a plain implication to the contrary.

On Certificate from the Court of Appeals of the District of Columbia.

Suit by John C. Heald and others, as committee of the person and estate of Eugene Peters, against the District of Columbia, to recover taxes paid under protest. On certificate from the Court of Appeals of the District of Columbia, certifying questions concerning the construction and constitutionality of the suit. Certificate dismissed for want of jurisdiction.

Messrs. A. S. Worthington and Vernon E. West, both of Washington, D. C., for petitioners.

Mr. F. H. Stephens, of Washington, D. C., for the District of Columbia.

Mr. Chief Justice WHITE delivered the opinion of the court.

The certificate made by the Court of Appeals of the District of Columbia as the basis *21 for the questions which *are propounded shows that they relate to a pending suit to recover taxes assessed by the District of Columbia upon intangible property pursuant to an act of Congress and paid under protest on the ground that the assessment was "illegal and void in whole and in its several parts." It suffices to say that the questions, which are stated in the margin,[1] express the purpose of the court below to ask our instructions as to the constitutionality of the act of Congress in the light of the construction of that act which was the basis of the assessment of which complaint is made.

At bar the subject is discussed as if the case were here on error or appeal, and on the other hand it is prayed that the power conferred in a case where a certificate is pending to order up the whole record be exerted. But as the want of power in the court below to make the certificate has been suggested and as that naturally arises on the face of the record and will if well founded preclude present inquiry into other questions, we come to consider that subject.

[1, 2] It is indisputable that the court below had no power to certify questions to this court in any case where its judgment or decree would be susceptible of review in this court on error or appeal. Arant v. Lane, 245 U. S. 166, 168, 38 Sup. Ct. 94, 62 L. Ed. 223. *22 *Whether the power to certify exists therefore must be decided by a consideration of section 250 of the Judicial Code (Comp. St. § 1227), which deals with the right to review by error or appeal. As when that section is considered it appears that its third paragraph in express terms confers power on this court to review on error or appeal judgments or decrees of the court below "in cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority," it is at once demonstrated that the court below was devoid of any authority to make the certificate and hence that this court has no jurisdiction to answer the questions.

But it is suggested that, as it was held in American Security & Trust Co. v. District of Columbia, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856, that the power conferred upon this court by paragraph 6 of section 250 to review on error or appeal judgments or decrees of the court below "in cases in which the construction of any law of the United

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[1] "1. Does section 9 of an act of Congress approved March 3, 1917 (39 Stat. 1046), under which said assessment was made, require that 'moneys and credits, including moneys loaned and invested, bonds and shares of stock * * * of any person, firm, association, or corporation * * * engaged in business within said District,' but residing outside of said District, shall be assessed by the District of Columbia for the purpose of taxation?

"2. If it does, is it invalid? And, if invalid, does that fact render void the entire section?

"3. Does the section require the District of Columbia to assess the bonds and other securities of the states and their municipal corporations held by residents of the District of Columbia; and if it does, does its validity on that account render the entire section void?"

States is drawn in question by the defendant" embraced only the construction of laws of general operation, as distinguished from those which were local to the District of Columbia, therefore the grant of power to determine the constitutionality of acts of Congress must be treated as applying only to such acts as are general in character, as to which it is insisted the act involved in this case is not one.

But the contention disregards the suggestion of a difference between the two subjects which was made in the American Security Case and overlooks the implication resulting from a subsequent case directly dealing with the same matter. United Surety Co. v. American Fruit Co., 238 U. S. 140, 35 Sup. Ct. 828, 59 L. Ed. 1238.

[3] In addition, as the paragraphs of section 250 in question but re-enact provisions of prior statutes which had been construed as conveying authority to review controversies *concerning the constitutional power of Congress to enact local statutes (Parsons v. Dist. of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; Smoot v. Heyl, 227 U. S. 518, 33 Sup. Ct. 336, 57 L. Ed. 621), the proposition conflicts with the settled rule that, where provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary (Latimer v. United States, 223 U. S. 501, 504, 32 Sup. Ct. 242, 56 L. Ed. 526; Anderson v. Pacific Coast S. S. Co., 225 U. S. 187, 199, 32 Sup. Ct. 626, 56 L. Ed. 1047; Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644, 38 Sup. Ct. 408, 62 L. Ed. 914).

That a decision below, which merely deals with and interprets a local statute, is not subject to review by error or appeal, affords no basis for saying that the exertion of the infinitely greater power to determine whether Congress had constitutional authority to pass a statute local in character should be necessarily subjected to a like limitation. To the contrary, the elementary principle is that the right to pass upon the greater question, the constitutional power of Congress, draws to it the authority to also decide all the essential incidents, even though otherwise there might not be a right to consider them. Field v. Barber Asphalt Paving Co., 194 U. S. 618, 620, 24 Sup. Ct. 784, 48 L. Ed. 1142; Williamson v. United States, 207 U. S. 425, 432, 28 Sup. Ct. 163, 52 L. Ed. 278; Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 64, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Wilson v. United States, 232 U. S. 563, 565, 34 Sup. Ct. 347, 58 L. Ed. 728; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 313, 34 Sup. Ct. 493, 58 L. Ed. 974.

It follows that the certificate must be and it is

Dismissed for want of jurisdiction.

(254 U. S. 122)

WATSON et al. v. STATE COMPTROLLER OF NEW YORK.

(Argued Oct. 13, 1920. Decided Nov. 15, 1920.)

No. 266.

1. Taxation 🔑42(1) — Classification which has reasonable relation to permitted governmental action is valid.

A classification of property for purposes of taxation is permissible, if it has a reasonable relation to some permitted end of governmental action; it not being necessary that the basis of the classification be deducible from the nature of the thing classified.

2. Taxation 🔑859(1)—Higher added transfer tax on investments previously untaxed not unreasonable.

Tax Law, § 221-b, as added by Laws N. Y. 1917, c. 700, § 2, imposing an additional tax on the transfer of investments held by decedent, on which neither the general property tax imposed by Tax Law, § 9, nor the stamp tax on investments, which under article 15 exempts them from the general property tax, had been paid, is a reasonable classification, in distinguishing between property which had borne its share of the tax burden during decedent's life and that which had not.

3. Taxation 🔑856—Additional transfer tax on untaxed investments not property tax or penalty.

The additional tax levied by Tax Law, § 221-b, as added by Laws N. Y. 1917, c. 700, § 2, on the transfer of investments of a decedent which had not been taxed during his life, is neither a property tax nor a penalty.

In Error to the Surrogate's Court of New York County, State of New York.

Proceeding for the assessment of the New York state transfer tax against the estate of Charles W. Watson, deceased. An order of the Surrogate's Court, disallowing an additional tax on the transfer of untaxed investments (In re Watson's Estate, 104 Misc. Rep. 212, 172 N. Y. Supp. 29), affirmed by the Appellate Division of the Supreme Court (In re Watson's Estate, 186 App. Div. 48, 174 N. Y. Supp. 19), was reversed by the New York Court of Appeals (In re Watson's Estate, 226 N. Y. 384, 123 N. E. 758), and Anna H. Watson and another, as executors of the last will and testament of the deceased, bring error against the State Comptroller of the State of New York. Judgment for payment of tax affirmed.

See, also, In re Watson's Estate, 227 N. Y. 584, 125 N. E. 926; 227 N. Y. 645, 126 N. E. 924.

*Messrs. Harold W. Bissell and Lee McCanliss, both of New York City, for plaintiffs in error.

Mr. John B. Gleason, of New York City, for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The New York Tax Law (Consolidated Laws, chapter 60) provides (article 1, § 9) that personal property shall be assessed and taxed to the owner at the place where he resides, but exempts (article 15) from such taxation certain bonds and other obligations, called in the act investments, on which there has been paid an optional tax at a lower rate, which payment is evidenced by a stamp affixed. The Tax Law also provides (article 10) for an inheritance or transfer tax, which varies, among other things, according to the relationship of the beneficiary to the decedent. By section 221-b, added by Laws of 1917, c. 700, § 2, an additional tax equal to 5 per cent. of the appraised value of the investment is imposed on the transfer of investments held by the decedent at his death, on which neither the general property tax nor the stamp tax above described has been paid during a fixed period prior thereto, provided that the estate is larger than the exemptions to relatives and charities.

Watson, a resident of New York City, held, at his death in 1917, certain bonds on which neither the general property tax nor the stamp tax had been paid. The transfer tax appraiser, appointed by the Surrogate's Court, reported that there was payable by the executors in respect to those bonds the additional transfer tax prescribed by the act of 1917. The surrogate (In re Watson's Estate, 104 Misc. Rep. 212, 172 N. Y. Supp. 29) disallowed the tax on the ground that the statute violated the state Constitution, and his decision was affirmed by the Appel*late Division of the Supreme Court (In re Watson's Estate, 186 App. Div. 48, 174 N. Y. Supp. 19). The Court of Appeals of New York held that the act violated neither the state nor the federal Constitution (In re Watson's Estate, 226 N. Y. 384, 123 N. E. 758), and the case comes here on writ of error. The contention is that the tax imposed denies to Watson's estate equal protection of the laws.

[1, 2] The occasion and the purpose of the statute are shown by the Court of Appeals. An owner of investments is not required either to list them for assessment locally under the general property tax law or to present them for stamping under the investment tax law. Whether the investments of a resident are taxed during his life depends either upon his own will or upon the vigilance and discretion of the local assessors. This condition led to loss of revenue by the state and to inequality in taxation among its citizens. To remedy both evils this additional transfer tax was imposed upon investments of a decedent which had wholly escaped taxation. It is insisted that the tax is discriminatory, because under it other property of the same kind bequeathed to persons standing in the same relationship to the decedent will not be taxed. But the power to classify for purposes of taxation is fully established. The executors admit, as they must, that a classification is reasonable, if made with respect to the kind of property transferred, or to the amount or value of property transferred, or to the relationship of the transferees, or to the character of the transferee, for instance, as engaged in charity. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 300, 18 Sup. Ct. 594, 42 L. Ed. 1037; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; Campbell v. California, 200 U. S. 87, 26 Sup. Ct. 182, 50 L. Ed. 382. But their list does not exhaust the possibilities of legal classification. See Beers v. Glynn, 211 U. S. 477, 484, 29 Sup. Ct. 186, 53 L. Ed. 290; Keeney v. New York, 22 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139; Maxwell v. Bugbee, 250 U. S. 525, 40 Sup. Ct. 2, 63 L. Ed. 1124. Compare New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736. Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It *is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified —here the right to receive property by devolution. It is enough, for instance, if the classification is reasonably founded in "the purposes and policy of taxation." Pacific Express Co. v. Seibert, 142 U. S. 339, 354, 12 Sup. Ct. 250, 35 L. Ed. 1035; Kidd v. Alabama, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669; Clement National Bank v. Vermont, 231 U. S. 120, 136–137, 34 Sup. Ct. 31, 58 L. Ed. 147; Farmers' Bank v. Minnesota, 232 U. S. 519, 529–530, 34 Sup. Ct. 354, 58 L. Ed. 706. And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not?[1]

[3] It does not follow, as is also argued, that the act in question imposes a property tax, merely because its existence may induce owners of investments to present them for taxation under the investment tax law. Nor is it to be deemed a law imposing a penalty merely because the decedent's estate may

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[1] Connecticut (Gen. Stat. 1918, § 1190) and Louisiana (Constitution 1898, arts. 235, 236; Act 45 of 1904) also impose a special inheritance tax on the transfer of property which has not borne its share of taxation during a period prior to the owner's death. The latter statute has been frequently before the courts. Succession of Mathias Levy, 115 La. 377, 385, 39 South. 37, 8 L. R. A. (N. S.) 1180, 5 Ann. Cas. 871, affirmed Cahen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215; Succession of Pritchard, 118 La. 883, 43 South. 537; Succession of Westfeldt, 122 La. 836, 48 South. 281.

under it be required to pay more in taxes than the deceased would have paid if he had presented his property for taxation under the investment tax law. Whether this additional transfer tax would be obnoxious to the Fourteenth Amendment, if it could be deemed a property tax or a penalty, we have no occasion to consider.

The judgment of the Surrogate's Court, entered on the remittitur from the Court of Appeals of New York, is
Affirmed.

(254 U. S. 113)

UNDERWOOD TYPEWRITER CO. v. CHAMBERLAIN, Treasurer of the State of Connecticut.

(Argued Oct. 13 and 14, 1920. Decided Nov. 15, 1920.)

No. 215.

1. Commerce 🔑72—State tax on income, not condition to doing interstate business, is not burden on interstate commerce.

A state tax, based on the income of a corporation, is not invalid under Const. U. S. art. 1, § 8, as a burden on interstate commerce, where its payment was not made a condition precedent to the right of the corporation to carry on business, including interstate commerce, but its enforcement was left to the ordinary means of collecting taxes.

2. Commerce 🔑69 — State tax on corporation's privilege of exercising franchise not contrary to commerce clause.

A state tax is not obnoxious to the commerce clause of the federal Constitution merely because imposed on property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising the corporation's franchise within the state.

3. Commerce 🔑69, 72—State tax, based on net profits, resulting partly from interstate commerce, not invalid.

A state tax, measured by the net profits of a corporation, whether deemed a property tax or franchise tax, is not obnoxious to the commerce clause of the federal Constitution, though the profits were derived in part, or indeed mainly, from interstate commerce.

4. Constitutional law 🔑283—Taxation 🔑37—State tax on corporate profits held not arbitrary, or unreasonable, or denial of due process of law.

A state tax on a foreign corporation, manufacturing its product within the state, but selling the greater part of it in other states, which was based on the proportion of the tangible property of the corporation within and without the state, so as to require the corporation to pay a tax on 47 per cent. of its income, is not inherently arbitrary, since the income from sales outside the state was partly earned by manufacturing within the state, and was not shown to be unreasonable, where the corporation introduced no evidence as to the relative portions of its income derived from operations within and without the state, and therefore does not take the corporation's property without due process of law, contrary to Const. U. S. Amend. 14.

5. Constitutional law 🔑283 — State tax on profits of corporation, which had theretofore made large investments within state, held not violation of Fourteenth Amendment.

A state statute, imposing a tax on the profits of a foreign corporation, apportioned by the percentage of tangible property within the state, is not contrary to Const. U. S. Amend. 14, because that corporation had made large permanent investments within the state before the act was passed.

In Error to the Superior Court of the State of Connecticut.

Action by the Underwood Typewriter Company against Frederick S. Chamberlain, Treasurer of the State of Connecticut, to recover taxes paid under protest. Judgment for defendant in the superior court of the state of Connecticut, after questions as to the validity of the tax had been answered favorable to its validity by the Supreme Court of Errors of Connecticut (94 Conn. 47, 108 Atl. 154), and plaintiff brings error. Affirmed.

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*Messrs. Arthur M. Marsh, of Bridgeport, Conn., and Arthur L. Shipman, of Hartford, Conn., for plaintiff in error.

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*Messrs. James E. Cooper, of New Britain, Conn., and Hugh M. Alcorn, of Hartford, Conn., for defendant in error.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

This action was brought by the Underwood Typewriter Company, a Delaware corporation, in the superior court for the county of Hartford, Conn., to recover the amount of a tax assessed upon it by the latter state and paid under protest. The company contended that as applied to it the taxing act violated rights guaranteed by the federal Constitution. The constitutional questions involved were reserved by that court for consideration and advice by the Supreme Court of Errors. The answers to these questions being favorable to the state (94 Conn. 47, 108 Atl. 154), judgment was entered by the superior court, confirming the validity of the tax. The case comes here on writ of error to that court.

Connecticut established in 1915 a comprehensive system of taxation, applicable alike to all foreign and domestic corporations carrying on business within the state. This system prescribes practically the only method by which such corporations are taxed, other than the general property tax to which all property located within the state, whether the owner be a resident or a nonresident, an individual or a corporation, is subject. The act divides business corporations into four classes, and the several classes are taxed by somewhat different methods. The fourth class, "Miscellaneous Corporations," includes, among others, manufacturing and trading companies, and with these alone are we concerned here. Upon their net income earned during the preceding year from business carried on within the state a tax of 2 per cent. is imposed annually. The amount of the net income is ascertained by reference to the *118 income upon which the corpora*tion is required to pay a tax to the United States. If the company carries on business also outside the state of Connecticut, the proportion of its net income earned from business carried on within the state is ascertained by apportionment in the following manner: The corporation is required to state in its annual return to the tax commissioner from what general source its profits are principally derived. If the company's net profits are derived principally from ownership, sale, or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income as the fair cash value of the real and the tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the state bear to the total gross receipts of the company. A corporation aggrieved because of a tax assessed upon it may, after paying the tax, apply for relief to the superior court for the county of Hartford. There it may show cause why it is not subject to the tax, or why the tax should have been less. If the whole tax assessed is found by the court to be proper, it enters judgment confirming the same. If the tax is found to be for any reason unauthorized in whole or in part, the court enters judgment for the company in the amount with interest which it is entitled to recover; and the state treasurer is directed to pay the same. The decision of the superior court is subject to review by the Supreme Court of Errors as in other cases. Laws of 1915, c. 292, pt. IV, §§ 19–29; Underwood Typewriter Co. v. Chamberlain, 92 Conn. 199, 102 Atl. 600.

The Underwood Typewriter Company is engaged in the business of manufacturing typewriters and kindred articles; in selling its product, and also certain accessories and supplies, which it purchases; and in repair- *119 ing and *renting such machines. Its main office is in New York City. All its manufacturing is done in Connecticut. It has branch offices in other states for the sale, lease, and repair of machines and the sale of supplies, and it has one such branch office in Connecticut. All articles made by it—and some which it purchases—are stored in Connecticut until shipped direct to the branch offices, purchasers, or lessees. In its return to the tax commissioner of Connecticut, made in 1916 under the above law, the company declared that its net profits during the preceding year had been derived principally from tangible personal property; that these profits amounted to $1,336,586.13; that the fair cash value of the real estate and tangible personal property in Connecticut was $2,977,827.67, and the fair cash value of the real estate and tangible personal property outside that state was $3,343,155.11. The proportion of the real estate and tangible personal property within the state was thus 47 per cent. The tax commissioner apportioned that percentage of the net profits, namely $629,668.50, as having been earned from the business done within the state, and assessed thereon a tax of $12.593.37, being at the rate of 2 per cent. The company, having paid the tax under protest, brought this action in the superior court for the county of Hartford to recover the whole amount.

[1-3] First. It is contended that the tax burdens interstate commerce, and hence is void, under section 8 of article 1 of the federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. Saint Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350, 364, 35 Sup. Ct. 99, 59 L. Ed. 265; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163, 23 Sup. Ct. 817, 47 L. Ed. 995. The statute is, therefore, not open to the objection that it compels the company to pay for the privileges of engag- *120 ing in interstate commerce. A *tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the state. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695, 15 Sup. Ct. 268, 39 L. Ed. 311. This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 40 Sup. Ct. 221, 64 L. Ed. 445; compare Peck & Co. v. Lowe, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause.

[4] Second. It is contended that the tax violates the Fourteenth Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the state. In considering this objection we may lay on one side the question whether this is an excise tax, purporting to be measured by the income accruing from business within the state, or a direct tax upon

that income; for "this argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution." Shaffer v. Carter, 252 U. S. 37, 55, 40 Sup. Ct. 221, 226 (64 L. Ed. 445). In support of its objection that business outside the state is taxed, plaintiff rests solely upon the showing that of its net profits $1,293,643.95 was received in other states and $42,942.18 in Connecticut, while under the method of apportionment of net income required by the statute 47 per cent. of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in *121 the state. The Legislature, in *attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the state. "The plaintiff's argument on this branch of the case," as stated by the Supreme Court of Errors, "carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs." The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary,[1] or that its application to this corporation produced an unreasonable result.

We have no occasion to consider whether the rule prescribed, if applied under different conditions, might be obnoxious to the Constitution. Adams Express Co. v. Ohio, 166 U. S. 185, 222, 17 Sup. Ct. 604, 41 L. Ed. 965. Nor need we consider the contention, made on behalf of the state, that the statute is necessarily valid, because the prescribed rule of apportionment is not rigid, and provision is made for rectifying by proceedings in the superior court any injustice resulting from its application.

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[5] *Third. It is stated in the brief, doubtless inadvertently, that the assignment of errors includes the objection that the tax was void under the Fourteenth Amendment also on the ground that the company, a foreign corporation, had made large permanent investments in Connecticut before the statute of 1915 was enacted. No such error appears to have been specifically assigned, and the objection was not pressed in brief or oral argument. It is clearly unsound. To the facts presented here the principle discussed in Southern Railway Co. v. Greene, 216 U. S. 400, 414, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247, has no application.

Affirmed.

(254 U. S. 96)

NORTHWESTERN MUT. LIFE INS. CO. v. JOHNSON.

NATIONAL LIFE INS. CO. OF MONTPELIER, VT., v. MILLER.

(Submitted Oct. 22, 1920. Decided Nov. 15, 1920.)

Nos. 70 and 71.

1. **Courts 🔑359—State must decide whether insurance against suicide contravenes public policy.**

   It is for the state to decide whether contracts of life insurance, which cover death by suicide while insured is sane, are contrary to public policy.

2. **Insurance 🔑400—Incontestable clause not against public policy in case of suicide.**

   A clause in an insurance policy, making it incontestable after one year from its date, requires the payment of the insurance in the event of suicide by the insured after the expiration of a year, but is not thereby invalid as contrary to public policy, unless the state in which the contract was written so declares.

3. **Insurance 🔑400—Clause excepting suicide within two years creates liability after that period.**

   A clause in a life insurance policy, excepting liability for suicide of the insured within two years from the date of the policy, impliedly imposes liability for such suicide occurring after the expiration of the two years.

On Certificates from the United States Circuit Court of Appeals for the Eighth Circuit.

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[1] Compare Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. Ed. 790; Pittsburg, etc., Railway Co. v. Backus, 154 U. S. 421, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Cleveland, etc., Ry. Co. v. Backus, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 38 L. Ed. 1041; Western Union Telegraph Co. v. Taggard, 163 U. S. 1, 14, 16 Sup. Ct. 1054, 41 L. Ed. 49; Adams Express Co. v. Ohio, 165 U. S. 194, 221, 17 Sup. Ct. 305, 41 L. Ed. 683; Id., 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 75, 19 Sup. Ct. 599, 43 L. Ed. 899; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 152, 20 Sup. Ct. 631, 44 L. Ed. 708; St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 365, 35 Sup. Ct. 99, 59 L. Ed. 265.

Separate suits by Isabel H. Johnson against the Northwestern Mutual Life Insurance Company and by A. M. Miller, administrator of the estate of George P. Johnson, deceased, against the National Life Insurance Company of Montpelier, Vt. From judgments for the plaintiffs in each case, the defendants appealed to the Circuit Court of Appeals, which certified certain questions to the Supreme Court. Questions answered in the affirmative.

See, also, 40 Sup. Ct. 9.

In No. 70:

Mr. George Lines, of Milwaukee, Wis., for Northwestern Mut. Life Ins. Co.

Mr. S. F. Prouty, of Des Moines, Iowa, for Johnson.

In No. 71:

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*Mr. George B. Young, of Montpelier, Vt., for National Life Ins. Co.

Mr. S. F. Prouty, of Des Moines, Iowa, for Miller.

Mr. Justice HOLMES delivered the opinion of the Court.

These are suits upon policies issued to George P. Johnson upon his life, payable in the first case to his wife, in the second to his executors or administrators. The wife and the administrator respectively recovered in the District Court and the cases having gone to the Circuit Court of Appeals the latter has certified certain questions to this court. The policy payable to the wife contained a provision that—

> "if within two years from the date hereof, the said insured shall * * * die in consequence
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>
> of a *duel, or shall, while sane or insane, die by his own hand, then, and in every such case, this policy shall be void."

Johnson, the insured, died by his own hand more than two years after the date of the policy. The first question put in the wife's suit is whether the above provision, there being no other in the policy as to suicide, makes the insurance company liable in the event that happened. The second is in substance whether the contract if construed to make the company liable is against public policy and void.

The policy payable to the administrator had no provision as to suicide but did agree that—

> "This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid."

Johnson's suicide was more than a year after the date of the policy. The first question propounded is whether the above provision prevents the insurer from denying liability in this case, it not appearing that Johnson was insane when he killed himself. The second is whether such a contract which makes no exception for death resulting from suicide is against public policy, and therefore void. There is a third as to a possible distinction between insurance payable to the wife and that payable to the estate of the insured which will not need to be discussed.

[1] The public policy with regard to such contracts is a matter for the states to decide. Whitfield v. Ætna Life Insurance Co., 205 U. S. 489, 495, 27 Sup. Ct. 578, 51 L. Ed. 895. This case qualifies the statement in Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 154, 18 Sup. Ct. 300, 42 L. Ed. 693, to the effect that insurance on a man's own life payable to his estate and expressly covering suicide committed by him when sane would be against public policy. The point decided was only that when the contract was silent there was an implied exception of such a death. There was evidence that the insurance was taken out with intent to commit

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suicide, and it plainly appeared *that the act was done by the insured for the purpose of enabling his estate to pay his debts. The application, although excluded below, warranted against suicide within two years, within which time the death took place. So that all the circumstances gave moral support to the construction of the policy adopted by the court in accordance with the view that has prevailed in some jurisdictions as to the general rule. In Burt v. Central Life Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, it was held that there was a similar tacit exclusion from the risk assumed of the death of the insured by execution for murder, and the same decision was reached in Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57. But the question here does not concern implied exceptions, it concerns the effect of express undertakings which as we have said depends upon the policy of the state.

[2] The certificates do not disclose in what states these contracts were made but it is not necessary to postpone our answer on that account. It appears from Whitfield v. Ætna Life Insurance Co., supra, that some legislatures have thought it best to insist that life insurance should cover suicide unless taken out in contemplation of the deed. But the case is much stronger when a considerable time is to elapse before the fact that the death was by the insured's own hand ceases to be a defense. The danger is less sinister and probably a good deal smaller than the danger of murder when the insurance is held by a third person having no interest in the continuance of the life insured, yet insurance on the life of a third person does not become void by assignment to one who has no interest in the life. Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863. When a clause makes a policy indisputable after one or two

years, the mere evocation of a possible motive for self-slaughter is at least not more objectionable than the creation of a possible motive for murder. The object of the clause is plain and laudable—to create an absolute assurance *102 of the benefit, *as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done. It is said that the insurance companies now generally issue policies with such a clause. The state decisions, so far as we know, have upheld it. Unless it appears that the state concerned adopts a different attitude we should uphold it here. Simpson v. Life Ins. Co. of Virginia, 115 N. C. 393, 20 S. E. 517; Mareck v. Mutual Reserve Fund Life Association, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; Goodwin v. Providence Savings Life Assurance Association, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411; Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899.

[3] We are of opinion that the provision in the first mentioned document avoiding the policy if the insured should die by his own hand within two years from the date is an inverted expression of the same general intent as that of the clause in the second making the policy incontestable after one year, and that both equally mean that suicide of the insured, insane or sane, after the specified time shall not be a defense. It seems to us that that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable in the event that happened. We answer the first question in each certificate, yes. The other questions are disposed of by our answer to the first.

Answer to question 1 in No. 70, Yes.

Answer to question 1 in No. 71, Yes.

Mr. Justice DAY took no part in the decision of these cases.

(254 U. S. 103)

HARRIS et al. v. BELL et al.

(Argued Jan. 26, 1920. Decided Nov. 15, 1920.)

No. 51.

1. Indians 🔑15(1)—Heirs of allottee who died before allotment not subject to restrictions on allottees.

Under Act March 1, 1901, § 28, Act June 30, 1902, § 7, and Act April 26, 1906, § 5, relating to allotments of lands to Creek Indians, those who received allotments as the heirs of an allottee who died before the allotment are not subject to the restrictions imposed upon conveyances by allottees in their own right, by Act April 26, 1906, § 19, and Act May 27, 1908, § 1.

2. Indians 🔑15(2)—Administrative construction of statute as to conveyances not controlling.

While the construction by the Secretary of the Interior, in accordance with an opinion of the Attorney General, that Act May 27, 1908, requiring approval of conveyances by heirs of Creek allottees by a court, did not prevent the approval by the Secretary of conveyances already made under the authority given by Act April 26, 1906, § 22, it is entitled to respect, so that those who have relied thereon should not be lightly put in peril, that construction is not controlling on the courts.

3. Indians 🔑15(2)—Act requiring approval by courts did not divest Secretary's power to approve prior conveyances.

Act May 27, 1908, § 9, requiring conveyances by full-blood Indian heirs of allottees to be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee, did not deprive the Secretary of the Interior of the power given him by Act April 26, 1906, § 22, to approve conveyances theretofore made by Indian heirs, but the later statute is limited to conveyances made after its enactment.

4. Indians 🔑15(2)—Lapse of 2½ years does not invalidate approval of conveyances.

The lapse of 2½ years between the execution of a conveyance by Indian heirs of a Creek allottee and the approval of the conveyance by the Secretary of the Interior is immaterial, where there was no lawful intervening disposition of the land.

5. Indians 🔑15(1)—Restriction on sales by living minors not applicable to inherited lands.

Act May 27, 1908, § 6, prohibiting sale of restricted lands of living minors by order of the court or otherwise, when construed to harmonize with section 9 of the same act, which recognizes the right to sell lands inherited from a deceased allottee with consent of the court, must be limited to lands originally allotted to the minors in their own right, and not applied to lands inherited by minors.

6. Indians 🔑15(1)—Requirement of approval of heir's conveyance by court settling estate does not apply to guardians under another court.

Act May 27, 1908, § 6, subjecting the persons and property of Indian minors to the jurisdiction of the probate courts of Oklahoma, which have authority under the laws of that state to authorize sale of the lands of such minors, limits the provision of section 9 of the same act, requiring a conveyance by an Indian heir to be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee to cases where the heir is not a minor, so that a sale of a minor heir's interest, approved by the probate court having jurisdiction of the minor's person and property, need not be approved by the court having jurisdiction of the estate of the deceased allottee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Annie Harris and others against Harry H. Bell and others, to cancel conveyances of allotted lands. Decree of the District Court, sustaining two of the conveyances (235 Fed. 626), was affirmed by the Circuit Court of Appeals (250 Fed. 209, 162 C. C. A. 345), and complainants appeal. Affirmed.

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*Mr. James C. Davis, of Muskogee, Okl., for appellants.

Messrs. William M. Matthews, of Kansas City, Mo., and George S. Ramsey, of Muskogee, Okl., for appellees.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

By this suit certain conveyances of lands allotted in the name and right of a Creek Indian after his death were assailed, and their cancellation sought, by the heirs who *105 *made them. On the final hearing the District Court upheld two of the conveyances (235 Fed. 626), and that decree was affirmed by the Circuit Court of Appeals (250 Fed. 209, 162 C. C. A. 345). The present appeal is by the heirs.

The circumstances to be considered are as follows: By the act of March 1, 1901, c. 676, 31 Stat. 861, as modified by the act of June 30, 1902, c. 1323, 32 Stat. 500, provision was made for the allotment and distribution of the Creek tribal lands and funds among the members of the tribe. An enrollment was to be made of (a) all members living on April 1, 1899; (b) all children born to members after that date up to and including July 1, 1900, and living on the latter date; and (c) all children born to members after July 1, 1900, up to and including May 25, 1901, and living on the latter date. All who were so enrolled were to share in the allotment and distribution. If any of these died before receiving his allotment and distributive share, the lands and moneys to which he "would be entitled if living" were to "descend to his heirs" and be "allotted and distributed to them accordingly." A provision in the act of March 3, 1905, plainly intended to amend and supplement the earlier acts, authorized the inclusion of all children born between May 25, 1901, and March 4, 1905, and living on the latter date. 33 Stat. 1071, c. 1479.

Originally all lands allotted to living members in their own right were subjected to specified restrictions on alienation; but those allotted in the right of deceased members were left unrestricted up to the passage of the act of April 26, 1906, c. 1876, 34 Stat. 137. Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198; Adkins v. Arnold, 235 U. S. 417, 420, 35 Sup. Ct. 118, 59 L. Ed. 294; Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; Brader v. James, 246 U. S. 88, 94, 38 Sup. Ct. 285, 62 L. Ed. 591; Talley v. Burgess, 246 U. S. 104, 107, 38 Sup. Ct. 287, 62 L. Ed. 600. Section 19 of that act materially revised the restrictions respecting lands of living allottees, and section 22 dealt with the alienation of inherited lands, including, as *106 this court has *held, lands allotted in the name and right of a member after his death. Talley v. Burgess, supra, 246 U. S. 108, 38 Sup. Ct. 287, 62 L. Ed. 600. Section 22 read as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Section 5 of the same act directed that all patents or tribal deeds for allotments should issue "in the name of the allottee"—meaning the member in whose right the allotment was made—and provided that if he were then dead the title should inure to and vest in "his heirs," as if the patent or deed "had issued to the allottee during his life." A like provision is found in section 32 of the act of June 25, 1910, c. 431, 36 Stat. 855.

Further provisions bearing on the alienation of lands of living allottees and also inherited lands were embodied in the act of May 27, 1908, c. 199, 35 Stat. 312, to be noticed presently.

The lands in question were allotted in the name and right of Freeland Francis, a Creek child who was born in 1903, was lawfully enrolled June 10, 1905, and died twelve days *107 later. After his death the allotment was *duly selected and made by the Commission to the Five Civilized Tribes, and in regular course a patent or deed was issued in his name. His heirs, to whom the title passed under the statutes already noticed, were his mother, Annie Francis (now Harris), his half-brother, Mack Francis, his brother, Amos, and his sister, Elizabeth. These were all enrolled Creeks—three being full-blood Indians and one a half-blood.

January 15, 1908, after the allotment was perfected, the mother, who was an adult, sold and conveyed her interest, and that conveyance was approved by the Secretary of the Interior, July 6, 1910, the approval as indorsed on the deed reading:

> "The conveyance by Annie Francis of her interest as full-blood Indian heir in and to the

within described lands allotted to Freeland Francis, a new-born Creek citizen, Roll No. 1070, who died prior to May 27, 1908, is hereby approved in accordance with the provisions of the act of Congress approved April 26, 1906."

The half-brother, Mack, sold and conveyed his interest in 1910, after he attained his majority, but the validity of that transaction is not questioned. He was not a full-blood Indian, but a half-blood.

January 15, 1912, the interest of Amos and Elizabeth, who were minors, was sold and conveyed by their guardian under the direction and approving order of the county court wherein the guardianship of their persons and property was pending.

At the time of Freeland's death the family was residing in that part of the Indian Territory which on the advent of statehood (November 16, 1907) became Wagoner county, and shortly after his death they removed to and ever since have resided in what became Okmulgee county. The lands are in the latter county and it was in the county court thereof that the guardian's sale and conveyance were directed and approved.

*The conveyance by the mother, who was a full-blood Indian, and that by the guardian of Amos and Elizabeth, who were full bloods, are the ones to be considered on this appeal. All rights under them are held by parties who were defendants in the District Court and are appellees here.

The grounds on which the conveyances are assailed are four in number—one directed at both conveyances, one at that of the mother alone and two solely at that of the guardian. They will be taken up in this order.

[1] 1. It is urged that the heirs took the lands as allottees and not as heirs of Freeland—in other words, that they received the lands as a direct allotment to them and not as an inheritance—and therefore that such of them as were full-blood Indians were restrained and disabled from disposing of the lands by reason of the restrictions applicable to living allottees of the full blood. If the premise were right, the conclusion would be unavoidable. See section 19, act of 1906, supra, and section 1, act of 1908, supra. But the premise is not right, as is shown by statutes already mentioned, such as section 28 of the act of 1901, section 7 of the act of 1902 and section 5 of the act of 1906. The allotment was made in virtue of the right of Freeland, who was one of those among whom the tribal property was to be distributed. Under the statutes that right was not extinguished by his death but was preserved for his heirs; and it was preserved for them because they were his heirs; and not because their relation to it was otherwise different from that of other members of the tribe. Such individual claims as they had to the tribal lands were to be satisfied by their individual allotments. What they were to receive in the right of Freeland was the lands and moneys to which "he would be entitled if living"; and these were to "descend" to and vest in them as "his heirs," as if he had received the same "during his life." Putting aside the distinctions between title by purchase and title by descent

*which prevail in the absence of controlling statutes, and giving effect to the letter and spirit of what Congress has enacted, we think it is manifest that these heirs must be regarded as having received these lands as an inheritance from Freeland, and not as a direct allotment to them. Perryman v. Woodward, 238 U. S. 148, 150, 35 Sup. Ct. 830, 59 L. Ed. 1242; Talley v. Burgess, supra.

[2-4] 2. The first restrictions applicable to Creek lands such as these were embodied in section 22 of the act of 1906, hereinbefore set forth. As respects the mother's conveyance, which was executed January 15, 1908, all that was necessary under that section to make the conveyance effective—the mother being an adult full-blood Indian—was that it be approved by the Secretary of the Interior. As before shown, it was approved by that officer July 6, 1910. But it is urged that before his approval was given all power to approve had been taken from him and lodged elsewhere by the act of May 27, 1908. Evidently the Secretary did not so construe that act when his approval was given, else he would have withheld it. Not only so, but his action in this instance was in accord with the practice of his office for a considerable period and also with an opinion rendered to him by the Attorney General. 27 Op. Attys. Gen. 530. This administrative view is, of course, entitled to respect, and those who have relied thereon ought not lightly to be put in peril. But it is not controlling. We have examined the act, including section 9, upon which reliance is had, and are of opinion that as to conveyances made prior to the act the power of the Secretary to examine and approve or disapprove under section 22 of the prior enactment was not taken away. The act contains no express revocation of that power, nor any provision inconsistent with its continued exercise as to prior conveyances. The provision in section 9, that no conveyance of any interest of any full-blood Indian heir shall be valid "unless approved by the court having jurisdiction of

the settlement of the *estate" of the deceased allottee, taken according to its natural import, prescribes a rule for future rather than prior conveyances; and no reason is perceived for rejecting its natural import. Had there been a purpose to cut off action by the Secretary as to conveyances already made, some of which were before him at the time, it is but reasonable to believe that other words aptly expressing that purpose would have been used. The matter hardly would have been left to conjecture or uncertain im-

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plication. Besides, the absence of such a purpose is measurably reflected by the declaration in section 1 that "the Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore." The lapse of two and one-half years between the execution of the conveyance and its approval is not material, there being no lawful intervening disposal. Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. 860, 36 L. Ed. 716; Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485.

[5] 3. Section 6 of the act of 1908 subjects the persons and property of minor allottees to the jurisdiction of the probate courts of the state, and in a proviso says:

> "No restricted lands of living minors shall be sold or incumbered, except by leases authorized by law, by order of the court or otherwise."

One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed is that it was in violation of this proviso. But in our opinion the proviso does not include or affect inherited lands. It refers, as a survey of the act shows, to lands of living minor allottees and not to lands inherited from deceased allottees. Section 9 expressly recognizes that the latter may be sold, and this proviso cannot be taken as prescribing the contrary. The word "living" evidently is intended to mark the distinction. What is intended is to make sure that minor allottees receive the benefit of the restrictions prescribed in section 1, and not to impose others. Apparently it was apprehended that the general language of section 6 might be taken as enabling probate *111 *courts and guardians to sell without regard to those restrictions and the office of the proviso is to prevent this. So understood, it is in accord with the general scheme of the act and not in conflict with any other provision.

[6] 4. The remaining objection to the guardian's conveyance is that it was not approved by the court having jurisdiction of the settlement of the estate of Freeland, the deceased allottee.

The situation out of which the objection arises is at least novel. Freeland died June 22, 1905, and the conveyance was made January 15, 1912. Statehood had intervened and counties had been organized where there were none before. He resided and died in what afterwards became Wagoner county, and under the local law the county court of that county is the one which at the time of the conveyance would have had jurisdiction of the settlement of his estate. The court in the Indian Territory which would have had such jurisdiction prior to statehood was no longer in existence. The conveyance was not approved by the county court of Wagoner county, but was approved by the county court of Okmulgee county, which under the local law was the only court having jurisdiction of the guardianship of the persons and property of the minors, Amos and Elizabeth. The lands were in that county and the minors, as also the other heirs, were residing there.

Section 6 of the act of 1908 and other congressional enactments explicitly subject the persons and property of Indian minors of the Five Civilized Tribes to the jurisdiction of the probate courts of Oklahoma. In that state the county courts are the probate courts.

Section 9 of the same act declares:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in *112 *such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

If in this instance the same court had had jurisdiction of the guardianship of the minor heirs and of the settlement of the estate of the deceased allottee, no embarrassment would have ensued; but as that was not the case, the question arises whether it was essential that the guardian's conveyance, directed and approved as it was, by the court having control of the guardianship, should also be approved by the court having jurisdiction of the settlement of the deceased allottee's estate. The Circuit Court of Appeals answered in the negative; and, while the question is not free from difficulty, we think that solution of it is right.

Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor he can convey only through a guardian, and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. The act of 1908 contains no manifestation of such a purpose outside the proviso in section 9. That proviso seems broad, but so is the provision in section 6 subjecting the persons and property of minor Indians to local guardianship. As both are in the same act, they evidently were intended to operate harmoniously and should be construed accordingly. The proviso does not mention minors under guardianship; and to regard its general words as including them will either take all supervi- *113 sion of the sale of their interest in *inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship—in other words, to adult heirs—the two provisions will operate in entire harmony and all full-blood heirs will receive the measure of protection intended. We think this is the true construction.

Decree affirmed.

(254 U. S. 135)

HORNING v. DISTRICT OF COLUMBIA.

(Argued Nov. 8 and 9, 1920. Decided Nov. 22, 1920.)

No. 77.

1. **Criminal law 🔑21—Intent to keep within law immaterial, if acts transgress it.**

Though it is permissible for defendant to come as close to the line as he could without violating Act Feb. 4, 1913, requiring a license for pawnbrokers doing business within the District of Columbia, his intent not to break the law is no defense, if his conduct in fact violated the law because he misconceived its meaning.

2. **Pawnbrokers and money lenders 🔑11—Evidence held to show defendant was conducting business within District.**

Undisputed evidence that defendant stored and returned pledged property within the District, though he transported the applicants for loans out of the District before making the loan or receiving the property, shows that he was doing business within the District, since an essential part of it was done there, and Act Feb. 4, 1913, requiring license from pawnbrokers within the District, is not limited to cases where the whole business is done therein.

3. **Criminal law 🔑1186(4)—Instruction that jury should find defendant guilty held not reversible error.**

Where the facts were established by the testimony of both the prosecution and defendant, and showed a violation of the law, an instruction that the jury could not capriciously say the testimony was not the truth, that it was their duty to accept the court's exposition of the law, that the court could not peremptorily instruct them to find the defendant guilty, but that he would if he could, and that the failure to bring in a verdict of guilt would arise only from a flagrant disregard of the evidence, the law, and their obligation as jurors, was at most a formal error, which does not require reversal under Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246).

Mr. Justice Brandeis, the Chief Justice, Mr. Justice McReynolds, and Mr. Justice Day, dissenting.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

George D. Horning was convicted of doing business as a pawnbroker without a license within the District of Columbia, and from a judgment of the Court of Appeals, affirming the conviction (48 App. D. C. 380), defendant brings certiorari. Affirmed.

Mr. Henry E. Davis, of Washington, D. C., for petitioner.

Messrs. Robert L. Williams, F. H. Stephens, and P. H. Marshall, all of Washington, D. C., for the District of Columbia.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This case comes here upon a writ of certiorari granted to review a judgment of the Court of Appeals that affirmed a conviction of the petitioner of doing business as a pawnbroker and charging more than six per cent. interest, without a license, which is forbidden by the Act of Congress of February 4, 1913, c. 26, 37 Stat. 657. 48 App. D. C. 380.

[1] The external facts are not disputed. The defendant had been in business as a pawnbroker in Washington but anticipating the enactment of the present law removed his headquarters to a place in Virginia at the other end of a bridge leading from the city. He continued to use his former building as a storehouse for his pledges but posted notices on his office there that no applications for loans would be received or examination of pledges made there. He did, however, maintain a free automobile service from there to Virginia and offered to intending borrowers the choice of calling upon him in person or sending their application and security by a dime messenger service not belonging to him but established in his Washington building. If the loan was made, in the latter case the money and pawn ticket were brought back and handed to the borrower in Washington. When a loan was paid off the borrower received a redemption certificate, presented it in Washington and got back his pledge. The defendant estimated the number of persons applying to the Washington office for loans or redemption at fifty to seventy-five a day. His Washington clerk, a witness in his behalf, put it at from seventy-five to one hundred. We may take it that there was a fairly steady stream of callers, as is implied by the automobile service being maintained. It is said with reference to the charge of the judge to which we shall advert that there was a *137 question *for the jury as to the defendant's intent. But we perceive none. There is no question that the defendant intentionally maintained his storehouse and managed his business in the way described. It may be assumed that he intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.

[2] As to whether the conduct described did contravene the law, it is urged that a pledgee has a right to keep the pledged property where he likes and as he likes provided he returns it in proper condition when redeemed. But that hardly helps the defendant. To keep for return, whatever latitude there may be as to place and mode, is part of the duty of a pledgee, and in the case of one who makes a business of lending on pledges is as much a part of his business as making the loan. As we read the statute its prohibition is not confined to cases where the whole business is done in Washington. If an essential part of it is done there and a Washington office is used as a collecting centre, it does not matter that care is taken to complete every legal transaction on the other side of the Potomac. We cannot suppose that it was intended to allow benefits so similar to those coming from business done wholly in the city to be derived from acts done there and yet go free. We are of opinion that upon the undisputed evidence the defendant was guilty of a breach of the law and turn at once to the question which seemed to warrant allowing the case to be brought to this Court.

[3] The question relates to the charge of the judge. The judge said to the jury that the only question for them to determine was whether they believed the concurrent testimony of the witnesses for the Government and the defendant describing the course of business that we have stated and as to which *138 there was no dispute. Those facts, *he correctly instructed them, constituted an engaging in business in the District of Columbia. This was excepted to and the jury retired. The next day they were recalled to Court and were told that there really was no issue of fact for them to decide; that they were not warranted in capriciously saying that the witnesses for the Government and the defendant were not telling the truth; that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that in a criminal case the Court could not peremptorily instruct them to find the defendant guilty but that if the law permitted he would. The Court added that a failure to bring in a verdict could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. On an exception being taken the judge repeated that he could not tell them in so many words to find the defendant guilty but that what he said amounted to that; that the facts proved were in accord with the information and that the Court of Appeals had said that that showed a violation of law.

This was not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do, Graham v. United States, 231 U. S. 474, 480, 34 Sup. Ct. 148, 58 L. Ed. 319. The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there has been no formal agreement. Perhaps there was a regrettable peremptoriness of tone— *139 *but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt. Act of February 26, 1919, c. 48, 40 Stat. 1181, amending section 269 of the Judicial Code; Act of March 3, 1911, c. 231, 36 Stat. 1087 (Comp. St. Ann. Supp. 1919, § 1246).

Judgment affirmed.

Mr. Justice McREYNOLDS dissents.

Mr. Justice BRANDEIS, dissenting.

It has long been the established practice of the federal courts that, even in criminal cases, the presiding judge may comment freely on the evidence and express his opinion whether facts alleged have been proved. Since Sparf v. United States, 156 U. S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute. United States v. Taylor (C. C.) 11 Fed. 470; Atchison, etc., Ry. v. United States, 172 Fed. 194, 96 C. C. A. 646, 27 L. R. A. (N. S.) 756. What the judge is forbidden to do directly, he may not do by indirection. Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398. The judge may enlighten the understanding of the jury and thereby influence their judgment; but he may not use undue influence. He may advise; he may persuade; but he may not command or coerce. He does coerce when without convincing the judgment he overcomes the will by the weight of his authority. Compare Hall v. Hall, L. R. 1, P. & D. 481, 482.

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*The character of the charge in this case is illustrated by the following paragraph:

"In conclusion I will say that a failure to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

In my opinion, such a charge is a moral command, and, being yielded to, substitutes the will of the judge for the conviction of the jury. The law, which in a criminal case forbids a verdict directed "in so many words," forbids such a statement as the above.[1]

It is said that if the defendant suffered any wrong it was purely formal; and that the error is of such a character as not to afford, since the Act of February 26, 1919, c. 48, 40 Stat. 1181, a basis for reversing the judgment of the lower court. Whether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the federal Constitution, a mere formality. Blair v. United States, 241 Fed. 217, 230, 154 C. C. A. 139. The offense here in question is punishable by imprisonment. Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. I find nothing in the act to indicate that it sought to do so.

Because the presiding judge usurped the province of the jury, I am unable to concur in the judgment of the court.

The CHIEF JUSTICE and Mr. Justice DAY concur in this dissent.

(254 U. S. 141)

ROCK ISLAND, A. & L. R. CO. v. UNITED STATES.

(Submitted Nov. 8, 1920. Decided Nov. 22, 1920.)

No. 82.

1. Internal revenue 🔑38—Appeal to Commissioner after payment is necessary before suit to recover.

Under Rev. St. § 3226, as amended by Act Feb. 27, 1877, § 1 (Comp. St. § 5949), prohibiting suit for the recovery of any tax until appeal has been made to the Commissioner of Internal Reveue according to the regulations of the Secretary of the Treasury, which regulations established a procedure for claims for refund of payments distinct from those used in applications for abatement, there can be no suit to recover a tax paid, where no appeal for refund was made after payment of the tax, though an application for abatement was made to the Commissioner before payment.

2. Internal revenue 🔑38—Appeal after payment is condition precedent to suit.

Rev. St. § 3226, as amended by Act Feb. 27, 1877, § 1 (Comp. St. § 5949), requires an appeal after payment of an internal revenue tax as condition precedent to the recovery of the payment, especially in view of section 3228 requiring claims of that sort to be presented to the Commissioner within two years after the cause of action accrued.

Appeal from the Court of Claims.

Claim by the Rock Island, Arkansas & Louisiana Railroad Company against the United States for money paid as an internal revenue tax. Petition dismissed, and claimant appeals. Affirmed.

Messrs. Thomas P. Littlepage and Sidney F. Taliaferro, both of Washington, D. C., for appellant.

Mr. Solicitor General Frierson, for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a claim for a sum paid as an internal revenue tax under the Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112. It is alleged that the claimant was not engaged in or doing business in the year for which the tax was collected and that therefore it was not due. The Court of Claims dismissed the petition on the ground that the claimant had not complied with the conditions imposed by statute and the claimant appealed to this Court.

The facts are simple. After the tax was assessed a claim for an abatement was sent to the Commissioner of Internal Revenue in *142 July, 1913. On December 18 of the *same year the Commissioner rejected the application, whereupon on December 26 the claimant paid the tax with interest and a penalty. So far as appears there was no protest at the time of payment and it is found that after it nothing was done to secure repayment of the tax. By Rev. Sts. § 3226, amended by Act of February 27, 1877, c. 69, § 1, 19 Stat. 248 (Comp. St. § 5949), no suit shall be maintained in any Court for the recovery of any tax alleged to have been illegally assessed "until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein, provided," etc. Regulations of the Secretary established a procedure and a form to be used in applications for abatement of taxes and distinct ones for claims for refunding them. The claimant took the first step but not the last.

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[1] Compare People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564; State v. Bybee, 17 Kan. 462; Meadows v. State, 182 Ala. 51, 62 South. 737, Ann. Cas. 1915D, 663; Randolph v. Lampkin, 90 Ky. 551, 14 S. W. 538, 10 L. R. A. 87; McPeak v. Ry., 128 Mo. 617, 30 S. W. 170; State v. Tulip, 9 Kan. App. 454, 60 Pac. 659; Lively v. Sexton, 35 Ill. App. 417. See Starr v. United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. Ed. 841.

[1, 2] By Rev. Sts. § 3220 (Comp. St. § 5944), the Commissioner of Internal Revenue is authorized "on appeal to him made, to remit, refund, and pay back" taxes illegally assessed. It is urged that the "appeal" to him to remit made a second appeal to him to refund an idle act and satisfied the requirement of § 3226. Decisions to that effect in suits against a collector are cited, the latest being Loomis v. Wattles (C. C. A.) 266 Fed. 876. But the words "on appeal to him made" mean, of course, on appeal in respect of the relief sought on appeal—to refund if refunding is what he is asked to do. The words of § 3226 also must be taken to mean an appeal after payment, especially in view of § 3228 (Comp. St. § 5951) requiring claims of this sort to be presented to the Commissioner within two years after the cause of action accrued. So that the question is of reading an implied exception into the rule as expressed, when substantially the same objection to the assessment has been urged at an earlier stage.

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*Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. Lex non præcipit inutilia (Co. Lit. 127b) expresses rather an ideal than an accomplished fact. But in this case we cannot pronounce the second appeal a mere form. On appeal a judge sometimes concurs in a reversal of his decision below. It is possible as suggested by the Court of Claims that the second appeal may be heard by a different person. At all events the words are there in the statute and the regulations, and the Court is of opinion that they mark the conditions of the claimant's right. See King's County Savings Institution v. Blair, 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657. It is unnecessary to consider other objections that the claimant would have to meet before it could recover upon this claim.

Judgment affirmed.

(254 U. S. 126)

INTERNATIONAL BRIDGE CO. v. PEOPLE OF STATE OF NEW YORK.

(Argued Dec. 16, 1919. Restored to the Docket for Reargument, Jan. 26, 1920. Reargued Oct. 11, 12, 1920. Decided Nov. 22, 1920.)

No. 46.

1. Statutes 🔑64(2)—Invalidity of toll rates does not affect requirements for construction of roadway on bridge.

If the rates of toll established by Laws N. Y. 1915, c. 666, for vehicles and pedestrians on an international bridge, are invalid as impairing the obligation of the contract in the original bridge company's charter, and as taking the company's property without due process of law, the invalidity of those provisions does not affect the validity of the other provisions of the statute requiring the construction of a roadway and pathway on the bridge.

2. Bridges 🔑15—Consolidation act held to require company to build roadway on international bridge.

Laws N. Y. 1869, c. 550, permitting the consolidation of the New York corporation chartered by Laws 1857, c. 753, with the Canadian corporation, to construct an international bridge, which subjected the consolidated corporation to the duties of the Canadian as well as of the New York charter, required the corporation to construct a roadway and pathway the entire length of the bridge, as it was required to do on the Canadian side by the Canadian charter, though the original New York charter merely permitted such construction.

3. Constitutional law 🔑126—Amendment of charter under reserved powers does not impair contract.

An amendment of the charter of a bridge corporation, which was within the power reserved to the state, does not impair the obligation of the contract contained in the charter.

4. Bridges 🔑5—Adoption by Congress of international bridge constructed under state authority does not prevent state regulation.

By Act Cong. June 30, 1870, authorizing as a lawful structure a bridge constructed across Niagara river in pursuance of New York act of 1857 and Act Cong. June 23, 1874, making such bridge a lawful structure and an established post route, which acts merely recognized the bridge constructed under state authority, Congress did not assume control of the bridge to such an extent as to exclude any control thereof by the state.

5. Bridges 🔑7—Congress not sole source of right to bridge international stream.

Act Cong. March 3, 1899, § 9 (Comp. St. § 9971), requiring the consent of Congress to a bridge across international waters, which is unnecessary for a bridge across navigable waters within a state, did not make Congress the source of a right to build such bridge, but assumed that such right comes from the state and merely subjects the right to the further condition of securing consent by Congress, and such consent, when given, does not deprive the state of its right of control of the bridge.

6. Bridges 🔑7—Conveyance to United States of land under bridge does not defeat state control of bridge.

A conveyance by the state of the land under navigable waters to the United States in aid of navigation does not deprive the state of the right of control which it had of a bridge, already erected, which extended in part across the land so conveyed.

The Chief Justice, Mr. Justice McKenna, and Mr. Justice McReynolds dissenting.

In Error to the Supreme Court of the State of New York.

Action by the People of the State of New York against the International Bridge Company to recover penalties for failure to perform duties required by statute. Judgment for the plaintiff was affirmed by the Appellate Division (179 App. Div. 950, 165 N. Y. Supp. 1104), and by the Court of Appeals (119 N. E. 351, 223 N. Y. 137), and defendant brings error. Affirmed.

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*Mr. Adelbert Moot and Mrs. Helen Z. M. Rodgers, both of Buffalo, N. Y., for plaintiff in error.

Messrs. James S. G. Ivins, of Albany, N. Y., and Ralph Averill Kellogg, of Buffalo, N. Y., for the People of the State of New York.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the State of New York to recover penalties from the Bridge Company for failure to place upon its bridge a roadway for vehicles and a pathway for pedestrians between Squaw Island in Niagara River and the mainland of New York State as required by ch. 666 of the Laws of 1915 of the State of New York. The defendant set up that the act was contrary to the Constitution of the United States in specified respects, but the plaintiff got judgment in the Supreme Court, which was affirmed by the Court of Appeals. 223 N. Y. 137, 119 N. E. 351.

The Bridge Company originally was incorporated by a special charter from the State of New York. Laws of 1857, c. 753. As the bridge was to cross the Niagara River from Buffalo to Canada, a similar corporation was created under the laws of Canada, 20 Vict. c. 227, and subsequently the two corporations were consolidated, pursuant to Laws of New York, 1869, c. 550, and a Canadian Act, 32 and 33 Vict. c. 65, subject to all the duties of each of the consolidated companies. By the Act of Congress of June 30, 1870, c. 176, 16 Stat. 173, any bridge constructed across the Niagara River in pursuance of the New York Act of 1857 and any acts of the New York legislature then in force amending the same was authorized as a lawful structure subject to the supervision of the Secretary of War and his approval of the plans. By the New York Act of 1857, "Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," § 15. And "whenever said bridge shall be complete for the passage of ordinary teams and carriages" the company may erect toll gates and charge tolls not exceeding certain rates for foot passengers, carriages, &c. The original Canadian act had words similar to those *129 just quoted from *§ 15, except that it said "shall be constructed" instead of "may be," a fact to which we shall advert again.

Between 1870 and 1874 the bridge was built as required by the charter with one draw across Black Rock Harbor and one across the main channel of the river. It crossed Squaw Island on a trestle, afterwards filled in, but was built as a railroad bridge exclusively without any provision for footpaths or roadways. By the Act of Congress of June 23, 1874, c. 475, 18 Stat. 275, it was declared a lawful structure and an established post route for the mail of the United States. In the year 1899 a plan for rebuilding the bridge with wings for roadways and footpaths was approved by the Secretary of War subject to changes at the expense of the Company if the Secretary should deem them advisable. The rebuilding took place in 1899-1901, but omitted the wings, and this modification was assented to by the Secretary of War.

The Niagara River is navigable at this point. In pursuance of plans for improvement adopted by the United States, in 1906 it acquired from the State of New York the land under Black Rock Harbor, lying on the New York side of Squaw Island, and the adjacent portions of the Erie Canal, both being within the limits of the State and crossed by the bridge. Thereafter the improvements were carried out.

In 1907 the Secretary of War gave notice to the Company that the bridge over Black Rock Harbor and Erie Canal obstructed navigation and that changes were required. The Company submitted plans again showing in dotted lines wings for roadways and footpaths, noting that they were not to be put in at present but that provision was made in the design for their future construction. The plans were approved and the bridge was built without the wings, the completion being reported by his resident representative to the Secretary of War.

By chapter 666 of the Laws of New York *130 for 1915, the charter *of the Company was amended so as to require the construction of a roadway for vehicles and a pathway for pedestrians upon the draw across Black Rock Harbor, the Company being allowed to charge tolls not exceeding specified sums. The Company failed to comply with the requirement and the time limit had expired before this suit was brought to recover penalties imposed by the act. It is found that the construction was necessary for the public interest and convenience; that the cost of the changes is insignificant in comparison with the assets and net earnings of the Company, and that it does not appear that the investment would not yield a reasonable return.

[1, 2] The first objections to the new requirement made by the State are that it impairs the obligation of the contract in the original charter and takes the Company's

property without due process of law. The argument is based partly upon a reduction of the tolls from those mentioned in the charter of 1857, made by the Act of 1915. Concerning this it is enough to say that the objection is premature. The clause relating to the construction of the roadway and pathway is distinct from and independent of that which fixes the maximum rates to be charged. The latter might be invalid and the former good. If the rates are too low they can be changed at any time. The only question now before us is whether the additions shall be built. As to that it would be going very far in the way of limiting the reserved right to amend such charters, if it should be held that the State had not the power to require what originally was contemplated in permissive words as part of the scheme. But however that might be, the New York Act authorizing consolidation subjected this consolidated corporation to the duties of the Canadian as well as of the New York charter, and the Canadian Act made the arrangement for foot passengers and carriages a duty. The words that we have quoted plainly impose one. The *131 *opinion in Attorney General v. International Bridge Co., 6 Ontario App. 537, 543, implies that they do so by speaking of the abandonment of a portion of the work as probably an abuse of the Act of Parliament, and the same is clearly stated in Canada Southern Ry. Co. v. International Bridge Co., 8 App. Cases, 723, 729.

It is argued that, the Canadian Act governing only the Canadian side, its adoption by New York carried the obligation no farther. But it appears to us that it would be quibbling with the rational understanding of the duty assumed to say that the Company could have supposed that it had a contract or property right to confine its building of the footpath and carriage-way to the Canada side of the boundary line.

[3] The New York Legislature of course confined its command to the half of the bridge within its jurisdiction. It may be presumed that if that command is obeyed either Canada or the Company will see the propriety of carrying the way and path across to the other shore. At all events the power of New York to insist upon its rights is not limited by speculation upon that point. As we agree with the Court of Appeals that this amendment to the charter was within the power reserved to the State the objection under the contract clause of the Constitution of course must fail, and, it would seem, that under the Fourteenth Amendment also. But as to the latter we may add, as the Court of Appeals added, that there is nothing to show that the addition to the structure will not yield a reasonable return; if that be essential in view of the charter. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472; Chesapeake & Ohio Ry. Co. v. Public Service Commission, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. Ed. 520.

[4] The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the State. It is *132 said that *the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us. The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built "in pursuance of" the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power.

From an early date the State has been recognized as the source of authority in the absence of action by Congress. Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442. And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United *133 States was spending con*siderable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such work. Cummings v. Chicago, 188 U. S. 410, 413, 428, et seq., 23 Sup. Ct. 472, 47 L. Ed. 525.

[5] But it is said that a different rule applies to an international stream and that

Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151 (Comp. St. § 9971). It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The Act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant.

No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream. When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain. We have adverted to the implications of the general law of 1899 and have mentioned the statutes that deal *134 specifically with *this bridge. The act of 1874 declaring the existing bridge lawful was a confirmation which it was natural to seek but was not a repeal of the authority given to the Company in 1870 to build subject to the approval of the Secretary of War. The superstructure has been rebuilt since 1874 and the Secretary of War twice has approved plans showing the carriage and footways. It is true that the Company never has sought to execute that part of the plan, but on the facts that we have stated it appears to us a strange contention that it has contract or property rights not to be required to build the bridge or that Congress by implication has forbidden the State to demand that the plan recognized by everyone from the beginning should at last be carried out.

[6] The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the State, and taken in connection with the acts of the Government before and after the grant does not invalidate the statute of 1915 even in part. See Cummings v. Chicago, 188 U. S. 410, 413, 23 Sup. Ct. 472, 47 L. Ed. 525; Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; Omaechevarria v. Idaho, 246 U. S. 343, 346, 38 Sup. Ct. 323, 62 L. Ed. 763.

Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice McKENNA, and Mr. Justice McREYNOLDS dissent.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Nov. 8, 1920. See, also, 254 U. S. 609, 41 Sup. Ct. 12, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Third report of receiver filed, on motion of Mr. J. S. Flannery in that behalf.

(254 U. S. 647)

No. 19. NEW YORK SCAFFOLDING COMPANY, petitioner, v. George R. WHITNEY, Sr., as administrator, etc. Nov. 8, 1920. On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see Whitney v. New York Scaffolding Co., 243 Fed. 180, 156 C. C. A. 46. Messrs. Frank Chase Somes, of Washington, D. C., and C. P. Goepel, of New York City, for petitioner. Messrs. Robt. H. Parkinson and Wallace R. Lane, both of Chicago, Ill., for respondent. Petition for a writ of certiorari denied. Announced by Mr. Justice McKenna.

(254 U. S. 609)

No. 28. Franklin SHAW et al., appellants, v. John Barton PAYNE, Secretary of the Interior. Nov. 8, 1920. Appeal from the Court of Appeals of the District of Columbia. For opinion below, see Shaw v. Lane, 47 App. D. C. 170. See, also, 40 Sup. Ct. 394. Messrs. Charles A. Towne, of New York City, and Duane E. Fox, of Washington, D. C., for appellants. The Attorney General, and Messrs. C. Edward Wright and Charles D. Mahaffie, both of Washington, D. C., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Champion Lumber Co. v. Fisher, 227 U. S. 445, 33 Sup. Ct. 329, 57 L. Ed. 591; Taylor v. Taft, 203 U. S. 461, 27 Sup. Ct. 148, 51 L. Ed. 269.

(254 U. S. 609)

No. 57. POSTAL TELEGRAPH-CABLE COMPANY, petitioner, v. J. L. DICKERSON. Nov. 8, 1920. On writ of certiorari to the Supreme Court of the State of Mississippi. For opinion below, see 79 South. 719. Messrs. James N. Flowers and Ellis B. Cooper, both of Jackson, Miss., for petitioner. Mr. William D. Anderson, of Tupelo, Miss., for respondent.

PER CURIAM. Reversed upon authority of Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. 118; Western Union Telegraph Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. 167, 64 L. Ed. 281.

(254 U. S. 610)

No. 60. MIDLAND LINSEED COMPANY, plaintiff in error, v. AMERICAN LIQUID FIREPROOFING COMPANY et al. Nov. 8, 1920. In error to the Supreme Court of the State of Iowa. For opinion below, see 183 Iowa, 1046, 166 N. W. 573. Messrs. William S. Kenyon and Denis M. Kelleher, both of Fort Dodge, Iowa, for plaintiff in error. Messrs. George H. Carr and Fred P. Carr, both of Des Moines, Iowa, for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(254 U. S. 610)

No. 73. Jane FIELD, appellant, v. The UNITED STATES. Nov. 8, 1920. Appeal from the Court of Claims. Mr. W. W. Scott, of Washington, D. C., for appellant. The Attorney General, for the United States.

PER CURIAM. Affirmed upon the authority of Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363; Hughes v. United States, 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. 1374, 46 L. R. A. (N. S.) 624; Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. 554, 60 L. Ed. 1238.

(254 U. S. 661)

No. 92. William PARENT et al., appellants, v. Irene L. Simmons PICOTTE. Nov. 8, 1920. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 254 Fed. 301, 166 C. C. A. 41. Messrs. Thomas L. Sloan, of Walthill, Neb., and Webster Ballinger, of Washington, D. C., for appellants. Mr. Edward E. Wagner, of Sioux City, Iowa, for respondent. Dismissed with costs, on motion of counsel for the appellants.

(254 U. S. 661)

No. 102. The LAKEWOOD ENGINEERING COMPANY, plaintiff in error, v. The NEW YORK CENTRAL RAILROAD COMPANY. Nov. 8, 1920. In error to the United States Circuit Court of Appeals for the Sixth Circuit. For opinion below, see 259 Fed. 61, 170 C. C. A. 129. Messrs. Clifford Thorne, of Chicago, Ill., and Mark A. Copeland, of Cleveland, Ohio, for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(254 U. S. 610)

No. 217. The AUGLAIZE BOX BOARD COMPANY, plaintiff in error, v. Bessie HINTON, etc., et al. Nov. 8, 1920. In error to the Supreme Court of the State of Ohio. For opinion below, see 126 N. E. 881. Mr. Earl H. Turner, of Dayton, Ohio, for plaintiff in error.

Messrs. J. H. Goeke, of Lima, Ohio, George T. Farrell, of Lisbon, Ohio, and T. T. Ansberry, of Washington, D. C., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) California Powder Works v. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Farson, Son & Co. v. Bird, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233; (2) Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Chicago, Rock Island & Pacific Ry. Co. v. Maucher, 248 U. S. 359, 362, 39 Sup. Ct. 108, 63 L. Ed. 294; Berkman v. United States, 250 U. S. 114, 118, 39 Sup. Ct. 411, 63 L. Ed. 877.

(254 U. S. 661)

No. 218. Gertrude GROOT, plaintiff in error, v. Caroline I. REILLY. Nov. 8, 1920. In error to the Court of Appeals of the District of Columbia. For opinion below, see 266 Fed. 1008. Mr. William C. Prentiss, of Washington, D. C., for plaintiff in error. Mr. Mason N. Richardson, of Washington, D. C., for defendant in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(254 U. S. 648)

No. 568. CHICHAGOFF MINING COMPANY, petitioner, v. John TUPPELA. Nov. 8, 1920. For opinion below, see 267 Fed. 753. Messrs. John P. Gray, of Couer d'Alene, Idaho, Overton G. Ellis and Robert E. Evans, both of Tacoma, Wash., and Herbert L. Faulkner, of Juneau, Alaska, for petitioner. Messrs. John R. Winn and J. H. Cobb, both of Juneau, Alaska, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 575. Jules W. ARNDSTEIN, appellant, v. Thomas D. McCARTHY, U. S. Marshal, etc. Nov. 8, 1920. See, also, 254 U. S. 71, 41 Sup. Ct. 26, 65 L. Ed. —. Messrs. William J. Fallon, of White Plains, N. Y., and George L. Boyle and Rufus S. Day, both of Washington, D. C. (Messrs. Fallon & McGee, of counsel), for appellant. Mr. William L. Frierson, of Chattanooga, Tenn., for appellee. Mandate granted, on motion of Mr. George L. Boyle for the appellant.

(254 U. S. 662)

No. 220. Tony TACHIN and Fred Fedotoff, plaintiffs in error, v. The STATE OF NEW JERSEY. Nov. 9, 1920. In error to the Court of Errors and Appeals of the State of New Jersey. For opinion below, see State v. Tachin, 93 N. J. Law, 485, 108 Atl. 318, which affirms judgment 92 N. J. Law, 269, 106 Atl. 145. Mr. Charles Recht, of New York City, for plaintiffs in error. Dismissed with costs on motion of counsel for the plaintiffs in error.

No. 300. John C. HEALD et al., Committee of the Person and Estate of Eugene Peters, v. The DISTRICT OF COLUMBIA. Nov. 9, 1920. See, also, 254 U. S. 20, 41 Sup. Ct. 42, 65 L. Ed. —. Messrs. A. S. Worthington and Vernon E. West, both of Washington, D. C., for petitioner. Mandate granted, on motion of Mr. A. S. Worthington for John C. Heald et al., Committee, etc.

(254 U. S. 662)

No. 108. The AMERICAN TELEPHONE & TELEGRAPH COMPANY OF BALTIMORE CITY, plaintiff in error, v. The STATE ROADS COMMISSION OF MARYLAND. Nov. 11, 1920. In error to the Court of Appeals of the State of Maryland. For opinion below, see American Telegraph & Telephone Co. of Baltimore City v. State Roads Commission of Maryland, 134 Md. 11, 106 Atl. 260. Mr. Shirley Carter, of Baltimore, Md., for plaintiff in error. Messrs. Albert C. Ritchie and Ogle Marbury, both of Baltimore, Md., for defendant in error. Dismissed with costs, per stipulation.

(254 U. S. 662)

No. 119. The CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF BALTIMORE CITY, plaintiff in error, v. The STATE ROADS COMMISSION OF MARYLAND. Nov. 11, 1920. In error to the Court of Appeals of the State of Maryland. For opinion below, see 134 Md. 1, 106 Atl. 257. Mr. Shirley Carter, of Baltimore, Md., for plaintiff in error. Messrs. Albert C. Ritchie and Ogle Marbury, both of Baltimore Md., for defendant in error. Dismissed with costs, per stipulation.

(254 U. S. 611)

No. 80. Jesse O. STARR et al., plaintiffs in error, v. The STATE OF NEW MEXICO. Nov. 15, 1920. In error to the Supreme Court of the State of New Mexico. For opinion below, see State v. Starr, 24 N. M. 180, 173 Pac. 674. Mr. H. B. Holt, of Las Cruces, N. M., for plaintiff in error. Mr. A. B. Renehan, of Santa Fé, N. M., for the State of Mexico.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186.

(254 U. S. 612)

No. 81. The STATE OF LOUISIANA ex rel., Thomas J. DUGGAN, etc., plaintiff in error, v. A. W. CRANDELL, register of the State land office. Nov. 15, 1920. In error to the Supreme Court of the State of Louisiana. For opinion below, see 144 La. 21, 80 South. 185. Messrs. W. J. Hennessey and W. O. Hart, both of New Orleans, La., Henry H. Glassie and Duane E. Fox, both of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60

L. Ed. 186; (2) California Powder Works v. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; Gaar Scott & Co. v. Shannon, 223 U. S. 468, 470, 32 Sup. Ct. 236, 56 L. Ed. 510; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Farson Son & Co. v. Bird, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233.

(254 U. S. 612)

No. 83. Benjamin **BOND**, plaintiff in error, v. Augusta E. **WALTERS**. Nov. 15, 1920. In error to the Court of Appeals for the First Appellate District, Division One, State of California. For opinion below, see 38 Cal. App. 245, 175 Pac. 909. Mr. Daniel N. Clark, of Los Angeles, Cal., for appellant. Mr. John C. Brooke, of Washington, D. C., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of the act of Congress of September 6, 1916.

(254 U. S. 613)

No. 349. W. H. **HUMPHREYS**, as administrator, etc., plaintiff in error, v. **BATES & ROGERS CONSTRUCTION COMPANY**. Nov. 15, 1920. In error to the Court of Appeals of the State of Kentucky. For opinion below, see Grannison's Adm'r v. Bates & Rogers Const. Co., 187 Ky. 538, 219 S. W. 806. Mr. Allan Cole, of Maysville, Ky., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) California Powder Works v. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; Gaar Scott & Co. v. Shannon, 223 U. S. 468, 470, 32 Sup. Ct. 236, 56 L. Ed. 510; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1143; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Farson, Son & Co. v. Bird, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233; (and see Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 619), 36 Sup. Ct. 223, 60 L. Ed. 467; (2) Equitable Life Assurance Soc. v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk & O. V. Ry. Co., 228 U. S. 596, 690, 33 Sup. Ct. 605, 57 L. Ed. 982; Merriam Co. v. Syndicate Pub. Co., 237 U. S. 618, 621, 35 Sup. Ct. 708, 59 L. Ed. 1148; Contributors to Pennsylvania Hospital v. City of Philadelphia, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (3) New York Central Railroad Co. v. White, 243 U. S. 188, 198, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Middleton v. Texas Power & Light Co., 249 U. S. 152, 163, 39 Sup. Ct. 227, 63 L. Ed. 527; Arizona Copper Co. v. Hammer, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537; (4) Palmer v. Ohio, 248 U. S. 32, 34, 39 Sup. Ct. 16, 63 L. Ed. 108.

(254 U. S. 648)

No. 359. Cornelius C. **WATTS** et al., plaintiffs in error, v. The **STATE OF ARIZONA** at the relation, etc., of Ignatius **BURGOON**, Treasurer, etc. Nov. 15, 1920. For opinion below, see State v. Watts, 185 Pac. 934. Messrs. Herbert Noble and Hartwell P. Heath, both of New York City, for plaintiffs in error. Mr. Leslie C. Hardy, of Nagales, Ariz., for defendant in error. Petition for a writ of certiorari herein denied.

(254 U. S. 626)

No. 544. James J. **RAFFERTY**, Collector of Internal Revenue for the Philippine Islands, petitioner, v. **SMITH, BELL & COMPANY**, Limited. Nov. 15, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted.

(254 U. S. 626)

No. 548. James J. **RAFFERTY**, Collector of Internal Revenue for the Philippine Islands, petitioner, v. **COMPANIA GENERAL DE TABACAS DE FILIPINAS**. Nov. 15, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted.

(254 U. S. 626)

No. 553. James J. **RAFFERTY**, Collector of Internal Revenue for the Philippine Islands, petitioner, v. **VISAYAN REFINING COMPANY**. Nov. 15, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted.

(254 U. S. 648)

No. 566. Fernand V. **GASQUET**, petitioner, v. George F. **LAPEYRE** et al. Nov. 15, 1920. For opinion below, see Interdiction of Gasquet, 85 South. 884. Messrs. J. C. Gilmore, Thomas Gilmore, and Williams Winans Wall, all of New Orleans, La., and G. T. Fitzhugh, of Memphis, Tenn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

(254 U. S. 648)

No. 574. The **KANSAS CITY SOUTHERN RAILWAY COMPANY**, petitioner, v. Nick **LEINEN**. Nov. 15, 1920. For opinion below, see 223 S. W. 1. Messrs. F. H. Moore and J. R. Bell, both of Kansas City, Mo., J. B. McDonough, of Ft. Smith, Ark., and A. F. Smith, of Kansas City, Mo. (Mr. S. W. Moore, of New York City, of counsel), for petitioner. Messrs. Chas. Stephens, of Columbus, Kan., A. D. Du Laney and George R. Steele, both of Ashdown, Ark., and John P. Curran and Fred B. Wheeler, both of Pittsburg, Kan., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(254 U. S. 648)

No. 584. **CHAPIN-SACKS MANUFACTURING COMPANY**, petitioner, v. The **HENDLER CREAMERY COMPANY** et al. Nov. 15, 1920. For opinion below, see 267 Fed. 180. Messrs. Isaac Lobe Straus, of Baltimore, Md., and Walter A. Johnston and Francis M. Phelps, both of Washington, D. C., for petitioner. Messrs. John Watson, Jr., and Vernon Cook, both of Baltimore, Md., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 649)

No. 591. Samuel C. JACKSON, petitioner, v. The UNITED STATES of America. Nov. 15, 1920. For opinion below, see 266 Fed. 770. Messrs. George H. Rummens and Jay C. Allen, both of Seattle, Wash., for petitioner. Mr. William L. Frierson, Solicitor General, of Chattanooga, Tenn., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 649)

No. 596. WASHINGTON RAILWAY & ELECTRIC COMPANY, petitioner, v. George C. STUART. Nov. 15, 1920. For opinion below, see 267 Fed. 632. Mr. John S. Barbour, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(254 U. S. 649)

No. 597. ROBERTS CONE MANUFACTURING COMPANY, petitioner, v. Frederick A. BRUCKMAN et al. Nov. 15, 1920. For opinion below, see 266 Fed. 986. Messrs. H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for petitioners. Mr. Albert E. Dieterich, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 649)

No. 599. P. LORILLARD COMPANY et al., petitioners, v. NATIONAL STEAM NAVIGATION COMPANY, LIMITED, OF GREECE. Nov. 15, 1920. For opinion below, see The Thessaloniki, 267 Fed. 67. Messrs. E. Henry Lacombe, John G. Milburn, D. Roger Englar and Charles K. Carpenter, all of New York City, for petitioners. Messrs. J. Parker Kirlin, Cletus Keating, and John D. Stephanidis, all of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 662)

No. 109. Emma BERNHARDT et al., plaintiffs in error, v. Lewis PERRY. Nov. 18, 1920. In error to the Supreme Court of the State of Missouri. For opinion below, see 208 S. W. 462. Mr. Abraham L. Levi, of St. Louis, Mo., for plaintiffs in error. Dismissed with costs, pursuant to the tenth rule.

(254 U. S. 614)

No. 98. The CITY OF NEWPORT, appellant, v. Howard HECKERMAN et al., etc. Nov. 22, 1920. Appeal from the District Court of the United States for the Eastern District of Kentucky. Mr. Brent Spence, of Newport, Ky., for appellant.

PER CURIAM. Reversed with costs and remanded for further proceedings upon the authority of Wagner v. City of Covington, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157.

(254 U. S. 613, 650)

No. 146. Frank R. LOPEZ, appellant, v. Frederick C. HOWE, as Commissioner of Immigration at the Port of New York. Nov. 22, 1920. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 259 Fed. 401, 170 C. C. A. 377. Mr. Charles Recht, of New York City, for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Kurtz v. Moffitt, 115 U. S. 487, 498, 6 Sup. Ct. 148, 29 L. Ed. 458; Lau Ow Bew v. U. S., 144 U. S. 47, 58, 12 Sup. Ct. 517, 36 L. Ed. 340; Cross v. Burke, 146 U. S. 82, 88, 13 Sup. Ct. 22, 36 L. Ed. 896; Whitney v. Dick, 202 U. S. 132, 135, 26 Sup. Ct. 584, 50 L. Ed. 963; Horn v. Mitchell, 243 U. S. 247, 37 Sup. Ct. 293, 61 L. Ed. 700. Petition for writ of certiorari herein denied.

No. 149. ARMOUR & COMPANY et al., appellants, v. The CITY OF DALLAS et al. Nov. 22, 1920. Mr. Francis Marion Etheridge, of Dallas, Tex., for appellants. Mr. Thomas J. Freeman, of New Orleans, La., for defendants. Suggestion of resignation of Pearl Wright and appointment of J. L. Lancaster and Charles L. Wallace as his successors as Receivers of Texas & Pacific Railway Company presented, and order substituting them as parties appellees entered, on motion of Mr. George H. Lamar, in behalf of counsel.

(254 U. S. 663)

No. 226. DALLAS LABOR TEMPLE ASSOCIATION et al., appellants, v. C. M. CURETON, Attorney General, etc., et al. Nov. 22, 1920. Appeal from the District Court of the United States for the Northern District of Texas. Mr. Joseph Manson McCormick, of Dallas, Tex., for appellants. Mr. C. M. Cureton, of Austin, Tex., for respondents. Dismissed with costs, pursuant to the tenth rule.

(254 U. S. 663)

No. 227. George Russell HILL et al., appellants, v. C. M. CURETON, Attorney General, etc., et al. Nov. 22, 1920. Appeal from the District Court of the United States for the Northern District of Texas. Mr. Joseph Manson McCormick, of Dallas, Tex., for appellants. Dismissed with costs, pursuant to the tenth rule.

(254 U. S. 664)

No. 228. GALVESTON ARTILLERY CLUB et al., appellants, v. C. M. CURETON, Attorney General, etc., et al. Nov. 22, 1920. Appeal from the District Court of the United States for the Northern District of Texas. Mr. Joseph Manson McCormick, of Dallas, Tex., for appellants. Dismissed with costs, pursuant to the tenth rule.

(254 U. S. 663)

No. 375. H. W. CARGILL, as assessor, etc., et al., petitioners, v. The UNITED STATES ex rel. Frank PIERCE. Nov. 22, 1920. On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see United States v. Cargill, 263 Fed. 856. See, also, 41 Sup. Ct. 14. Mr. U. S. Bratton, of Little Rock, Ark., for petitioners. Dismissed for want of prosecution.

(254 U. S. 663)

No. 440. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, plaintiff in error, v. Joseph N. KINNEY. Nov. 22, 1920. In error to the District Court of the United States for the Eastern District of Pennsylvania. For opinion below, see 264 Fed. 542. Mr. Solicitor General Frierson, for plaintiff in error. Dismissed with costs, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(254 U. S. 614)

No. 502. Hugh REILLY, plaintiff in error, v. Robert SHIPMAN et al. Nov. 22, 1920. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 266 Fed. 852.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Shulthis v. McDougal, 225 U. S. 561, 568, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 302, 35 Sup. Ct. 598, 59 L. Ed. 965; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Devine v. Los Angeles, 202 U. S. 313, 333, 26 Sup. Ct. 652, 50 L. Ed. 1046; Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; St. Anthony Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119.

(254 U. S. 627)

No. 594. The FIRST NATIONAL BANK OF AIKEN, petitioner, v. The J. L. MOTT IRON WORKS. Nov. 22, 1920. For opinion below, see J. L. Mott Iron Works v. Kaiser Co., 103 S. E. 783. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted.

(254 U. S. 627)

No. 595. PACIFIC MAIL STEAMSHIP COMPANY, petitioner, v. J. LUCAS. Nov. 22, 1920. For opinion below, see 264 Fed. 938. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 627)

No. 603. UNITED ZINC & CHEMICAL COMPANY, petitioner, v. Van BRITT and Susie Britt. Nov. 22, 1920. For opinion below, see 264 Fed. 785. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(254 U. S. 240)

GREAT WESTERN SERUM CO. v. UNITED STATES.

(Argued Nov. 12, 1920. Decided Dec. 6, 1920.)

No. 90.

Courts ⚷449(1)—Contract to pay for destroyed property not implied from appropriation therefor.

Act March 4, 1915, authorizing the Secretary of Agriculture to expend a sum thereby appropriated for the eradication of animal disease, including the payment of claims growing out of the destruction of animals or materials contaminated by or exposed to such disease, does not itself raise an implied contract by the United States to pay for property so destroyed, and therefore an owner of such property cannot sue for its value in the Court of Claims, where there was no purchase of the destroyed property, or agreement therefor.

Appeal from the Court of Claims.

Suit in the Court of Claims by the Great Western Serum Company against the United States. Judgment for the United States (54 Ct. Cl. 203), and claimant appeals. Affirmed.

Mr. Edwin H. Cassels, of Chicago, Ill., for appellant.

Mr. Assistant Attorney General Davis, for the United States.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The Serum Company sued to recover the value of anti-hog cholera serum, anti-cholera virus, and serum blood, seized without agreement to purchase by agents of the Bureau of Animal Industry in November, 1914, and thereafter destroyed. Judgment went for the defendant, and we are asked to reverse it upon the ground that—

"As a conclusion of law the court should have found that the Act of Congress of March 4, 1915, created an obligation to pay for the appellant's materials, and that the facts show an implied contract to purchase and to pay for such materials."

The act provides:

"In case of an emergency arising out of the existence of foot and mouth disease, rinderpest, contagious pleuro pneumonia, or other contagious or infectious disease of animals, which in the opinion of the Secretary of Agriculture threatens the live stock industry of the country, he may expend in the city of Washington or elsewhere, out of any money in the treasury not otherwise appropriated, the sum of $2,500,000, which sum is hereby appropriated, or so much thereof as he determines to be necessary, in the arrest and eradication of any such disease, including the payment of claims growing out of past and future purchases and destruction, in co-operation with the states, of animals affected by or exposed to, or of materials contaminated by or exposed to, any such disease, wherever found and irrespective of ownership, under like or substantially similar circumstances, when such owner has complied with all quarantine regulations, and said sum shall be immediately available for the purposes specified." 38 Stat. 1115.

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*There was no purchase of the destroyed articles or agreement therefor—none is claimed—and we think it quite clear that no contractual obligation by the United States to pay for them can be implied from the act itself.

The judgment below must be

Affirmed.

(254 U. S. 242)

THE FRANCIS McDONALD.

THAMES TOWBOAT CO. v. THE FRANCIS McDONALD (CUMMINS, Claimant).

(Argued Nov. 18, 1920. Decided Dec. 6, 1920.)

No. 97.

1. Admiralty ⚷11—Contract for construction of ship is not maritime.

A contract for the complete construction of a ship or for supplying materials therefor is nonmaritime, and not within admiralty jurisdiction.

2. Admiralty ⚷11—Contract to complete ship already launched is not maritime.

The fact that a ship had been already launched before libelant undertook a contract to complete it, though it was not in condition to render any service in commerce by water, does not make the contract for its completion a maritime contract, within the jurisdiction of admiralty.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the Thames Towboat Company against the schooner Francis McDonald (Albert D. Cummins, Claimant), to recover for supplies furnished and repairs made. From the decree dismissing the libel for want of jurisdiction, libelant appeals. Affirmed.

Mr. Samuel Park, of New York City, for appellant.

Mr. Mark Ash, of New York City, for appellee.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The libel was dismissed for want of jurisdiction and the cause is here on that question only.

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*Seeking to recover for supplies furnished and repairs made to the schooner Francis McDonald, appellant libeled the vessel in United States District Court, Southern District of New York.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Under a definite contract the Palmer Shipbuilding Company began construction of the schooner at Groton, Conn., and launched the hull. That company found itself unable to proceed further, thereupon appellant agreed with the owner to complete the work and for such purpose the hull was towed to its yard at New London. While lying there in the stream the materials, work, and labor for which recovery is now sought were furnished. Later the vessel, so advanced, was towed to Hoboken and finished by a third company. When received by appellant the schooner was manifestly incomplete—her masts were not in, the bolts and beams and gaff were lying on deck, the forward house was not built, and she was not "in condition to carry on any service." Appellant worked on her for 6 weeks, and 30 or 40 more days were required to finish her.

Was appellant's contract to furnish the materials, work, and labor for her completion, made after the schooner was launched, but while yet not sufficiently advanced to discharge the functions for which intended, within the admiralty and maritime jurisdiction? The District Court thought not, and so do we.

[1] Under decisions of this court the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is nonmaritime, and not within the admiralty jurisdiction. People's Ferry Co. v. Beers, 20 How. 393, 15 L. Ed. 961; Roach v. Chapman, 22 How. 129, 16 L. Ed. 294; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; The Winnebago, 205 U. S. 354, 363, 27 Sup. Ct. 509, 51 L. Ed. 836; North Pacific Steamship Co. v. Hall, 249 U. S. 119, 125, 39 Sup. Ct. 221, 63 L. Ed. 510.

[2] But counsel for appellant insist that there is a broad distinction between such a *244 contract and one for work and *material to finish a vessel after she has been launched and is water-borne. In support of this position they rely upon The Eliza Ladd (1875) Fed. Cas. No. 4364; The Revenue Cutter (1877) Fed. Cas. No. 11,714—both by Judge Deady, in the United States District Court for Oregon; The Manhattan (District Court for Washington, 1891) 46 Fed. 797, which followed the District Court for Oregon; and Tucker v. Alexandroff, 183 U. S. 424, 438, 22 Sup. Ct. 195, 46 L. Ed. 264. The first three cases are directly in point, but are opposed by many of no less authority. Tucker v. Alexandroff must be read in the light of the particular matter under consideration—detention of a foreign seaman—and the conclusion announced, that after the vessel was launched "she was a ship within the meaning of the treaty." The court had no immediate concern with contracts for ship construction, and there was no purpose to lay down any definite rule applicable to them. On the other side the following cases are cited, and they are entitled to the greater weight: The Tosco, Fed. Cas. No. 7,060; The Pacific (D. C.) 9 Fed. 120; The Count de Lesseps (D. C.) 17 Fed. 460; The Glenmont (D. C.) 32 Fed. 703, and (C. C.) 34 Fed. 403; The Paradox (D. C.) 61 Fed. 860; McMaster v. One Dredge (D. C.) 95 Fed. 832; The United Shores (D. C.) 193 Fed. 552; The Dredge A, 217 Fed. 617; The Winnebago, 205 U. S. 354, 363, 27 Sup. Ct. 509, 51 L. Ed. 836; Northern Pac. S. S. Co. v. Hall Bros. Marine Co., 249 U. S. 119, 125, 39 Sup. Ct. 221, 63 L. Ed. 510.

Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are nonmaritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. Edwards v. Elliott, 21 Wall. 532, 554, 555, 22 L. Ed. 487; The William Windom (D. C.) 73 Fed. 496; Pacific Surety Co. v. Leatham & S. Tow. & Wreck. Co., 151 Fed. 440, *245 80 C. C. A. 670. And *we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended.

The judgment of the court below is affirmed.

(254 U. S. 272)

HAUPT v. UNITED STATES.

(Argued Nov. 10, 1920. Decided Dec. 6, 1920.)

No. 85.

United States 🔑97 — Contract to pay for use of patent in unsuccessful experiment on harbor improvement held not implied.

A contract by the government to pay for the use of a patent for harbor improvement work is not implied where, after a private corporation had failed to carry out plans for the improvement embodying the patented ideas, Congress made three appropriations for such improvement expressly requiring the work to be done in accordance with the plans of the private corporation, but without mentioning the patentee or his patents, and after that work was completed without successfully meeting the difficulties, further appropriations were made for work on other plans which were successful.

Appeal from the Court of Claims.

Suit by Lewis M. Haupt against the United States on a claim for the use of a patent by the government. Petition dismissed (53 Ct. Cl. 591), and petitioner appeals. Affirmed.

Mr. Benjamin Carter, of Washington, D. C., for appellant.

The Attorney General and Mr. Daniel L. Morris, of Washington, D. C., for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

Aransas Pass is an inlet, naturally too shallow for ocean navigation, connecting the waters of the Gulf of Mexico and those of Aransas Bay and the bay of Corpus Christi on the coast of Texas. The problem of obtaining a navigable channel through this pass occupied the attention of the government and of private enterprise for many *273 *years prior to 1912, when a channel of the desired depth of 20 feet was obtained.

This is a suit instituted by the appellant, Haupt, a distinguished engineer and the patentee of improvements in dikes and breakwaters, to recover a large sum of money for the use which he claims the government made of his invention in the construction of jetties, which, with dredging, resulted in the creating of the Aransas Pass channel in 1912. The Court of Claims dismissed the petition holding that no contract, express or implied, with the United States was shown for the use of appellant's patented invention and that it was therefore without jurisdiction.

A résumé of what was done in the effort to procure the channel, which is necessary to a decision of the case, will develop the relations of the appellant to the enterprise and to the government on which he bases his claim.

Between 1880 and 1889 the United States government constructed what is designated in the record as the "Mansfield Jetty," 5,500 feet in length, designed to deepen the channel through the Pass; but it had no appreciable effect on the depth of water and the work was suspended in 1889.

In 1890 the state of Texas chartered the Aransas Pass Harbor Company, a private corporation, organized for the purpose of improving the channel at Aransas Pass, and in the same year Congress authorized (26 Stat. 105) the company to construct such jetties and breakwaters as might be necessary to create and permanently maintain a navigable channel "across the outer bar which obstructs the entrance to Aransas Pass harbor." This company built the jetty designated in the record as the "Nelson jetty," about 1,800 feet in length, which also failed to deepen the channel and was abandoned in 1893.

In 1894 another act of Congress (28 Stat. 26) granted an extension of time to the same company to further pursue its objects, and at this point in the history the appellant ap- *274 peared *with United States patent No. 380,569 for certain improvements in dikes and breakwaters for improving the channels of rivers and harbors.

In the view we take of the case it will be a sufficient statement of the principle involved in, and of the claims of, appellant's patent to say that the inventor aimed to accomplish results with a single jetty, of a form specially adapted to each locality, which had theretofore been accomplished only with two or more jetties. The claims are variously worded, as usual, but the substance of the alleged discovery is, that the study of the conformation of the bottom and shores of a given locality and of the prevailing currents, tidal and other, will enable one skilled in the art to so apply the principles disclosed in the patent as to give such form and location to a single breakwater or jetty that it will "cut the advancing waves" and "resist and decompose the flood resultant" in such manner that, without the aid of a second jetty or of dredging, it will scour out and maintain a channel of the required depth in a designated location.

The appellant granted a license to the Aransas Pass Harbor Company to use his patented device or design, on condition that the work should be done under his supervision, and he thereupon prepared the necessary plans and drawings for the construction which he thought would effectuate the desired result. The cost of the jetty, as thus designed by the appellant, was too great for the resources of the company and, upon request, he eliminated a portion of it which reduced the estimated cost by one-half. The jetty thus modified consisted of a reverse curve or letter S and a contract for the construction of it was let in July, 1895. Work was prosecuted vigorously until the following January, by which time it was ascertained that a portion of the first, the "Mansfield jetty," which had been reported officially as having disappeared, was still in place and *275 in such a position, it was claimed, as to *prevent free erosion by the currents as they had been and would be modified by the new jetty under construction. Thereupon a contract was let for the removal of a part of the "Mansfield jetty," but in May, 1897, before the new jetty was completed or the old one removed, all work was suspended.

This suspension in the month of May, 1897, marks the end of the effort to obtain the desired channel through private enterprise, and Congress, in May of the following year, by resolution called upon the Secretary of War to prepare and submit plans for the deepening of the Pass to at least 20 feet. Six months later a board created by the War Department reported in favor of two jetties, to be supplemented by dredging. It was recommended that the northerly jetty should be located substantially upon the line of the one partially constructed by the Aransas Pass

Harbor Company and the other some distance southerly from it.

While the subject was thus before Congress, appellant brought his plan for dealing with the problem to the attention of the committee, and proposed to enter into a contract to construct and maintain the desired channel for a much less sum of money than the estimated cost of the work recommended by the War Department board. His proposition was given serious attention and, although it was rejected, he was assured by members of the congressional committee that they desired to give his plan a trial, as well they might, for, if it had proved successful, it would have resulted in a great saving to the government in dealing with many like situations and problems.

Before any further work was done, the Aransas Pass Harbor Company conveyed to the United States the jetty or breakwater, which we have seen was constructed as designed by appellant, and Congress, in 1899, appropriated $60,000 for dredging and improving the Pass, but with the proviso that the Secretary of War was authorized "to *276 *contract for the removal of that portion of the old government jetty (the Mansfield jetty) in said harbor from the end nearest the curved jetty" constructed by the Aransas Pass Harbor Company, but in such manner as not to interfere with that jetty. This is a plain indication of interest on the part of Congress in appellant's theory or method of dealing with the problem, for he was claiming that the old jetty constituted an obstruction to the action of the water and prevented the jetty which the Harbor Company had built under his direction from scouring out the desired channel.

That appropriation was expended and three years later, in 1902, Congress appropriated $250,000 for continuing the improvement of the Pass, but again with the proviso:

> "That the work shall be confined to the completion of the north jetty, in accordance with the designs and specifications of the Aransas Pass Harbor Company, and in the continuance of the work heretofore carried out on said jetty by said company."

Here again is plainly evidenced the purpose of Congress to give appellant's theory a full and fair trial, for, it should be noted, as yet it had never been reduced to actual practice.

Plans and specifications for the contract under this second appropriation were drawn by the government engineer in charge and were by him submitted to the Aransas Pass Harbor Company and the appellant suggested amendments, which were adopted. Among other things done under this contract was the removal of a considerable part of the Mansfield jetty which the appellant had claimed so affected the action of the currents as to prevent the obtaining of the desired results from his construction.

Three years later, in 1905, Congress appropriated a further sum of $100,000, and in 1906 a like amount, for the improvement of the Pass and in each case the provision was incorporated that the money was to be *277 applied to *construction "in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore done."

The findings of the Court of Claims are: That in compliance with the provisions of these various acts the work of improvement was continued and completed in 1906, in accordance with the plans and specifications, as modified by appellant; that from 1896 to 1906 the depth and width of the channel were variable and shifting, with a ruling depth of only 6 feet of water in 1908; and that the evidence does not show to the satisfaction of the court that the so-called Haupt jetty, which was constructed under appellant's direction, "did produce, or would have produced, a navigable channel of the necessary or proper depth for navigation purposes."

It is upon the terms in which the three appropriations were made in 1902, 1905, and 1906, each for the construction or completion of the project "in accordance with the design and specifications of the Aransas Pass Harbor Company," that the appellant relies, and from them, it is argued, that a contract to pay him for the use of his design and for the impairment of his patent should be derived. But we not only have the Court of Claims finding that the experiment of attempting to procure the desired channel by appellant's method and under his plans, pursued through many years and definitely for 4 years, from 1902 to 1906, at an expense to the government of $450,000, resulted in failure, but we have the further action of Congress, next to be described, which clearly shows the correctness of the court's conclusion.

In March, 1906, as we have seen, the work of improvement according to the plans as modified by the appellant was completed without securing the required channel. In the following December a board appointed by the War Department to further consider the Aransas Pass project, recommended that the *278 spacing which Haupt had left *between the end of his jetty and St. Joseph's Island, for its influence on the currents, should be closed and that a parallel jetty should be built to the south of the Haupt jetty, thus making the project one of two jetties, instead of the single jetty of appellant's plan.

In 1907 Congress appropriated $200,000, and authorized contracts for the additional amount of $290,000 for improving the Pass "in accordance with the plans submitted in its report of December 22, 1906, by the board of engineers created by authority of the act of June 13, 1902." It will be seen that all reference to appellant's method of solving the problem disappeared from this act, which adopted the new plan of solution.

Contracts were made under this appropriation of 1907 and a second jetty, generally parallel to the Haupt jetty, was commenced in March, 1908, and completed in 1911. The Court of Claims finds: That, beginning with 1912, coastwise and seagoing vessels have been going through the Pass and that in that year the port of "Aransas Pass" was given the status of a commercial port on a par with Galveston by the Railway Commission of Texas; that "dredging was necessarily done in the years 1912 and 1915, inclusive, to obtain a proper navigable depth of channel in the pass"; and that this construction as ultimately completed "did not embody any of the devices of the plaintiff's (appellant's) letters patent No. 380,569."

It is, of course, essential to recovery by appellant on a quantum meruit, that he should prove a contract express or implied, on the part of the government to pay him, that his patented method of construction was used, and what the value of it was. Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453; Ball Engineering Co. v. White Company, 250 U. S. 46, 39 Sup. Ct. 396, 63 L. Ed. 835. The three acts requiring the money appropriated to be used in accordance with the design and specifications of the Aransas Pass Harbor Company, which were prepared *279 by *appellant, implied clearly that Congress intended to give the experimental construction of appellant a fair trial and common honesty would infer a disposition, but not a contract, to pay for the use of the patented form of construction, if it should be found to be valuable. But, saying as much as it did, the failure of Congress to say more imports a determination on its part to hold within its discretion the decision as to the usefulness of appellant's ideas and as to what, if anything, should be paid for them. The absence of any reference to appellant or to his patent and of any words implying a contract to pay him, from the three acts of Congress in which reference is so distinctly made to the specifications embodying his ideas, is unmistakable evidence that Congress deliberately dealt with appellant's theories as still in the experimental stage, and that it was willing to use the public money to give them a trial in practice, but that payment for them was reserved for consideration until their usefulness should be established, and this, the finding by the Court of Claims shows, was never done.

For these reasons, to the sufficient finding that the construction which produced the desired channel did not embody any of the devices of the appellant's patent, we must add that the record fails wholly to show anything from which a promise by the government to pay for the use of such devices can reasonably be implied, and therefore the judgment of the Court of Claims must be affirmed.

Being of opinion that our conclusion would not be affected by any findings to be made on the points asked for in the appellant's motion to remand for additional findings of fact, that motion is denied.

Affirmed.

(254 U. S. 166)

DE REES v. COSTAGUTA et al.

(Submitted Oct. 11, 1920. Decided Dec. 6, 1920.)

No. 341.

1. Courts 🔑385(4)—Judgment rendered without jurisdiction over the person reviewable by direct appeal to Supreme Court.

Where there is a contention that no valid service of process has been made on defendant, and a judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to the Supreme Court.

2. Courts 🔑385(4)—No direct appeal to Supreme Court, when question of jurisdiction not peculiar to federal courts.

Where the question of jurisdiction presented and decided turns on questions of general law, determinable on principles alike applicable to actions brought in other jurisdictions, the jurisdiction of the federal court as such is not so presented as to authorize a direct appeal to the Supreme Court.

3. Courts 🔑385(4)—Dismissal of bill, because contract alleged did not justify relief against nonresidents, held not to justify direct appeal.

A decree dismissing a bill for dissolution of an alleged partnership and establishment of a lien on property of defendants and parties to which they were claimed to have transferred it, in which it was sought to serve nonresidents by publication, under Judicial Code, § 57 (Comp. St. § 1039), on the ground that the contract set up in the bill gave no lien upon or right in rem in the assets sought to be reached within the district, did not involve the jurisdiction of the federal court as such, so as to justify a direct appeal to the Supreme Court.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by Henry S. De Rees against David Costaguta and others. From a decree dismissing the bill, plaintiff appeals. Appeal dismissed.

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*Messrs. Marion Erwin and Frederick M. Czaki, both of New York City, for appellant.

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*Mr. Walter H. Merritt, of New York City, for appellees.

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*Mr. Justice DAY delivered the opinion of the Court.

The appellant, plaintiff below, a resident and citizen of the state of New Jersey, filed a bill of complaint against David Costaguta, Marcos A. Algiers, Alajandro Sassoli, and Eugenio Ottolenghi, individually and as copartners composing the firm of David Costaguta & Co., asserting that they, and each of them, were aliens, and residents of the republic of Argentine, South America. The bill joined as defendants Renado Taffell, a British subject, resident of New York and the Southern district thereof, and the American-European Trading Corporation, organized under the laws of New York.

The bill sets forth at length a contract whereby it is alleged that a copartnership was formed between the plaintiff and David Costaguta & Co., for the buying and selling of hosiery. The bill alleges that to carry the contract into effect a place of business was established in New York City; that disagreements arose between the parties; that plaintiff elected to terminate the contract and demanded a liquidation of the merchandise and an accounting; that the firm of David Costaguta & Co., caused the American-European Corporation to be organized under the laws of New York, and that said firm caused certain assets of the copartnership to be transferred to the corporation in fraud of the plaintiff, and which assets, it was alleged, were within the territorial
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jurisdiction of *the Southern district of New York. Plaintiff prayed a dissolution of the alleged copartnership; the liquidation of the property thereof; that the nonresident defendants account for their acts and transactions, and that it be established what sum, if any, remained due to the plaintiff; that the plaintiff be decreed to have a lien on all of the property of the defendants and on the property and assets of the American-European Trading Corporation; that a receiver pendente lite be named. An order was prayed for the delivery of the property to the receiver, and an injunction to restrain its transfer or disposition. A temporary restraining order was asked pending the hearing and the return of the rule nisi, prohibiting in any manner or form interference with the property, or removing the same from the jurisdiction of the court. An order was issued requiring the defendants to show cause why such receiver pendente lite should not be appointed, and the defendants required to transfer the property to such receiver, and enjoining them from otherwise transferring the same. The subpœna and order for the rule were served on the resident defendants American-European Trading Corporation and Taffell. Plaintiff then procured an order for service upon the nonresident defendants by publication under section 57 of the Judicial Code (Comp. St. § 1039). The nonresident defendants filed a special appearance for the purpose of asking the court to quash and set aside the order for service by publication, and for an order requiring the plaintiff to show cause why an order should not be made vacating and setting aside the service by publication, and also to vacate, quash, and set aside certain alleged service on an agent of the firm in the Southern District of New York. A motion was also made by the American-European Trading Corporation and Taffell, by special appearance, for the purpose of opposing the jurisdiction. The District Court denied the plaintiff's motion for an injunction and receiver, and granted
*171
the nonresident *defendants' motion to vacate the order for service by publication. This resulted in the dismissal of the plaintiff's bill by final decree, and the case was brought here by the plaintiff under section 238 of the Judicial Code (Comp. St. § 1215) upon the question of jurisdiction of the court.

The District Judge after entering the decrees of dismissal made a certificate as follows:

> "I hereby certify that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this court would have jurisdiction within the meaning of section 57 of the Judicial Code, or in which this court could render a judgment otherwise than a judgment in personam against the nonresident aliens who appeared specially and objected to the jurisdiction of the court."

The judge also delivered an opinion, which is in the record, holding that under the terms of the contract the plaintiff had no right in the assets as such, and no partner's lien upon the property, but was confined to his rights in personam against the firm, and that, therefore, there could be no service by publication under section 57 of the Judicial Code. That section is a re-enactment of section 8 of the Act of March 3, 1875, 18 Stat. 472. It provides for service by publication when in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto.[1]

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[1] Section 57: "When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the dis-

Section 238 of the Judicial Code provides *172 that, the case *being one in which the jurisdiction of the court is in issue, that question shall be certified to this court.

The appellees challenge the jurisdiction of this court to entertain this appeal on the ground that the case does not present a jurisdictional issue properly reviewable by this court.

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[1] *Since the decision of Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602, it has been the accepted doctrine that where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as Merriam v. Saalfield, 241 U. S. 22, 26, 36 Sup. Ct. 477, 60 L. Ed. 868.

[2] It is equally well settled that where the question of jurisdiction presented and decided turns upon questions of general law, determinable upon principles alike applicable to actions brought in other jurisdictions, the jurisdiction of the court as a federal court is not presented in such wise as to authorize the jurisdictional appeal directly to this court, and the question must be decided as other questions are, by the usual course of appellate procedure, giving review in the Circuit Court of Appeals. Louisville Trust Co. v. Knott, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; Bache v. Hunt, 193 U. S. 523, 24 Sup. Ct. 547, 48 L. Ed. 774; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 31 Sup. Ct. 185, 55 L. Ed. 163; Scully v. Bird, 209 U. S. 481, 485, 28 Sup. Ct. 597, 52 L. Ed. 899; Bogart v. Southern Pac. Co., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768.

That the question of the adequacy of the allegations of the bill to justify the relief sought does not present a jurisdictional question was held in Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731; Illinois Central R. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; L. & N. R. R. Co. v. Western Union Telegraph Co., 234 U. S. 369, 372, 34 Sup. Ct. 810, 58 L. Ed. 1356; Darnell v. Illinois Central R. R. Co., 225 U. S. 243, 32 Sup. Ct. 760, 56 L. Ed. 1072; Public Service Co. v. Corboy, 250 U. S. 153, 162, 39 Sup. Ct. 440, 63 L. Ed. 905.

[3] The opinion of the court below, read in connection with the certificate, shows that it was held that the contract set up in the bill gave no lien upon or right in rem in the assets sought to be reached within the district. The question was presented, the court in the exercise of jurisdiction, after an examination of the contract set forth in the bill and a consideration of its terms, deter- *174 mined it *upon principles which would have been equally applicable had the question been presented in other jurisdictions. Its decision, therefore, did not involve the jurisdiction of the federal court as such, which, it is settled, is required in order to justify a direct appeal to this court.

In Chase v. Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990, the Act of March 3, 1875, now section 57 of the Judicial Code, was involved, and there was an attempt to have service on alien defendants by publication under the provisions of the statute. The issue made was as to whether there was property of the defendants within the jurisdiction of the court. That issue was held to present a question of jurisdiction properly reviewable in this court under section 238. In the case now presented no question is made as to the presence of property in the district. The attempted service was set aside, and the bill dismissed, upon consideration of the allegations of the bill which, it was held, upon application of general principles, did not show that the plaintiff had any lien upon or interest in the property authorizing him to invoke the procedure outlined in section 57 of the Judicial Code.

As to the contention that the whole case is here upon a constitutional question because

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trict where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants, to appear, plead, answer, or demur by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state: Provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said District Court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

of the procedure in the court below, section 238 provides that when a case comes here upon a question of jurisdiction, that question alone shall be certified. Moreover, we find no merit in the alleged deprivation of constitutional rights so as to present questions arising under the Constitution.

It follows that the appeal must be dismissed for want of jurisdiction.

Dismissed.

(254 U. S. 148)

UNITED STATES v. NEDERLANDSCH-AMERIKAANSCHE STOOMVART MAATSCHAPPIJ (HOLLAND-AMERICAN LINE).

(Argued Jan. 28, 1920. Restored to Docket for Reargument Oct. 11, 1920. Reargued Nov. 17, 1920. Decided Dec. 6, 1920.)

No. 53.

1. Courts 🔑463—Petition in Court of Claims held one in tort for payments made under duress.

A petition in the Court of Claims by a steamship company, alleging that the immigration officials rendered bills for the treatment and maintenance of detained aliens subsequently admitted, which the company paid because of threats that, if they were not paid, aliens would thereafter be held on board ship until their application for admission was finally adjudicated, and that the exaction of such payments and the making of such threats were without warrant of law, *held* based upon payments alleged to have been made under duress, because of the wrongful and tortious acts of United States officials, acting without authority of law, in coercing claimant to make such payments.

2. Courts 🔑449(2)—Claims for payments extorted by duress not within jurisdiction of Court of Claims.

Under Judicial Code, § 145 (Comp. St. § 1136[1]), giving the Court of Claims jurisdiction of claims for damages not sounding in tort, a claim by a steamship company to recover payments made by it for the treatment and maintenance of detained aliens, because of duress by immigration officials, was not within the court's jurisdiction.

Appeal from the Court of Claims.

Suit by the Nederlandsch-Amerikaansche Stoomvart Maatschappij against the United States. From a judgment for the claimant (53 Ct. Cl. 522), the United States appeals. Reversed and remanded, with instructions to dismiss.

Mr. Assistant Attorney General Davis, for the United States.

Messrs. Howard Mansfield and Franklin Grady, both of New York City, for appellee.

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*Mr. Justice DAY delivered the opinion of the Court.

A suit was brought in the Court of Claims by the Holland-American Line to recover from the United States for the cost of the maintenance and medical care furnished by the United States for certain aliens brought by the plaintiff to this country on the steamers of its line which it had been required to pay.

The petition sets forth that the United States immigrátion officials temporarily detained some aliens in hospitals because they were alleged to be suffering from temporary illness, or accompanied aliens who were so suffering, and subsequently permitted them to enter the country. The aliens were detained and subsequently admitted under the act of Congress known as the Immigration Act, passed February 20, 1907 (Comp. St. § 4242 et seq.). It is stated that the Secretary of Commerce and Labor and the Commissioner General of Immigration, and their subordinates, claiming to act under the authority of the Immigration Act, rendered to the petitioner from month to month bills for the hospital treatment and maintenance of the aliens so detained and subsequently admitted. Certain regulations of the Commissioner General of Immigration are cited; and it is alleged that the United States officials threatened that, if the bills were not paid, thereafter all aliens so brought to this country would be held on board ship until their application for admission to the United States should be finally adjudicated. It is set forth that on all vessels arriving in the port of New York there were aliens who were temporarily detained and subsequently admitted; that detention on board ship would have delayed the sailing of petitioner's vessels from periods varying from a few days to several weeks. The threats were actually carried out, at least in one instance, and if vessels were so detained the result would have been not merely great inconvenience and financial

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loss to the petitioner, *but a complete disruption of oceanic commerce in the port of New York and the United States. "Consequently, the petitioner paid, under duress and involuntarily, the bills, when rendered."

It is alleged that the exaction of such payments of the petitioner, and the making of such threats were entirely without warrant of law; that the Immigration Act provides that, where a suitable building is used for the detention and examination of aliens, the immigration officials shall there take charge of such aliens and the transportation companies shall be relieved of the responsibility for their detention thereafter; that there was in the port of New York a suitable building for the detention and examination of aliens; that the Immigration Act required petitioner to pay the United States $4 for each alien entering the United States on its vessels; that the aliens whose hospital and maintenance expense bills were rendered to and paid by the petitioner, were detained and examined and subsequently admitted to the United States pursuant to the requirements of the Immigration Act; that special appropriations have been made for all expenses of the enforcement of the laws regulating the immigration of aliens into the United States, so that there has always been an available fund in the United States Treasury for the payment of the expenses of regulating the immigration of aliens into the United States, including the hospital bills referred to above.

Petitioner recites disagreement, as to such charges between the Secretary of Commerce and Labor and the steamship companies transporting aliens to the United States, and sets forth that an action was brought by the United States in the United States District Court for the Southern District of New York against the petitioner to recover hospital charges for aliens brought to the port of New York and temporarily detained and subsequently admitted. A judgment in favor of *152 the company was *subsequently reviewed by the Circuit Court of Appeals and was there affirmed. See 212 Fed. 116, 128 C. C. A. 632, affirmed by an equally divided court, 235 U. S. 686, 35 Sup. Ct. 203, 59 L. Ed. 424.

It is further alleged that the exaction from the claimant of the above-mentioned hospital charges under duress was in violation of its rights and privileges secured to petitioner as a subject of the kingdom of the Netherlands under the Constitution of the United States, by the treaties between the United States and the kingdom of the Netherlands and the laws of the United States; that the amounts thus unlawfully exacted from the claimant were remitted to the Commissioner of Immigration at the port of New York as required by him.

There being no demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises on the part of the United States, the Court of Claims directed a general traverse under the rules of the court, and afterwards made findings of fact, and substantially following the decision of the Circuit Court of Appeals, supra, held the United States liable for the payments exacted.

As to the claim that the plaintiff had bound itself by contract to pay these charges, the court held that the claimant was coerced into making the contract by threats of the defendant which would have destroyed the plaintiff's business, if ever executed.

The government contends that the claim thus presented was one sounding in tort, and, consequently, not within the jurisdiction of the Court of Claims, and that the petition should have been dismissed.

The jurisdiction of the Court of Claims rests upon section 145 of the Judicial Code (Comp. St. § 1136[1]), re-enactment of the Tucker Act of March 3, 1887 (24 Stat. 505). The jurisdiction conferred includes:

> "All claims (except for pensions) founded upon the Constitution of the United States or any *153 law of Congress, *upon any regulation of an executive department, upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

[1] We think that the statement of the substance of the petitioner's claim, as above set forth, shows that it rested upon payments alleged to have been made under duress because of the wrongful and tortious acts of officials of the United States government acting without authority of law in coercing the claimant to pay the sums demanded.

[2] In many decisions of this court it has been held that by the provisions of the Tucker Act the government did not subject itself to liability for the torts or wrongful acts of its officers. Gibbons v. United States, 8 Wall. 269, 19 L. Ed. 453; Morgan v. United States, 14 Wall. 531, 20 L. Ed. 738; Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; United States v. Buffalo Pitts Co., 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290; Tempel v. United States, 248 U. S. 121, 39 Sup. Ct. 56, 63 L. Ed. 162; Ball Engineering Co. v. White Co., 250 U. S. 46, 39 Sup. Ct. 393, 63 L. Ed. 835.

The appellee relies upon and quotes certain expressions found in the opinion delivered in Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074. In Basso v. United States, 239 U. S. 602, 36 Sup. Ct. 226, 60 L. Ed. 462, suit was brought in the Court of Claims for the illegal arrest and imprisonment of the claimant upon a charge of having imported goods from the United States into Porto Rico without having made entry of the same under an act of Congress which the appellant alleged was not in force in Porto Rico. It was alleged that the court was without jurisdiction, and that therefore the trial, conviction, and sentence of imprisonment deprived him of his liberty without due process of law in violation of the Constitution. The *154 United States filed a general *traverse of the petition, and subsequently moved to dismiss upon the ground that the court had no jurisdiction as the action sounded in tort. This motion was sustained in the Court of Claims, and an appeal taken to this court. Speaking of the contention of the appellant that the Court of Claims had jurisdiction, this court said:

> "He, however, contends that the Court of Claims has jurisdiction under the Tucker Act

over claims ex delicto founded upon the Constitution of the United States. And this, he further contends, is supported by the recent decisions of this court, and relies especially upon Dooley v. United States, 182 U. S. 222.

"But that case did not overrule Schillinger v. United States, 155 U. S. 163, which, counsel says, holds directly contrary to his contention and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the Schillinger Case. We are not disposed to overrule the case, either directly or by implication. * * *

"The Dooley Case and cases subsequent to it which are relied upon by the appellant concerned the exaction of duties or taxes by the United States or its officers or property taken by the government for public purposes. In such cases jurisdiction in the Court of Claims for the recovery of the duties and taxes or for the value of the property taken was declared.

"In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted after judgment upon issues openly framed by the opposing parties both of fact and the applicable law, whether that law was sections 2865 and 3082 of the Revised Statutes or the Constitution of the United States. But, conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different *155 character from the Dooley *Case, as was also the Schillinger Case. The latter case passed upon the jurisdiction of the Court of Claims in actions founded on tort and declared the general principle to be, based on a policy by imposed necessity, that governments are not liable (155 U. S. 167) 'for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties.' And it was further said (page 168): 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government.' Gibbons v. United States, 8 Wall. 269, 275; Morgan v. United States, 14 Wall. 531, 534."

The principle, reaffirmed in the case just quoted, is applicable here, for the reason that the claim presented sounded in tort, and was in substance an action to recover for the wrongful acts of the United States officials in compelling the claimant to pay under duress and without authority of law the sums sued for. Following the well-established construction of the Tucker Act, as declared in many cases in this court, we think that the Court of Claims should have dismissed the petition because it presented a claim not within its jurisdiction. The judgment of the Court of Claims is reversed, and the cause remanded to that court, with instructions to dismiss the petition.

Reversed.

(254 U. S. 231)

BOTHWELL et al. v. UNITED STATES.

(Argued Nov. 9, 1920. Decided Dec. 6, 1920.)

No. 78.

1. Eminent domain 🔑271 — Party claiming damages from overflowing of land held in no better position than if condemnation proceedings had not been instituted.

Where in proceedings by the United States to condemn land overflowed by the construction of a dam, damages for loss from a forced sale of the landowners' cattle and the destruction of their business were denied, and the landowners brought suit in the Court of Claims, they were in no better position in respect to such damages than if no condemnation proceedings had been instituted.

2. Eminent domain 🔑93—United States, overflowing land, not liable for destruction of business.

Where in the construction of a dam the United States overflowed land used by the claimants in their business of stockraising, it was not liable for the claimants' loss on a forced sale of their cattle, or their loss from the destruction of their business, as there was no actual taking thereof, and no basis for an implied promise to make compensation under Const. Amend. 5.

3. Appeal and error 🔑878(1)—Government, not appealing from Court of Claims, cannot contest judgment on claimant's appeal.

Where the claimant appealed from a judgment of the Court of Claims allowing certain items of his claim and disallowing others, the United States, which did not appeal, cannot contest the judgment.

Appeal from the Court of Claims.

Suit by Albert J. Bothwell and another against the United States. From a judgment of the Court of Claims (54 Ct. Cl. 203) for an insufficient amount, the claimants appeal. Affirmed.

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*Mr. Charles H. Merillat, of Washington, D. C., for appellants.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Appellants owned and utilized in their business of stock raising a large tract of land lying in Sweetwater Valley, Wyo. In June, 1909, much hay was stored upon the land and a thousand head of cattle were there confined. Under the Reclamation Act of June 17, 1902 (32 Stat. 389, c. 1093, § 7 [Comp. St. § 4706]), the United States constructed the Pathfinder Dam. This arrested the flood waters and caused inundation of appellants' lands. The hay was destroyed, and it became necessary to remove the animals and sell them at prices below their fair value.

Proceedings to condemn the land were instituted by the appellee, in the United States Circuit Court for Wyoming before the overflow. It is said the right to enter was not acquired until thereafter. The value of the land was ascertained and paid, but the court denied appellants' claim for the hay, and for loss consequent upon forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for value of the hay only, and the cause is here upon claimants' appeal.

[1, 2] Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the government by the very act of taking impliedly has promised to make compensation because the dictates
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of *justice and the terms of the Fifth Amendment so require." United States v. Cress, 243 U. S. 316, 329, 37 Sup. Ct. 380, 385 (61 L. Ed. 746). But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation. We need not consider the effect of the judgment in the condemnation proceedings.

[3] It is suggested that although the United States did not appeal they may now contest the judgment upon the ground that there was no contractual obligation to make compensation for the hay. "Without an appeal, a party will not be heard in an appellate court to question the correctness of the decree of the trial court." Cherokee Nation v. Blackfeather, 155 U. S. 218, 221, 15 Sup. Ct. 63, 64 (39 L. Ed. 126).

The judgment below is
Affirmed.

(254 U. S. 156)

BERLIN MILLS CO. v. PROCTER & GAMBLE CO.

(Argued Nov. 15, 1920. Decided Dec. 6, 1920.)

No. 93.

1. Patents 🔑328—1,135,351, claims 1 and 2, for lardlike food product, held invalid for want of invention.

Claims 1 and 2 of the Burchenal patent, No. 1,135,351, for a homogeneous lardlike food product, consisting of an incompletely hydrogenized vegetable or cottonseed oil, *held* invalid for want of invention; it having been previously known that a vegetable oil could be changed into a semisolid homogeneous substance by a process of hydrogenation arrested before completion, and that it might be edible.

2. Patents 🔑17—Improvement which one skilled in art might make without exercise of inventing faculty not patentable.

A product which is the result of mechanical improvement only is not patentable, where the step in advance of that previously disclosed and open to public use is only that which one skilled in the art might well make without the exercise of the originating or inventing faculty.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by the Procter & Gamble Company against the Berlin Mills Company. A decree for defendant was reversed by the Circuit Court of Appeals (256 Fed. 23, 167 C. C. A. 295), and defendant brings certiorari. Reversed and remanded, with directions.

Messrs. Marcus B. May, of Boston, Mass., Charles E. Hughes and John C. Pennie, both of New York City, and Melville Church, of Washington, D. C., for petitioner.

Messrs. Livingston Gifford and Thomas B. Kerr, both of New York City, John H. Brickenstein, of Washington, D. C., and Alfred M. Allen, of Cincinnati, Ohio, for respondent.

Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by the Procter & Gamble Company against the Berlin Mills
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Company for the infringe*ment of the patent of John J. Burchenal for a food product, issued on April 13, 1915, No. 1,135,351, to the Procter & Gamble Company, assignee. The District Court held the patent void for lack of invention, and also that the claims in suit were not infringed. The Circuit Court of Appeals, one judge dissenting, held the patent valid and infringed. 256 Fed. 23, 167 C. C. A. 295.

[1] The patent in controversy relates to a lardlike food product, consisting of a vegetable oil partially hydrogenized to a homogeneous, whitish, yellowish product. The record discloses that the making of lard substitutes has been accomplished by mixing melted fat with vegetable oils.

These oils contain glycerids—olein, linolin, and stearin. The hydrogenation, or hardening process, has the effect to increase the proportion of the solid glycerids of high saturation. Stearin is called a saturated glycerid, for the reason "that there are present in the molecule as many hydrogen atoms as possibly can be joined to the carbon atoms." Linolin and olein are called unsaturated glycerids, and can be converted by the addition of hydrogen into hardened glycerids.

The patentee in the specifications of his patent states the object of his alleged invention, and what he intended to accomplish, as follows:

"The special object of the invention is to provide a new food product for a shortening in cooking, in which the liability to become rancid is minimized, and in which the components of such vegetable oils which are inferior and detrimental to use as such a food product have been to a large extent converted into a higher and more wholesome form. All such vegetable oils contain glycerids of unsaturated fatty acids, and among these notable quantities of fatty glycerids of lower saturation than olein. It is the presence of these glycerids of lower saturation that seriously affects the rancidity *158 of the material. Oxidation is *largely the cause of rancidity, which oxidation weakens the fat at the point of absorption at the double bonds, and these glycerids of lesser saturation readily absorb oxygen from the air at ordinary temperatures, while the more highly saturated glycerids, as olein, only absorb oxygen at elevated temperatures. It is evident, therefore, that oils or fats containing notable quantities of glycerids of linolic acid, or of lesser saturation, are distinctly inferior as an edible product to those containing a minimum of these glycerids with a larger per cent. of olein. On the other hand, while it is important to get rid of the readily oxidizable glycerids of lower saturation, it is also important not to supply too large a per cent. of fully saturated glycerids. * * * Oil, liquid at the ordinary temperatures, does not make the best shortening, because the oil remains liquid, keeping the food in a soggy condition, and the oil will even settle to the under part of the cooked product and soil the cloth, paper, or whatever it may come in contact with. Moreover, fats of a melting point above the temperature of the human body, 98° F., are not so digestible as fats which are liquid at this point, or which have a melting point below 98° F. It is therefore my object in the preparation of my new lardlike composition and food-product, and in preparing same from cottonseed oil, to change the chemical composition of the oil to obtain a product with a high percentage of olein, a low percentage of linolin and the lesser saturated fats, and with only sufficient stearin to make the product congeal at ordinary temperatures.

"In manufacturing this product, cottonseed or other vegetable oil is caused to chemically absorb a limited amount of hydrogen by reacting on the oil with hydrogen in the presence of a catalytic agent and at an elevated temperature. The oil is preferably agitated in a closed vessel in the presence of an atmosphere of compressed hydrogen, a catalyzer of finely divided *159 nickel carried by *kieselguhr being maintained in suspension in the oil and its temperature being raised to about 155° C.

"According to the present invention, the amount of hydrogen absorbed is carefully regulated and limited. In practice, the operation is stopped when the oil has been converted into a product which cools to a white or yellowish semisolid more closely resembling lard than do the commercial mixtures of cottonseed oil and animal oleostearin, while in many respects the product is superior to the best leaf lard as a shortening. It is not so liable to become rancid, and the product can be heated to a considerably higher temperature than lard without smoking or burning. * * * The high temperature to which my product can be raised without smoking or burning makes the product ideal for frying, inasmuch as a crust forms almost instantly on the food fried, which prevents any absorption of the shortening. A lardlike product thus prepared from cottonseed oil has a saponification value of about 195, and an iodin value ranging from about 55 to about 80. The product having an iodin value of 55 has a titer of about 42° and a melting point of about 40° C.; that having an iodin value of 80 has a titer of about 35° and a melting point of about 33° C. While but partially hydrogenized, containing from about 1.5 per cent. to 2.5 per cent. of additional hydrogen more than in the nonhydrogenized material, it shows no free cottonseed oil when subjected to the Halphen test, thereby differing from all commercial lard substitutes containing this oil. It contains from 20 to 25 per cent. of fully saturated glycerids, from 5 to 10 per cent. linolin, and from 65 to 75 per cent. olein, and an average of a number of samples gives 23 per cent. of saturated fats, 7.5 per cent. linolin, and 69.5 per cent. olein, while the cottonseed oil before treatment contained 17 per cent. saturated fats, 37 per cent. linolin, and 46 per *160 cent. olein. It will thus be seen *that I have produced an ideal food product, which is high in olein, low in linolin and lesser saturated fats, and with only enough stearin to make the product congeal at ordinary temperatures."

The patent has seven claims—two broad claims, which are the ones here involved:

1. "A homogeneous lardlike food product, consisting of an incompletely hydrogenized vegetable oil."
2. "A homogeneous lardlike food product, consisting of incompletely hydrogenized cottonseed oil."

The five additional claims, more specific and limited, are not involved in this suit. Two of the four judges who considered this patent and the validity of the claims in suit reached the conclusion that they were void for want of invention; two judges of the Circuit Court of Appeals held the patent valid, and infringed.

In deciding between these conflicting views, we must consider the genesis of the alleged invention, and what was theretofore known and disclosed in the art. Burchenal, the patentee, was not a chemist, and was the general manager of the Procter & Gamble Company, whose principal business had been the manufacture of soap. One Edwin C. Kayser, who had been in the employ of Crossfield & Son, an English firm, and familiar with the Normann process, to be hereinafter considered, came to this country in 1907, and saw Mr. Burchenal at the Procter & Gamble factory. A contract was made with Kayser, and an experimental plant was erected at the Procter & Gamble works for hydrogenating oil.

It is the contention of the respondent that the merit of Burchenal's alleged invention arises from the fact that he was the first to originate and develop the process involved, so as to make a food product of the character described.

The District Court found that Burchenal in fact invented nothing, and that all that was real invention, as established by the testimony, came from Kayser. But *161 *considering, for the purposes of this discussion, that the thought occurred to Burchenal, which he developed in the production of a food product, the subject-matter of this patent, the primary question is presented whether what Burchenal accomplished amounted to invention within the meaning and protection of the patent law.

[2] In considering the patentability of this alleged invention, it is to be remembered that this is not claimed to be a process patent. While the process is described in the specifications, Burchenal makes no claim that it is his invention, indeed, he concedes in the testimony that the process is not his, and counsel frankly say that the patent must stand or fall upon its validity as a product patent of a new and useful thing within the meaning of the patent law. If this product were the result of mechanical improvement only, when viewed in the light of that which was previously disclosed and open to public use, the step in advance being only that which one skilled in the art might well make, without the exercise of the originating or inventing faculty, then the achievement is not within the protection of the patent law.

The English patent to Normann of October, 1903, disclosed to the world the process of converting unsaturated fatty acids, or their glycerids, into saturated compounds. After referring to other discoveries he says:

> "By causing acetylene, ethylene, or benzene vapour in mixture with hydrogen gas to pass over one of the said metals, the said investigators obtained from the unsaturated hydrocarbons saturated hydrocarbons, partly with simultaneous condensation.
>
> "I have found that it is easy to convert by this catalytic method unsaturated fatty acids into saturated acids. This may be effected by causing vapours of fatty acid together with hydrogen to pass over the catalytic metal, which is preferably distributed over a suitable support, such as pumice stone. It is sufficient, however, to expose *162 *the fat or the fatty acid in a liquid condition to the action of hydrogen and the catalytic substance.
>
> "For instance, if fine nickel powder, obtained by reduction in a current of hydrogen, is added to chemically pure oleic acid, then the latter heated over an oil bath, and a strong current of hydrogen is caused to pass through it for a sufficient length of time, the oleic acid may be completely converted into stearic acid.
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> "The quantity of the nickel thus added and the temperature are immaterial and will only affect the duration of the process. Apart from the formation of small quantities of nickel soap, which may be easily decomposed by dilute mineral acids, the reaction passes off without any secondary reaction taking place. The same nickel may be used repeatedly. Instead of pure oleic acid, commercial fatty acids may be treated in the same manner. The yellowish fatty acids of tallow, which melt between 44 and 48° C. and whose iodine number is 35.1, will, after hydrogenation, melt between 56.5 and 59° C., while their iodine number will be 9.8, and their colour slightly lighter than before, and they will be very hard.
>
> "The same method is applicable not only to free fatty acids, but also to their glycerids occurring in nature; that is to say, to fats and oils. Olive oil will yield a hard tallowlike mass; linseed oil and fish oil will give similar results.
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> "By the new method, all kinds of unsaturated fatty acids and their glycerids may be easily hydrogenized."

An expert witness, called by petitioner, gives in his testimony certain views of this process which commend themselves to our judgment as entirely reasonable and accurate, and so well stated that we quote them in part:

> "Dr. Normann discovered, and sets forth in the patent, that unsaturated acids or unsaturated oils by the action of hydrogen in the presence of finely divided nickel may be converted into corresponding saturated compounds. *163 He *defines the reaction rather carefully in some regards. He says, for instance, if fine nickel powder obtained by reduction in a current of hydrogen is added to chemically pure oleic acid, then the latter heated over an oil bath, and a strong current of hydrogen is caused to pass through it for a sufficient length of time, the oleic acid may be completely converted into stearic acid."

Further on he says:

> " 'Apart from the formation of small quantities of nickel soap, which may be easily decomposed by dilute mineral acids, the reaction passes off without any secondary reaction taking place.'
>
> "I think that those two sentences which I have read very well define the product which is obtained by such reduction, especially the second sentence, where he says that the reaction goes on in a quantitative way, we will say; that is, he says that there is no side reaction takes place. A chemist would know from this first paragraph, where he says that oleic acid goes to stearic acid, and from the second one, where he says that no side reaction takes place, the chemist would know exactly what the product is which is formed by this reaction. * * *
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> "I would call attention particularly to the fact that he hardened olive oil to a hard, tallowlike mass. Tallow is a substance that is obtained from the fat of either cattle or of sheep, and is a substance of somewhat semisolid character; that is, its lower limit of melting point is within a lard range, and its upper limit is just slightly beyond the lard range, so that, if Normann hardened olive oil to a tallowlike mass, that means that he hardened it to a product of a semisolid character.
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> "Q. 63. Does Normann specify anywhere in

> his patent any of the purposes for which his patents are intended?
>
> "A. He does not. He says nothing in the patent as to what these products should be used for. The presumption is that they might be used for any purpose for which fats of that general character could be utilized. They *164 might be *used for making candles; they might be used for soaps; they might be used for edible purposes.
>
> "By the passages I have read he has very carefully specified what the product is, so that any chemist would know for what particular purposes it might be useful.
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> "Q. 64. In the process of hydrogenation as described in the Normann patent from which you made citations—that is, the British patent, No. 1,515 of 1903—what would your conclusion be as to the edibility of the resultant product when the material hydrogenated was among those suggested by him, olive oil?
>
> "A. If an edible olive oil was started with, one would certainly obtain an edible hydrogenated product."

It is in evidence that this method, shown by Normann, is a practicable one, and may be used for the making of edible food products of the kind here involved.

With the knowledge disclosed in the Normann patent conclusively presumed to be known by the patentee, was it invention to apply the known process to vegetable oils? In this connection the history of the application for the patent in suit in the Patent Office is interesting and instructive. It is true that claims 1 and 2 were finally allowed, and the patentee is entitled to the presumption which arises from the granting of them. But it appears in the history of the application for the Burchenal patent, found in the record, that as originally presented it contained two claims not so broad as the ones now in suit, and a third claim for "A semisolid hydrogenized oil," was added by amendment. All of the claims were rejected; the examiner saying:

> "The composition of lard and of cottonseed oil, as to the glycerids olein and stearin that they contain, is well known. To make a product from cottonseed oil that shall simulate lard, the content of stearin should be increased. [Referring to patents.] It is thought, therefore, that if the problem of simulating *165 lard from cottonseed oil were *presented to an oil chemist, an incomplete hydrogenization of the cottonseed oil would at once suggest itself to him as a solution of the problem. All the claims are accordingly rejected on the above ground of lack of invention. Claim 3 is further rejected on the product formed by the above-cited patents."

Replying to the communication of the examiner, amendment was made canceling claim 3. Further consideration was requested on claims 1 and 2, upon arguments which were presented. The claims were afterwards rejected upon reference to patents to Kayser of September 26, 1911, and November 14, 1911, the examiner stating that these patents were adapted to hydrogenize glycerids, the latter one specifically mentioning its adaptability for cottonseed oil, and that the process could be arrested at any time during its progress, and thus an incompletely hydrogenized article be produced.

Subsequently the specifications were amended, giving more definitely the percentages of olein, linolin and stearin. The patentee concludes the amended specifications, stating:

> "It will thus be seen that I have produced an ideal food product, which is high in olein, low in linolin, and lesser saturated fats, and with only enough stearin to make the product congeal at ordinary temperatures."

Additional and more limited claims were added, but ultimately the patent, containing the broad claims here involved, was granted.

It is true, as the Circuit Court of Appeals states in its opinion, that the applicant never did acquiesce in the examiner's action rejecting his claims, and finally obtained what he had in the first place asked for.

This record establishes that it was known before Burchenal took up the subject that a vegetable oil could be changed into a semi-solid, homogeneous substance by a process of hydrogenation arrested before completion, and that it might be edible. This much of *166 the art was public *property and open to general use. The product of this process was known and open to public use. To supply such products as the patentee has described in the broad claims in suit may have been new and useful, but does not in our opinion rise to the dignity of invention, and is an advance step which would occur to one skilled in the art, when investigating and considering the subject. It follows that the decree of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court, with directions to dismiss the bill, on the ground that claims 1 and 2 are void for the reasons stated in this opinion.

Reversed.

(254 U. S. 233)

SAMPLINER v. MOTION PICTURE PATENTS CO. et al.

(Argued Nov. 12, 1920. Decided Dec. 6, 1920.)

No. 89.

Trial 🔑176—Conditional request for submission to jury prevents finding by court.

A statement by plaintiff's counsel, after defendant moved for directed verdict, that he thought there were only questions of law under the evidence, but that, if there were questions of fact to be disposed of, he requested to go to the jury, is an adequate and timely request for submission to the jury if the court disagreed with his view of the evidence, so that it was error for the trial court to make a finding of fact against plaintiff.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Joseph H. Sampliner against the Motion Picture Patents Company and others. Judgment for defendants on directed verdict, on the ground that the assignment of the claim to plaintiff was void for champerty (243 Fed. 277), was affirmed by the Circuit Court of Appeals (255 Fed. 242, 168 C. C. A. 202), and plaintiff brings error. Reversed and remanded.

*234

*Messrs. John G. White, of Cleveland, Ohio, Gustavus A. Rogers and Saul E. Rogers, both of New York City, E. C. Brandenburg, of Washington, D. C., and Austin V. Cannon, of Cleveland, Ohio, for plaintiff in error.

Messrs. Samuel Seabury, William M. Seabury, and Charles F. Kingsley, all of New York City, and Robert H. McCarter, of Newark, N. J., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The opinion below is reported in 255 Fed. 242, 168 C. C. A. 202.

By an assignment executed in Ohio December 28, 1911, the Lake Shore Film & Supply Company, a corporation of that state, undertook to convey to plaintiff in error its claim and right of action against defendants for damages resulting from their violations of the Sherman Act (Comp. St. § 8820 et seq.). Relying upon the assignment, he brought suit for $750,000 January 16, 1917, in the United States District Court, Southern District of New York. The defendants denied liability, and set up the following as a separate and distinct defense:

"The plaintiff at the time of his alleged purchase of the claims in controversy, set up in the complaint herein, was an attorney and counselor at law of the state of Ohio, practicing as such before the courts of that state. * * * That at the time of such alleged purchase it was, and is now, the law of the state of Ohio that an attorney who purchased a demand with full knowledge and notice that the same was contested and would be litigated, and with the intent and for the purpose of bringing an action thereon, was guilty of maintenance and champerty and got no title to such
*235
demand by such pur*chase which could be enforced either at law or in equity, and that the same was at said time, and still is, the law of the state of New York. * * * That the plaintiff purchased the demand set forth in the complaint with full knowledge and notice that the same was contested and would be litigated and with the intent and for the purpose of bringing action thereon."

All parties agreeing, the court directed a separate trial before a jury upon the issues of fact and law arising under the special defense. Plaintiff in error testified in his own behalf and called two other witnesses—none were called by the defendants. The essential facts as well stated by the Circuit Court of Appeals follow:

"The assignment states that 'for value received the Lake Shore * * * Company * * * hereby sells, assigns, and transfers to J. H. Sampliner all of its rights and interests in and to any and all damages which it has sustained and suffered by reason of injury to its business, because of the unlawful combination and monopoly in restraint of interstate commerce, and in violation of the Sherman Anti-Trust Act, brought about, engaged in and as a result of the unlawful agreement by and between the Motion Picture Patents Company; * * * all of said parties having conspired together for the purpose of ruining and destroying the business of the Lake Shore * * * Company, and contrary to and in violation of the Sherman Anti-Trust Act. * * *'

"The testimony shows that the plaintiff had rendered legal services to the assignor as its general counsel in connection with the difficulties in which it found itself with the defendants, and that those services extended over a period from July, 1910, to December, 1911. The plaintiff regarded the reasonable value of his services as worth from $8,000 to $10,000. On December 10, 1911, he was asked by the president of the Lake Shore Company whether he would be willing to bring suit
*236
against the defendants, *and that he replied that he would bring the suit, being satisfied that the company had a valid claim, and that it would cost from $8,000 to $10,000. He was informed by the president of the company that it had been losing money very heavily, and it was absolutely impossible for it to undertake any litigation of that kind. He was asked what the company already owed him, and replied in the neighborhood of $9,000 or $10,000. He was told the company did not have the money and could not pay him, and thereupon he said, that if the company would pay him $5,000, in cash he would cancel the indebtedness. After some reflection the president, Mr. Mandelbaum, told him that the corporation would transfer to him all rights it had against the defendants, if he would be willing to accept it as a satisfaction of the company's indebtedness to him. The

plaintiff told him that he would think it over and give him an answer. After a few days' reflection the plaintiff expressed a willingness to accept the assignment, and was told that the board of directors wanted to know whether, if they made an assignment, the plaintiff would as a part of the consideration defend the company and its officers in case any suit was brought against them in matters growing out of their difficulties with the defendants. He agreed to do this, and the assignment was executed.

"It appears, therefore, that the assignment originated, not with the plaintiff, but with the Lake Shore Company, and that the consideration for the agreement involved the payment of a past indebtedness, as well as for future services of a professional character. It is also to be noted that the invalidity of the assignment is set up, not by the client, the assignor, who has at no time sought to repudiate it, but by third parties, between whom and the plaintiff no fiduciary relations have existed."

At the conclusion of the evidence the defendants asked a directed verdict "on the *237 ground that the plaintiff has *not shown title to this cause of action and it now affirmatively appears from the evidence that the agreement under which the plaintiff assumes to bring this suit is champertous and void." Thereupon the following occurred—Mr. Rogers representing the plaintiff:

"Mr. Rogers: If your honor is going to grant the motion for a direction of a verdict I will take a formal objection to it, but my request is that if your honor is going to find for the defendant, that it be a nonsuit to the plaintiff's cause of action. I think that is as far as your honor can go.

"The Court: You may be right, but the defendant has rested and moves for the direction of a verdict, and I am going to pass on that motion.

"Mr. Rogers: But, your honor, I submit there aren't any questions of fact on which to go to the jury; I submit the matter is purely a matter of law for your honor to determine; and I think the question whether the agreement is or is not champertous is one of law for the court.

"The Court: Well, Mr. Rogers, you may either rest on the motion of the defense and take an exception to such ruling as I make, if it should be adverse, or you can ask to go to the jury. That is entirely for you to determine.

"Mr. Rogers: Well, if there are any questions of fact to be disposed of, your honor, I ask to go to the jury upon the questions of fact.

"Mr. Seabury: I think he should specify, and not put a hypothetical motion.

"The Court: I cannot have any 'ifs.' If you think, under section 973 of the Code, the court has no right to make a direction, and you are right about it, you will have a good exception; if, on the other hand, the court is right, your *238 exception will be addressed, not to *the question of practice, but to the substantive questions in the case.

"Mr. Rogers: Then, your honor, may I state my position on the record?

"The Court: Yes, certainly.

"Mr. Rogers: The defendant having moved for a direction in order to preserve the plaintiff's rights, I beg leave to state my position on the record with the permission of the court.

"My understanding is that the question is one of law to be passed upon by the court from the facts adduced. If, however, it is necessary in order to preserve the plaintiff's rights that I make a request to go to the jury, I ask to go to the jury upon the question as to whether or not the plaintiff took an assignment of the cause of action for the intent and purpose to begin an action thereon, and whether the assignment to him was bona fide for an antecedent indebtedness.

"The Court: The court cannot take conditional offers. Counsel is at liberty, if so advised, to request to go to the jury and the court will rule.

"Mr. Rogers: Then I move for a direction, your honor, for the plaintiff, upon the issue framed under your honor's order on the ground the defendant has failed to make out the defense set up in the answer, to wit, that the plaintiff purchased this cause of action—that is the defense that is set up—and I desire to call your honor's attention particularly to the form of the defense as pleaded. The defense that this plaintiff's title is void because he purchased this cause of action with the intent to sue thereon. It now appears uncontradicted, from the evidence, that instead of having purchased this cause of action, it was assigned to him under a bona fide assignment for an antecedent indebtedness owing to him for services which he had performed for the corporation.

"The Court: Both sides having moved for *239 a direction *of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon.

"I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the board of directors."

A verdict for the defendants was directed and judgment entered thereon. The Circuit Court of Appeals declared itself concluded by the trial court's finding "that the plaintiff purchased this cause of action with intent to sue thereon," and held:

"We must dispose of this case upon the theory that the plaintiff did not in fact take this assignment to extinguish a precedent debt but that he purchased it for the purpose of suing upon it; that he, an attorney at law, purchased from his client for $5,000 a cause of action which he values at $750,000. The question we must answer therefore is whether the law sanctions such a transaction between parties standing in the confidential relation of attorney and client. We are satisfied that the common law does not sanction it."

Among other things counsel for plaintiff in error now insist that—

"If there were any questions of fact to be decided or divergent inferences of fact to be made the District Court erred in not submitting them to the jury."

The point is well taken.

Statements by plaintiff's counsel made it sufficiently plain that while he sought an instructed verdict he also requested to go to the jury if the court held a contrary view concerning the evidence. In the circumstances disclosed we think the request was adequate and timely under former opinions of this court. Empire State Cattle Co. v. Atchison, Topeka & Santa Fé Ry. Co., 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Sena v. American Turquois Co., 220 U. S. 497, 501, 31 Sup. Ct. 488, 55 L. Ed. 559; Schmidt v. Bank of Commerce, 234 U. S. 64, 66, 34 Sup. Ct. 730, 58 L. Ed. 1214; Williams v. Vreeland, 250 U. S. 295, 298, 39 Sup. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. It should have been granted. Clearly some substantial evidence *240 strongly *tended to show that the assignment was taken in extinguishment of an existing indebtedness and not for mere speculation upon the outcome of intended litigation.

The judgment below must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

(254 U. S. 196)

CHICAGO, M. & ST. P. RY. CO. et al. v. DES MOINES UNION RY. CO. et al.

DES MOINES UNION RY. CO. et al. v. CHICAGO, M. & ST. P. RY. CO. et al.

(Argued March 23 and 24, 1920. Decided Dec. 6, 1920.)

Nos. 66, 67.

1. Railroads 🔑139 — Modification of trust agreement for railway terminal held not to terminate trust.

Where three railways entering a city agreed to establish a joint terminal, and provided that the terminal property should be held in trust, and that a depot company might be incorporated, the subsequent incorporation of a company to control the entire terminal, and not merely the depot, but which by its articles of incorporation was to operate the property in conformity with the trust agreement, and the conveyance of the terminal property to such a corporation to enable it to manage and control the terminal, though a modification of the original agreement, did not change its nature or invest the terminal company with absolute title.

2. Trusts 🔑25(1) — Need not be created by particular words or in deed conveying property.

No particular form of words is needed to create a trust, if there be reasonable certainty as to the property, the objects, and the beneficiaries, and though a trust, the subject of which is a legal interest in property, is not perfectly created unless the legal title to the property is vested in the trustee, the trust agreement need not be stated in the instrument conveying that title to the trustee.

3. Railroads 🔑139—Contract between trustee terminal company and beneficiary railways held not to defeat trust.

A contract between a terminal company and the railway companies for whom it held the terminal property in trust, providing for the issuance of bonds for the cost of the property and of stock in the terminal company to the railway companies in proportion to their interest in the trust company and for the payment of the expenses of operating the property, though it modified the original trust agreement, does not terminate the trust under which the railways were to have the use of the property on paying the expenses of operating it, so that there could be no profits for distribution to the stockholders of the terminal company.

4. Railroads 🔑139—Officers of trustee terminal company sustained fiduciary relation to beneficiaries.

The fiduciary character of a terminal company, which held the property in trust for the railways using the terminal, extended to the officers and directors and to all others concerned in the management of the terminal company, charging them with the duty to uphold the trust, and prohibiting them from reaping a personal advantage at the expense of the beneficiaries.

5. Railroads 🔑139—Sale of stock in trustee terminal company by beneficiaries held not to estop claim of trust.

Where a railway company, which was beneficiary of the trust by which a terminal company held terminal property, sold stock for a valuable consideration to officers of the terminal company, who had knowledge of the trust, to enable the latter to sell an interest in the company to some other railway capable of participating in the use of the terminal, the railway company was not thereby estopped from enforcing the trust against the terminal company.

6. Railroads 🔑139 — Notice that officers of trustee terminal company claim stock held not to estop purchaser of beneficiary's interest from asserting trust.

The fact that a railroad company, which purchased another company having a beneficial interest in a trust covering terminal property, had notice that the officers of the terminal company were claiming a portion of the stock in that company, does not prevent the purchasing company from enforcing the trust.

7. Railroads 🔑139—Officers not presumed to have authority to release trust in terminal property.

Executive and managing officers of railroad corporations, which had the beneficial interest in terminal property held in trust by a terminal company, are not presumed by virtue of their offices to have authority to bind their companies to a release of the trust, so that a contract effecting such release is not binding on the railroad companies, in the absence of evidence of authority or ratification by them, especially where it appeared that the officers and agents executing the contract, through mistake as to the legal effect of previous contracts, thought they were merely giving effect to a changed situation already accomplished by the previous contracts.

8. **Railroads 🔑139—Assertion by trustee of title not inconsistent with trust in terminal property does not evidence termination of trust.**

The fact that a terminal company, which held title to the terminal property in trust for railroad companies using it, had executed contracts, conveyances, and mortgages in which it asserted ownership of the property without qualification, does not evidence a termination of the trust, where none of the instruments were in any wise inconsistent with the trust, but all were made in the course of the administration of the trust, or dealt with legal titles only.

9. **Railroads 🔑139 — Negligence of beneficiaries does not permit officers of trustee holding terminal property to acquire benefits.**

The mere inattention of beneficiaries of the trust, even amounting to negligence, whereby officers of the trustee corporation had acquired a dominant interest in the trust property, which in effect defeated the trust, was not sufficient to discharge the trust, if it does not amount to estoppel or laches.

10. **Railroads 🔑139—Beneficiaries held not to have misled officers of trustee holding terminal property, so as to create estoppel.**

Beneficiaries of trust agreement are not estopped to assert the trust by transactions in the stock of the trustee corporation with the officers of the trustee, who had full knowledge of the trust agreement, so that the officers could not claim to have been misled by the acts of the beneficiaries.

11. **Railroads 🔑139—Beneficiaries of trust in terminal property held not to have lost rights by laches.**

The acquiescence by the managing officers of railroads holding the beneficial interest in property conveyed to a terminal corporation in trust in the election of directors of the trust company in conformity with an unauthorized agreement which defeated the trust does not amount to laches, so as to defeat the right to enforce the trust as against the officers of the trustee corporation, who had acquired an interest in its capital stock, where the possession and management of the trust property was consistent with a continued recognition of the trust until shortly before the bill was filed, and not until then did the trustee and its stockholders contend that the trust had been repudiated.

12. **Railroads 🔑139—Officers of trustee corporation required to surrender stock in terminal property inconsistent with fiduciary relationship.**

Where terminal property was conveyed to a terminal corporation in trust for the railroads using it, who were to have the use of it on payment of the expenses of maintenance and operation, and who were originally entitled to the stock of the terminal company, officers of the terminal company, who had acquired a controlling interest in the stock in breach of their fiduciary relations, can be compelled to surrender the stock for cancellation on repayment of the amount paid therefor, with interest, so as to prevent the danger of the stock coming into the hands of innocent purchasers and to give the beneficiaries the right to control the trustee corporation, to which their interests entitled them.

13. **Railroads 🔑139—Beneficiaries of trust in terminal property held entitled to surplus earnings of trustee corporation.**

Where a terminal company, which held the property in trust for the railroads using it, had a contract whereby the beneficiaries were to pay the expense of operating the terminal on the basis of the traffic of each of them, after applying the receipts from other railroads using the terminal, the beneficiaries are also entitled to recover from the terminal company amounts received by it from switching charges and lease of privileges, which it had not deducted from the expense of operation.

14. **Appeal and error 🔑901—Party complaining of decree must furnish data necessary to decision thereon.**

Parties who assigned error to a decree requiring payment of surplus earnings to the opposite party cannot ask to have the decree reversed as to part of the surplus earnings applied to the cash purchase of property for the benefit of the other parties, where they did not furnish the data necessary to determine the amount so applied.

On Writs of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Suit in equity by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railway Company against the Des Moines Union Railway Company and others to enforce an asserted trust in certain property and to recover surplus earnings from that property. On appeal by both parties from the decree of the District Court, the Circuit Court of Appeals found the defendant company the owner of the property free of the trust, but awarded the surplus earnings to complainants (254 Fed. 927, 168 C. C. A. 289), and both parties bring certiorari. Decree as to trust reversed, and that as to surplus earnings affirmed, and cause remanded to District Court for further proceedings.

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*Messrs. Robert J. Cary and Burton Hanson, both of Chicago, Ill., James L. Minnis, of St. Louis, Mo., John C. Cook, of Cedar Rapids, Iowa, and Winslow S. Pierce, of New York City, for Chicago, M. & St. P. Ry. Co., and others.

Messrs. James L. Parrish, of Des Moines, Iowa, and Frederick W. Lehmann, of St. Louis, Mo., for Des Moines Union Ry. and others.

Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity brought in the year 1907 in the Circuit (now District) Court of the United States for the Southern District of Iowa by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company. By an amended bill the individual defendants, Frederick M. Hubbell, Frederick C. Hubbell, and their firm of F. M. Hubbell & Son, were brought in, and afterwards the Wabash Railway Company, having succeeded to the rights of the Wabash Railroad Company, was substituted as a complainant in its stead. Jurisdiction depended entirely upon diverse citizenship of the parties.

Complainants own and operate lines of railroad extending to the city of Des Moines, Iowa, and connecting there with a joint terminal property, legal title to which is held by the defendant Des Moines Union Railway Company (hereinafter called for convenience the terminal company), in which complainants hold a minority of stock, the Wabash Company an eighth, the other complainant a quarter, *200 *while the Messrs. Hubbell hold five-eighths. Complainants assert that the terminal company holds its property in trust for their use, and that they are the sole beneficial owners, having an equitable tenancy in common, and being entitled to the joint use of the property in perpetuity, exclusive except as other railroads may be admitted to participate in such use with their consent. This is the principal matter in controversy. Intimately connected with it is the question of the validity as against complainants of the Messrs. Hubbell's claim to ownership of five-eighths of the capital stock. A subordinate issue relates to the disposition of what are called "surplus earnings," acquired by the terminal company from outside parties during the operation of the terminal under an agreement made in the year 1889 between the terminal company and the predecessors of complainants and which expired in 1918.

Complainants base their principal contention upon a trust alleged to have been established under and pursuant to an agreement made January 2, 1882, between three companies then engaged in the construction of as many railroads converging at Des Moines, and through the incorporation of the terminal company in the year 1884 for the express purpose of acting as trustee for the three companies, and the conveyance to it by them of the terminal property, followed by the working agreement of 1889, from all of which it is contended that the terminal company has from the beginning held and still holds all its property subject to a trust under which the three railroad companies and their successors and assigns, and such other railroad companies having lines terminating at Des Moines as may be admitted with their consent, are entitled to have the terminal property maintained and operated for their use and benefit at the actual cost of the terminal service performed. Complainant Chicago, Milwaukee & St. Paul *201 Railway Company is the remote *successor of two of the three companies, owning what may be called the Northern and the Northwestern lines. Complainant Wabash Railway Company is the remote successor of the original company that owned the third, which may be called the St. Louis line.

The bill of complaint prayed for a decree declaring and establishing the trust, an accounting for all income and profits received by the terminal company for switching or handling traffic at the terminal for companies other than complainants and their predecessors, and for rentals of real estate and the like, and specifically and generally for other appropriate relief. The defenses set up in the answer and attempted to be supported by the proofs are, briefly, that by the deeds of conveyance made to the terminal company it took title not as trustee but absolutely and for its own sole use and benefit; that whatever relation may have arisen from the provisions of the original articles of incorporation, whether fiduciary or merely contractual, was substantially modified, and if fiduciary terminated, by amendments adopted April 8, 1890, alleged to have been thereafter recognized by complainants and their predecessors as valid and so treated by defendants and all others concerned; that complainants by their conduct and that of their predecessors are estopped from setting up the equitable title alleged, and have been guilty of laches barring relief in equity; hence that they are not entitled to assert any right or interest in the terminal property except such as arises from their ownership of a portion of the stock of the terminal company and from the provisions of the agreement of 1889; and that by the proper construction of that agreement the so-called surplus earnings are the property of the terminal company and not of complainants.

Upon final hearing the District Court made a decree from which both sides appealed to the Circuit Court of Appeals, where it was *202 held (one judge dissenting) that *the terminal company had complete and absolute title to the terminal property; that complainants, except as holders of its stock or bonds, had no interest in it, nor voice in the control or management; that by the true construction of the 1889 agreement complainants were entitled to the surplus earnings until May 1, 1918, and that thereafter the rights of the parties respecting the use of the terminal were only such as sprang from their nature as carriers and their physical and business relations to each other and to the terminal; by reason of which the terminal company must furnish them with reasonable terminal facilities at reasonable charges to be agreed upon, or in default of agreement to be fixed by the proper public tribunal. 254 Fed. 927, 168 C. C. A. 289.

Cross-writs of certiorari bring the resulting decree here for review.

The facts are intricate, and the evidence so voluminous that any detailed recital of it would be unduly tedious. It is sufficiently referred to in the prevailing and dissenting opinions delivered in the Circuit Court of Appeals, and we will content ourselves with touching upon the salient points. The case involves no abstruse legal or equitable doctrine; the application of familiar principles to the facts as they are developed will direct us to the proper outcome.

The agreement of January 2, 1882, was made between the three railroad companies and two individuals in whose names certain titles had been taken for the benefit of the companies. Its principal provisions were:

> That terminal facilities in Des Moines should be purchased, constructed, and maintained at the joint expense of the three companies and held and used in common; that the expense of acquisition should be borne one-half by the St. Louis Company, one-quarter by each of the others; "that a depot company may be organized and may take permanent charge of the property upon the terms herein set forth, and *203 *that said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements. * * * The title to said property shall be and remain in a trustee to be named by agreement of said companies, but subject to the joint use and occupation of all of said railway companies upon the terms herein described."

The St. Louis Company was to be charged with police control, supervision, and maintenance of the terminal, and the expense thereof (including taxes) apportioned between it and the other companies according to the use they should respectively make as evidenced by the wheelage; spur tracks were to be built connecting the terminal with factories and other sources of trade in and about the city, but if either of the companies should deem the construction of any such track not advantageous the question of constructing it and which of the three companies should pay for it was to be determined by arbitration; any railroad company having a line not extending to Des Moines, but having effected an arrangement for running its trains into the city over the line of either of the three companies, was to be entitled to the use of the terminal facilities upon paying a fair sum for rental and a proportion of the maintenance account, the rental to inure to the three companies in the same proportion as the original outlay, and the sum due for maintenance to be determined in the same manner as in the case of the three companies; railroad companies having lines extending into Des Moines might be admitted to the use of the terminal by agreement of all three companies; differences arising under the agreement were to be referred to arbitration.

The terminal company was organized by representatives of the three companies under articles of incorporation dated December 10, 1884, which recited the 1882 contract in full, with special emphasis upon the pro- *204 vision that a *depot company might be organized to take permanent charge of the property, and declared that the new company was organized for this purpose as well as others that were expressed. The articles contained apt provisions to comply with the laws of the state of Iowa so as to enable it to construct, own, and operate a railway in, around, and about the city, with depots and everything else useful and convenient for the operation of railways at the terminal point, and with all the powers conferred upon corporations for pecuniary profit. Its corporate existence was to continue for 50 years, with the right of renewal. It was expressly declared:

> "All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882."

There was a provision that the written assent of the three companies should be necessary before the terminal company should lease or otherwise dispose of the use of any part of its franchises to any other railroad company. The capital stock was to be $1,000,000, divided into shares of $100 each, and paid in as the board of directors might determine, with authority to the board to receive in payment the property and franchises in Des Moines held by the three companies and their trustees. Four members of the board of directors were to be nominated by the St. Louis Company, two members by each of the other proprietary companies, and no stockholder to be eligible for membership in the board unless so nominated. This provision to apply to and be enjoyed by any grantee or assignee of either of the three companies. No contract, lease, or other agreement amounting to a permanent charge upon the property of the corporation to be entered into unless first approved by the three companies or their assigns and by more than three-fourths of all the stockholders.

January 1, 1885, each of the three companies held a stockholders' meeting, at which *205 formal resolutions were *adopted reciting the contract of January 2, 1882, and the organization of the terminal company as contemplated in that contract and in order to carry out its purpose; each company thereby accepting and ratifying, so far as its interests were affected, the articles of incorporation of the terminal company as in substantial accord and compliance with the terms and conditions of the contract, and authorizing its officers to transfer to the new company all its right, title, and interest in the terminal property in exchange for a proper share of the bonds and stock of the terminal company.

On the same day the board of directors of the terminal company adopted resolutions accepting the transfer, management, and operation of the terminal property, appointing a committee to confer with the three railroad companies with respect to the terms and price at which the terminal property and franchises should be conveyed to it, and to procure from them "such conveyance and transfer as may be necessary to fully invest this company with the title, control and management of said properties provided for in said contract of January 2, 1882," and authorizing the issue of all its capital stock and not exceeding $500,000 of bonds to be secured by mortgage of the properties so to be conveyed; the bonds and stock to be used in paying for the property, maintaining, operating, and improving it, and purchasing other property necessary to carry out the objects of the company.

Due apparently to the financial embarrassment of the original Wabash Company, which dominated the St. Louis and the Northwestern, terminal matters remained in abeyance until November, 1887, when deeds were authorized, and, between that time and the following April, were made by the companies and the individual trustees with the effect of vesting in the terminal company complete legal title to the properties that had been acquired for the purpose of es- *206 tablishing the terminal. The *deeds were absolute in form. The terminal company by amendment of its articles increased its capital stock from $1,000,000 to $2,000,000, and authorized the making of a mortgage, which afterwards was given as of date November 1, 1887, to the Central Trust Company of New York as trustee, to secure an issue of $800,000 of 5 per cent. bonds for the purpose of paying for its property and completing improvements thereon; the mortgage covering all its real estate, rolling-stock, etc., then owned or thereafter to be acquired.

Until May 1, 1888, the terminal property continued to be operated by the St. Louis Company under the original agreement; on that date the terminal company took possession, and ever since then has continued to operate it and render terminal service thereon to the three railroad companies and their successors, as well as to other companies admitted from time to time under special agreements.

Upon a review of all the evidence, construing the writings in the light of the circumstances and the manifest purpose and intent of the parties, we are clear that the effect of the transactions thus far recounted was to establish a trust in the full and proper sense of the word, the terminal company being invested as trustee with complete legal title, but without beneficial ownership, and subject to a duty to maintain and operate the property and exercise all of its corporate powers for the common use and benefit of the three railroad companies, their successors and assigns, and such other companies as might be admitted by them to a proprietary participation in the terminal.

[1] The gist of defendants' argument to the contrary is that the incorporation of the terminal company and the conveyance of the property to it by deeds absolute in form manifested a substantial change of plan from that embodied in the contract of January 2, *207 1822; stress being laid *upon the fact that the powers of a terminal railway company as acquired under the articles of incorporation were much more extensive than those of a depot company, and it being contended that the provisions of the articles respecting the control of the terminal company and the resolutions providing for the transfer of the property to it, the form of the deeds themselves, and the issuance of stock and bonds to the proprietary companies in payment, demonstrated a purpose to invest the terminal company with title for all purposes. But the main object of establishing a joint terminal at the common expense and for the common use of the three companies and to retain their proprietary interest in it while confiding its maintenance and operation to their trustee is so manifest that all the proceedings are properly to be construed as designed to give effect to it, and seeming inconsistencies and ambiguities resolved accordingly. The provision of the articles that "all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract" is not merely contractual, but amounts to a declaration of trust and together with the other evidence shows clearly that the powers were procured from the state expressly to enable the company the better to fulfill the purposes of its existence as such trustee, and not to set it

up in business on its own account. The substitution of the terminal company with more elaborate powers in place of the depot company contemplated at the beginning shows a development and modification of the original plan, but no departure or substantial change. The particular stipulations contained in the articles respecting the control of the terminal company were intended not as a substitute for but as safeguards of the trust. The absolute form of the conveyances, and the issuance of stock and bonds "in payment," were intended to give credit to the company in its dealings with outside parties and to render its bonds more readily *208 salable; but they constituted the *mere mechanism for carrying into effect the main purpose of the parties, and as between them were controlled by that purpose and by the articles and resolutions that manifested an express declaration of the trust. All the circumstances, and what we have quoted from the resolution of the terminal company directors, show that the title was conveyed for the purpose of enabling that company to control and manage the terminal in furtherance of the objects of the 1882 agreement.

[2] It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. Colton v. Colton, 127 U. S. 300, 310, 8 Sup. Ct. 1164, 32 L. Ed. 138. But if, as here, the subject of the trust be a legal interest in property and capable of legal transfer, the trust is not perfectly created unless the legal interest be actually vested in the trustee. Adams v. Adams, 21 Wall. 185, 192, 194, 22 L. Ed. 504. Hence the necessity in this case of deeds conveying the fee to the terminal company. But it is not necessary that the trust be expressed in the same instrument that transfers the title. Various instruments may be read together in order to ascertain the intention to establish one. Loring v. Palmer, 118 U. S. 321, 340, 6 Sup. Ct. 1073, 30 L. Ed. 211.

[3] The agreement of May 10, 1889, between the terminal company of the first part and the three proprietary companies of the second part fixed the terms upon which the property should be managed and the terminal service performed for a period of 30 years to date from May 1, 1888. It constituted a working arrangement for that period, but did not in terms or by implication set aside the trust or place a time limit upon it. It provided that for the terminal service the proprietary companies should make payments, in proportion to the wheelage of each, to cover interest upon the mortgage bonds, the cost of maintenance, repairs, taxes, and insurance and the cost of operating the terminal, including all expenses (except the operation of engine houses, care of engines, *209 and repairs *thereto, which were separately dealt with), after deducting any amounts which other railway companies might be obliged to pay for the use of the property. Engine house expenses were to be apportioned according to the number of engines of each company, engine repairs to be charged to the company for which the work was done. The agreement contained other provisions of permanent effect, providing for the allotment of the stock of the terminal company to the proprietary companies and declaring the terms upon which outside companies might be admitted to ownership of the stock or the use of the property. It recited that the proprietary companies were entitled to the stock in the proportion of one-half to the St. Louis Company, one-fourth to each of the others, and provided for the issuance of certificates accordingly, and that these should express upon their faces that they were not transferable without the consent in writing of all the proprietary companies, except as to shares issued to qualify directors. And there was a provision that the St. Louis Company might sell one-half of its stock, or one-quarter of the whole, to such railroad company as might be acceptable to a majority of the proprietary companies, in which case the purchasing company might be admitted as one of the parties to the agreement upon the same terms and conditions as those stipulated for the other parties of the second part; and that, except as thus provided, other railroad companies should not be admitted to the use of the terminal property without the consent of all the parties of the second part.

Here again we have a further modification of some of the details of the original plan, but in respects altogether consistent with the continuance of the trust; inconsistent, indeed, with a purpose to treat the terminal company as an independent entity subject only to contractual obligations and remit the proprietary companies to the ordinary rights of stockholders. Their contributions to the *210 original cost *of the property having been secured by mortgage bonds according to the plan of 1882, provision was now made for distributing the entire capital stock according to the original proportions, one-half to the St. Louis, one-quarter to each of the two other companies, but with certain material restrictions upon the ordinary rights of stockholders expressed in the agreement and others necessarily implied.

Since, from the very nature and terms of the trust, all the property and franchises of the terminal company were to be held for the benefit of the proprietary companies, and all its corporate powers exercised in the administration of the joint terminal for their common use, the stockholding interest in the terminal company necessarily must be modified, as between the parties, to the extent necessary to give full effect to the trust. In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stock holdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the operations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal. In the hands of others having notice of the trust, *211 the stock represented no sub*stantial property interest. Some recognition of the anomalous status of the stockholding interest is to be found in the acts of the parties above set forth, especially in the provisions of the agreement of 1889. The amount of stock provided for shows that it was deemed probable that eventually the property would have a value in excess of the original cost represented by the bond issue, or that value might be given to the stock through liquidation of the bonds or otherwise, and that upon a sale of a participation in the terminal property and facilities to an outside railroad company, evidenced by a transfer of stock in the terminal company, some return could be got for such increased value. The apportionment of the original issue, and the stipulations of the 1889 agreement, recognized that the St. Louis Company, as representative of the original Wabash Company, was equitably entitled to preference in any profits that might be derived from such a sale to an outside company. And evidently it was then anticipated that there would be four proprietary companies, each holding one-fourth of the stock, with equal representation in the board of directors.

We are not here concerned with any question pertaining to the rights of the bondholders. It may be assumed that, if necessary for their protection, the mortgage would be treated as conveying the entire estate, both legal and equitable, in the terminal property. No express provision appears to have been made for paying off the principal of the bonds. Whether the beneficiaries of the trust, as between themselves, were or are entitled to have provision made for discharging the principal by including periodic amortization charges as a part of the cost of operating the terminal is a question that we need not consider.

Nor are we at this moment concerned with any question that might arise if stock of the terminal company had come or should come to the hands of a bona fide purchaser for value without notice. The principal con- *212 tro*versy arises from the fact that defendants F. M. Hubbell and F. C. Hubbell have become the holders of five-eighths of the capital stock, upon which fact, together with the alleged effect of the amendments to the articles of incorporation adopted April 8, 1890, defendants rest the insistence that the proprietary companies have lost their right to control the action of the terminal company, that the Messrs. Hubbell as stockholders are entitled to control it and to have dividends out of its profits, and that from and after the expiration of the 1889 agreement, complainants have no right to the use of the terminal except upon terms to be agreed upon by the terminal company as controlled by the Messrs. Hubbell.

It is important, therefore, to consider the circumstances under which their stock was acquired and the amendments adopted.

[4] Obviously the fiduciary character of the terminal company extended to its officers and directors as to all others concerned in its management, charging them with a duty to uphold the trust and imposing upon them the usual disability about reaping a personal advantage at the expense of the beneficiaries. And it is clear and undisputed that the Messrs. Hubbell acquired their stock with full notice of all essential facts pertaining to the trust; they themselves at all times material were officers and directors of the terminal company and acted in a fiduciary capacity in everything relating to its affairs. Mr. F. M. Hubbell was an officer and director of that company at the beginning and continuously thereafter, especially active in its management; and during a period which included the important transactions in question he also was a director and officer of each of the proprietary companies and their trusted representative in respect to terminal matters at Des Moines. Mr. F. C. Hubbell became a director of the terminal company in January, 1890, president two years later, and has been such continuously since.

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*In the year 1886 and thereafter until and during the year 1890 the property of the Wabash system, including the stock of the St. Louis Company with control of its part of the stock of the terminal company, was in the hands of a purchasing committee as trustees for the Wabash bondholders. In February, 1890, F. M. Hubbell obtained from this committee an option for the purchase of $135,000 of the terminal company bonds and a quarter interest in its capital stock for $135,000, accepted the option, made over to

General Dodge a half interest in it, and Hubbell and Dodge each received one-half of the specified bonds and one-eighth of the outstanding capital stock, with a guaranty on the part of the purchasing committee that the St. Louis Company would approve the transfer (as it afterwards did, through its board of directors), and that the committee would consent to such change in the articles of incorporation of the terminal company as would permit one director to be nominated by any person or company holding one-eighth of the stock. At this time Gen. Dodge was president of the terminal company, and also president and principal stockholder of the Northern Company; Hubbell, besides his relation to the terminal company, was president of the Northwestern Company and its controlling stockholder. In correspondence between Mr. Hubbell and the purchasing committee antecedent to this transaction they warned him that it would be necessary to confine a sale of stock "to such railway companies as would be interested in the station"; and he assented to this, acknowledging that "it would be prejudicial to sell any of this stock to outsiders, and I understand it as you do that the stock cannot be sold without the consent of the different railroad companies who now form the terminal company." Later Hubbell acquired from the purchasing committee $50,000 of the bonds and an additional eighth interest in the capital stock of the terminal company *214 for $57,736, being *par and accrued interest for the bonds and 15 per cent. of par for the stock, upon the understanding expressed in writing that an eighth interest should be "sufficient to represent a proprietorship in the company, according to the understanding we had when you were here" —evidently meaning that the eighth retained by the purchasing committee should carry with it a proprietary interest and influence in the terminal not limited in proportion to the amount of the stock.

[5] Defendants insist that because the purchasing committee sold the stock to Hubbell and Dodge for a valuable consideration, they must be taken to have dealt with it as having substantial value; and that since, in afterwards making report to the board of directors of the Wabash Company, with an account of their financial transactions, the committee included their receipts from sales of the stock and bonds of the terminal company, and the directors approved the account, complainant Wabash Railway Company is estopped from denying that Hubbell and Dodge acquired a substantial and valuable interest in the terminal company. We deem it clear, however, that the intent of the purchasing committee, known and assented to by Hubbell and Dodge at the time, was merely to enable the latter to sell the three-eighths interest to some railroad company capable of participating in the use of the terminal. Whether consistently with their fiduciary relations or not, they took advantage of this opportunity in the following year, when the Northern and Northwestern companies were consolidated and they sold to the consolidated company the stock in question, apparently and presumably at a profit over and above what they paid the purchasing committee for it. There is no foundation for the suggested estoppel.

The title now asserted by the Messrs. Hubbell to five-eighths of the terminal company stock was derived not directly from the Wabash *215 purchasing committee, but from *the consolidated Northern and Western company. That company, in addition to the three-eighths transferred to it by Hubbell and Dodge, had the two quarter-interests originally owned by those companies, making seven-eighths in all. In October, 1893, the consolidated company pledged to F. M. Hubbell & Son five-eighths of the terminal company stock (2,500 shares) as security for a debt. The stock was transferred to the Hubbell firm on the books at that time, and so remained down to the institution of this suit, except as to five "qualifying shares" placed in the names of individuals but controlled by the firm. On January 29, 1894, the indebtedness was settled between the directors of the consolidated company and the Messrs. Hubbell upon terms that included a purchase by the latter of the 2,500 shares of terminal company stock at ten per centum of its par value. Passing for the moment certain special grounds of attack upon the title they thus acquired to these shares, it is obvious that they took them subject to all qualifications arising out of the trust that pertained to the property and franchises of the terminal company.

[6] The quarter interest in the terminal company stock retained by the consolidated company afterwards passed from it to the complainant Chicago, Milwaukee & St. Paul Railway Company, which acquired at the same time the Northern and Northwestern lines. That company took with notice of the claim of the Hubbells to a five-eighths interest; but this does not estop it from disputing the validity of their claim, nor from setting up, as in this suit, whatever beneficial participation in the trust respecting the terminal property may be incident to its ownership of one-fourth of the stock of the terminal company together with connecting lines of railroad, and asking for relief against any inequitable use by the Hubbells of the five-eighths interest claimed by them.

As to the amendments to the articles of incorporation: These are alleged to have *216 been adopted at a meeting of *the stockholders of the terminal company held April 8, 1890. Their purport was, briefly, to omit from the articles the copy of the contract of 1882 recited therein, the declaration that the powers exercised by the company should be in accordance with the terms and spirit of that contract, and the requirement that assent in writing of the proprietary companies should be necessary before any disposition of the franchises of the terminal company should be made; to set aside previous proceedings respecting the amount of capital stock to be issued to the proprietary companies and provide for the distribution of a much decreased amount ($400,000 par, instead of $2,000,000) but in the same proportions as before, the remaining capital stock ($1,600,000 par) to be issued only by resolution of the stockholders adopted by vote of more than seven-eighths of all the stock theretofore issued; and to eliminate the former method of selecting directors and provide that they should be elected by the stockholders, but that it should require the votes of more than seven-eighths of all the stock to elect a director, and that as to all matters except the ordinary operation of the property the directors could act only upon unanimous vote of the eight members of the board. One of the articles adopted purported to repeal, strike out, and expunge the proceedings of a stockholders' meeting held December 10, 1884, at which the original articles of incorporation were adopted.

[7] It is plain enough, and is conceded, that the corporation could not, by merely altering its own internal organization, affect the interests of its cestuis que trustent. It is as evidence of a modification of the agreement between the stockholders of the terminal company—themselves beneficiaries of the trust—that the amendments are invoked. So regarding them, the question is, by what authority and with what intent were they adopted? The stockholders' meeting was attended by six individuals (including the two Hubbells), and two others by proxy, each of *217 *whom assumed to represent, and in a general sense did represent, one or the other of the three proprietary companies. F. M. Hubbell himself was president of the Northwestern Company and assumed to represent it. Others present were the vice president of the Northern and the president of the St. Louis Companies. The evidence fails to show that those present had express authority to act for the proprietary companies in amending the articles; and action of this kind—materially affecting the property interests of the three companies in a matter so vital as the ownership and control of an important terminal—was so far out of the usual or ordinary course of business that authority to represent their corporations in assenting to it was not to be implied as coming within the general scope of their duties. Nor did either of the proprietary companies, by any formal corporate action, accept or ratify the amendments.

Moreover, it affirmatively appears, and both courts below in effect found, that there was no actual intent on the part of any of the parties concerned to affect the substantial rights or equities of the proprietary companies, or to terminate, repudiate, or substantially modify the trust respecting the terminal property. It does appear that some of those active in proposing the amendments, and assuming to act for the proprietary companies in assenting to them (there is a question whether they actually were adopted by a proper vote of the stockholders, but we do not go into this), were under the impression that the contract of 1882, recited in the articles of incorporation, already had been abrogated and the trust set aside by the issuance of the terminal company's bonds and apportionment of the stock to the proprietary companies in payment for the property conveyed and by the making of deeds absolute in form; that both in respect to the ownership of the property and the management of it under the contract of 1889 the original *218 arrangement had been abandoned; and *that it was desirable to amend the articles so as to make them conform to the situation actually existing.

Clearly, this was a mistaken impression, as will appear from what we have said. It was a mistake not indeed as to any mere matter of fact, nor on the other hand as to any pure question of law, but rather as to the existing legal rights, interests, and relations of the parties resulting from antecedent transactions. Whether it was such a mistake as to furnish ground for a cancellation of the amendments in equity, is a question into which we need not enter. See Snell v. Insurance Co., 98 U. S. 85, 90, 25 L. Ed. 52; Griswold v. Hazard, 141 U. S. 260, 284, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; Utermehle v. Norment, 197 U. S. 40, 56, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; Philippine Sugar Co. v. Philippine Islands, 247 U. S. 385, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177; Pom. Eq. Jur. §§ 841–849. For the fact that those who assumed to act for the proprietary companies in assenting to the amendments were mistaken as to the existing legal situation, so that the amendments, if given effect according to their terms, instead of bringing the articles into conformity with the situation already actually existing, would materially change the situation to the disadvantage of the proprietary companies by putting an end to an important trust contrary to their actual intent as parties beneficially interested, is a cogent reason for holding as we do that authority on the part of agents to assent to such amendments is not to be implied where it was out of the ordinary course of business and express authority was not conferred.

[8] In support of the contention that the terminal property was not subject to any

trust either before or after the amendments, defendants cite a series of contracts in which the terminal company asserted its ownership without qualification, and of conveyances, mortgages, etc., by the proprietary companies recognizing the legal title of the terminal company to its property and asserting in themselves only a title to shares in the terminal company. But when a trust is once established and acknowledged it does *219 *not need to be constantly reiterated or confessed. None of the instruments referred to is in anywise inconsistent with the trust, the contracts of the terminal company were made in the very course of its administration of the trust, and the mortgages and conveyances of the proprietary companies dealt with legal titles only, their equitable interests in the terminal passing without mention as incidental to their ownership of the stock together with the connecting lines.

The majority of the Circuit Court of Appeals held that the control of the proprietary companies was relinquished by reason of the amendments and the conduct of the parties at the time and thereafter, upon this theory: That although the amendments were neither previously authorized nor afterwards formally accepted or ratified by the three companies, yet since their executive officers were aware of and approved the action of the meeting; since Hubbell was encouraged to purchase the bonds and stock, the value of the stock being wholly prospective; since after the amendments the stock of the terminal company was issued in accordance therewith and directors elected by the new method, the railroads making no attempt to exercise their right of naming directors in certain proportions as before; since for 17 years the railroads acted, as it seemed to the court, in harmony with the amended articles, not questioning their validity until this suit was commenced—they could not, after such delay, enforce their rights in a court of equity against defendants who to their knowledge had acted upon the belief that such rights did not exist, and had acquired and held property which had largely increased in value in the interval. It was held that this result had come to pass although the railroads never had intended it; that the sale of a part of the Wabash stock by the purchasing committee to Hubbell and Dodge, then influential in the two other roads, would seem at the time a mere rear- *220 rangement of the interests of *the three companies in the terminal company; but that the effect of the amendments was a severance of the control of the roads over the terminal company, and subsequent events confirmed this, so that when the Hubbells disposed of their interests in the Northern and Northwestern to the Milwaukee, retaining for themselves a majority of the terminal holdings, the result was that the railroads themselves had gradually let slip that exclusive ownership and control which at the beginning they had so much valued and so carefully guarded.

[9] Convinced that the relation of the parties was fiduciary and not merely contractual, we are unable to accept the view thus outlined. It would require a clear case to warrant a court of equity in declaring that the trustees of an express trust, in the very course of their administration of the trust, had acquired a dominant interest in the trust property and in effect a discharge of the trust, through mere inattention or even negligence—not raising an estoppel or amounting to laches—on the part of the parties beneficially interested, or of their executive officers. Conduct merely equivocal, or apparently inconsistent with a vigilant insistence upon the obligations of the trustee, is not sufficient to discharge a trust. The cestui que trust is entitled to rely upon the fidelity of the trustee, until plainly put on guard against him. And the trustee is at all times disabled from making a profit for himself out of any dealings in the trust property without the express consent of the cestui que trust.

[10] Nothing appears to create an estoppel against complainants. Neither they nor their predecessors have misled defendants to their disadvantage. The purchasing committee accepted a money consideration from Hubbell and Dodge for the transfer of a block of stock. But the purchasers had more complete and intimate knowledge of the situation than the committee had, and were specially put on notice, as the correspon- *221 dence shows. Indeed, their *knowledge of the true nature and office of the terminal company constituted adequate notice. And again, when the Messrs. Hubbell reacquired the same three-eighths with an additional one-quarter interest from the consolidated Northern and Western Company, they were as before chargeable with full notice of all the facts out of which the equities of complainants arise.

[11] The question of laches presents more difficulty; but after mature consideration we are convinced that it must be resolved in favor of complainants. Acquiescence by the executive officers of the proprietary companies in the changed situation resulting from the amendments of April 8, 1890, is stressed by counsel for defendants, as it was in the majority opinion of the Circuit Court of Appeals; it being pointed out that after the amendments directors were elected in in the new mode, and that in an agreement of ratification dated July 31, 1897, made for the purpose of giving recognition to the participation of the Wabash and of the consolidated Northern and Western Company in the obligations of the 1889 agreement, it was declared that so much of that agreement as

related to the issuance and distribution of the capital stock of the terminal company was no longer binding, and the stock was held in specified proportions, including "F. M. Hubbell & Son, 2,500 shares." This was a recognition of their status as de facto stockholders, but not a concession that the fiduciary character of the terminal company had been changed, or that the stock possessed any quality or value other than was consistent with the nature and terms of the trust. The parties acted in harmony with the amended articles so far as the internal organization of the company was concerned, but the company remained in possession of the property as before and continued to manage it in accordance with the terms of the agreement of 1889. Such possession was as consistent with a continued recognition of the trust as with the opposite; and it *222 does not appear *that at any time until shortly before the bill was filed defendants contended that the amendments amounted to an express repudiation of the trust or that the terminal company would be free from obligation at the expiration of the agreement. Prior to this there had been a difference about the disposition of the "surplus earnings," but this was no more than a question about the proper construction of the working agreement.

It seems to us the court below attributed undue weight to the conduct of the executive officers of the proprietary companies indicating acquiescence in a supposedly changed situation resulting from the amended articles. It would not be surprising if occasionally there was a failure to appreciate fully and accurately the rights and obligations growing out of the trust. But the Messrs. Hubbell, because of their fiduciary relation, are estopped from laying hold of the incautious, negligent or mistaken acts of the executive officers as a ground on which to build up a profit or advantage for themselves at the expense of the proprietary roads which were their cestuis que trustent.

Upon the whole case, it is our conclusion that the trust with respect to the terminal property continues substantially as it was established at the incorporation of the terminal company; that this company holds all its property and franchises—whether conveyed to it at the beginning or acquired since—in trust for the purpose of carrying out, in substance, the terms and spirit of the contract of January 2, 1882, with such minor changes as have been agreed upon since, and is bound to exercise all its powers (including its power to renew the corporate charter) in furtherance of the trust; that the amendments of April 8, 1890, were unauthorized by the proprietary companies and had no effect in discharging or modifying the trust; that complainants are the sole beneficial owners of the property and franchises of the terminal company, and they and their successors *223 and assigns, and such other *railroad companies owning or operating lines of railroad extending to or near Des Moines as may be admitted to a proprietary interest by consent of complainants and their successors and assigns, are (as between the present parties and their successors) entitled to the sole beneficial use of the terminal property upon paying the cost of the terminal service, including interest upon the mortgage debt and other proper charges, after crediting all revenues derived from other sources, and without profit to the terminal company; and that from and after the expiration of the 1889 agreement complainants were and are entitled to have a similar working arrangement renewed from time to time perpetually, its specific terms to be agreed upon between themselves, or judicially ascertained if they are unable to agree.

Complainants are entitled to a decree establishing the trust, with all appropriate incidental relief. We do not attempt to lay down the particular provisions of the decree. These may be settled by the District Court upon the going down of the mandate.

To consider, next, the status of the Hubbell stock: The title acquired by them from the consolidated company is attacked by the Chicago, Milwaukee & St. Paul on the ground that it was acquired by inequitable means, the Hubbells being at the time in control of the board of directors. It is attacked by the Wabash on the ground that the consolidated company could not in equity pass the stock to the Hubbells and thus impair the interest in the terminal company then held by the St. Louis Company, to which the Wabash has succeeded. We have not found it necessary to consider whether these contentions ought to be sustained as independent grounds of substantive relief, or to what extent they would be affected by the agreement of July 31, 1897, in which the consolidated and the Wabash Companies apparently gave recognition to the ownership of the stock by the Hubbells.

[12] We pass this, because convinced that *224 as incidental to the *principal relief granted, and necessary to give full effect to it, complainants are entitled upon equitable terms to have the Hubbell shares (including all "qualifying shares" controlled by them) surrendered for cancellation. Our reasons, briefly, are as follows: The issuance of the stock to the Messrs. Hubbell, and the clause of the 1897 agreement relating to it, already have been considered with other evidence cited by defendants to show an assent to or acquiescence in a modification or abandonment of the trust, and are found insufficient for the purpose. Hence this stock, being like all other stock of the terminal company subordinate to the trust that dominates all its property and franchises, does not repre-

sent in the hands of the Hubbells any property interest that they are entitled to set up as against the proprietary companies. When they acquired it, and at all other times material, they themselves were and still are acting in a fiduciary relation to the trust; hence they cannot be heard to assert any right in the stock that is inconsistent with the trust. Manifestly it would be inequitable for them to sell it to a bona fide purchaser who might claim (even though unsuccessfully) to hold it exempt from the trust. They may have expected to sell it at a profit to one of the proprietary companies, or with their consent to an outside company or companies qualified to participate in the beneficial use of the terminal property under the trust. But, because of their fiduciary character, they are debarred in equity from trafficking in the trust property in this or any other way without the express consent of the beneficiaries; they would be bound to account for any profit that might accrue; and any seeming consent on the part of the beneficiaries to waive such profit in advance, not amounting to a termination of the fiduciary relation, is in its nature revocable. The Hubbell stock, therefore, representing no legitimate proprietary interest as against complainants, serves merely to evidence a voting power and to *225 qualify its holders to act as directors *and officers of the terminal company; in short, to participate in a fiduciary employment, without profit beyond compensation for the value of the services rendered. But complainants, being the sole present beneficiaries of the trust and equitable owners of the terminal property, are entitled in equity to a controlling voice in the choice of directors, and especially to have the management of the trustee company, now and hereafter, freed from the domination of a stock interest that represents no property-interest in the concerns of the trust. To guard against such alien control and at the same time prevent the danger of the Hubbell stock getting into the hands of bona fide holders who might set up rights under it which the present holders are debarred in equity from asserting—in short, to avoid undue jeopardy to the trust—complainants are entitled to have this stock surrendered, retired and canceled, and, until surrendered, to an injunction against any sale, assignment, or transfer of it or any part of it, and against the exercise of any voting power thereon; but upon terms that complainants shall repay to the Messrs. Hubbell the amount they paid to the consolidated Northern and Western Company for it, viz. $25,000, with interest thereon from January 29, 1894. How this should be apportioned, as betweeen complainants, has not been discussed. It may be settled by the District Court.

The issue as to the surplus earnings relates to a considerable accumulation of moneys received by the terminal company from sources outside the proprietary companies. Possibly it may have become a moot question, in view of the result we have reached upon the main matter; but as this is not altogether clear we will dispose of the issue as raised. The agreement of 1889 provided that in making up the net cost of maintenance and operation chargeable to the proprietary lines on a wheelage basis, there should be deducted "the amount if any which other railway companies may be under obli- *226 gation to pay by virtue of con*tracts for the use of said property or parts thereof." In the course of time, the terminal company received not only payments from outside railroad companies under contracts technically for participation in the use of the terminal property—which have been credited to complainants and their predecessors according to their wheelage—but, in addition, substantial sums from railroad companies and others for switching and other terminal services and for rent of portions of the property and privileges thereon. Receipts of the latter character were called "surplus earnings." For a period of nearly two years after the making of the 1889 agreement they were included in the credits given to the proprietary companies. This was done at first by the accounting officers of the terminal company under the general direction of its president and executive committee. In February, 1891, the practice was approved by action of the board of directors. About a year later the board resolved that until its further action sums received as rents of real estate and all switching charges should not be thus credited, but should be used as a cash capital "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." Thereafter the surplus revenues were not again credited to the proprietary companies.

[13] We concur in the opinion of the Circuit Court of Appeals that by the fair construction of the 1889 agreement and the practical construction placed upon it by the parties at the beginning—a construction entirely consonant with the terms of the trust —complainants and their predecessors were entitled to credit for the surplus earnings as they accrued, each company to a share proportioned to its wheelage, and that the 1897 contract did not change this. It was decreed that these earnings belonged to complainants, and that there should be an accounting to ascertain the part due to each upon a wheelage basis. As to this the only question that occurs to us is whether the *227 accounting *should include sums that have been appropriated out of these earnings and devoted to capital expenditures for acquiring additional property and for permanent

improvements—sometimes, apparently, with approval of complainants or their predecessors, sometimes without. This would hardly seem to be of serious consequence in view of the result we have reached upon the main issue. It is chiefly of interest to complainants; but they have not argued the question, declaring indeed that the entire controversy as to the surplus earnings would be material only should this court decide that complainants had no proprietary interest in the terminal company.

[14] Defendants have assigned error to so much of the decree of the Circuit Court of Appeals as awards the surplus earnings to complainants, but have not furnished data enabling us to draw an accurate line between those that were and those that were not disbursed for permanent improvements, or between those disbursements that were approved and those that were not. Unaided by counsel we hardly could be expected to unravel the somewhat obscure evidence bearing upon these points. We must therefore content ourselves with simply affirming that portion of the decree which relates to the surplus profits.

The main portion of the decree as attacked by complainants must be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

As to costs, the decrees of the courts below apportioned them one-half to complainants and one-half to the terminal company. We leave this disposition undisturbed. The entire costs in this court should be paid by defendants Frederick M. Hubbell and Frederick C. Hubbell.

No. 66. Decree reversed.

No. 67. Decree affirmed.

Cause remanded to the District Court for further proceedings in conformity with this opinion.

(254 U. S. 175)

WELLS FARGO & CO. v. TAYLOR.

(Argued Dec. 19, 1919. Decided Dec. 6, 1920.)

No. 41.

1. Appeal and error 🔑1201(1)—On reversal, because bill failed to state necessary fact, trial court may allow amendment.

A decision by the Circuit Court of Appeals, reversing a decree for plaintiff because the bill failed to state a necessary fact, did not prevent amendment of the bill by leave of the District Court to allege that fact, even though, in denying a petition for rehearing, the Circuit Court of Appeals refused to direct the allowance of the amendment, especially where, on a subsequent appeal, the Circuit Court of Appeals did not construe its former decree as finally disposing of the case.

2. Courts 🔑508(3)—United States court can enjoin enforcement of judgment wrongfully obtained in state court.

The United States court can enjoin the enforcement of a judgment rendered by a state court on a showing that the judgment was obtained by fraud, or that for some other reason it was inequitable to enforce it, since that is an independent suit, not affected by Judicial Code, § 265 (Comp. St. § 1242), prohibiting the United States courts from granting injunction to stay proceedings in a state court.

3. Master and servant 🔑88(1)—Contract between express company and railroad held not to make express messenger a railroad employé.

A contract between an express company and a railroad company, whereby the latter agreed to furnish the cars and motive power for the transportation of the express and the messengers in charge thereof, in return for a stated compensation, does not make an express messenger, while riding on a car, an employé of the railroad company.

4. Master and servant 🔑100(1) — Express company not "common carrier by railroad," within federal act forbidding release.

The federal Employers' Liability Act (Comp. St. §§ 8657–8665), applying to every "common carrier" by railroad, applies only to a railroad acting as a common carrier, which is not only in accord with the ordinary acceptation of the words, but is enforced by provisions of the several sections of the act, obviously referring to railroad property and equipment, so that section 5 of that act (section 8661), prohibiting contracts by employés of such carriers to release liability for injuries, does not apply to a contract between an express company and its messenger.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

5. Master and servant 🔑100(1) — Contract assuming risk valid, in absence of statute.

In the absence of statute regulating the subject, an express messenger's agreement to assume all risk of injury incidental to his employment, from whatever cause arising, is valid and binding.

6. Judgment 🔑452—Servant can be enjoined from enforcing judgment obtained in violation of contract for which master would be liable.

Where an express messenger obtained in the state court a judgment against a railroad company for injuries sustained during his employment, in violation of his agreement with the express company to assume all risks of injury from whatever source, and it appeared that the express company would be obligated under its contract with the railroad company to pay that judgment, and that the messenger had no property subject to execution, the express company is entitled to have the enforcement of the judgment restrained.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by Wells Fargo & Co. against Oscar G. Taylor to restrain the enforcement of a judgment secured by defendant Taylor in the state court. Decree for plaintiff was reversed by the Circuit Court of Appeals, with directions to dismiss the bill (Taylor v. Wells Fargo & Co., 249 Fed. 109, 161 C. C. A. 161), and plaintiff brings certiorari. Decree of the Circuit Court of Appeals reversed.

*176

*Messrs. Charles W. Stockton, Branch P. Kerfoot, and Edward R. Whittingham, all of New York City, for petitioner.

Mr. Thomas Fite Paine, of Aberdeen, Miss., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

Oscar G. Taylor, an express messenger of Wells Fargo & Co. a common carrier by express, *177 received sub*stantial personal injuries through the derailment of an express car in which he was working, and which was part of a passenger train moving over the railroad of the St. Louis & San Francisco Railroad Company in the state of Mississippi—the derailment resulting from negligence on the part of the railroad company and its employés. To recover for these injuries Taylor brought an action against the railroad company in the circuit court of Monroe county, Mississippi, and obtained a judgment for $4,000, which was affirmed by the Supreme Court of the state without an opinion. See St. Louis & S. F. Ry. Co. v. Taylor, 58 South. 485.

In his declaration in that case Taylor explained and justified his presence on the train and in the express car by alleging that he was then in the employ of the express company as its messenger and in the course of that employment was in charge of express matter which the railroad company was transporting for the express company, that this transportation was in pursuance of a contract between the two companies, and that under the contract the express car was furnished by the railroad company and he, as the express company's messenger, was permitted to accompany the express matter carried therein.

While the declaration said nothing more about the nature or terms of that contract, it is important here to have them in mind. The contract shows that it was intended to, and did, cover all express business on and over the railroad company's road, both within and without the state of Mississippi, for a specified period, including the day when Taylor was injured. It gave to the express company the exclusive privilege of conducting an express business on and over the railroad and obligated the railroad company to refrain from conducting an express business. There were provisions whereby the railroad company agreed (a) to transport by suitable cars, to be provided by it and attached to its passenger trains, all express matter of the express company and the messengers accompanying *178 the *same; (b) to light and warm the cars and equip them with necessary conveniences; and (c) to permit portions of its station houses to be used by the express company for the reception, safe keeping and delivery of express matter. And there were other provisions whereby the express company agreed (a) to make stated payments—usually a percentage of the gross earnings—for the facilities furnished and service rendered by the railroad company; (b) to assume all risks, losses and damages to its own property, express matter and valuable packages transported under the contract; (c) to assume all risk and damage to its agents and employés while engaged in its business on the trains or property of the railroad company; and (d) to indemnify and hold harmless the railroad company in respect of all claims for damages suffered by such agents and employés while so engaged.

There was also a contract between Taylor and the express company, spoken of as a messenger's agreement, wherein—following a recital that he had full knowledge of the service required and the conditions on which the railroad company would permit messengers to accompany express matter on its trains, and that with such knowledge he was desirous of becoming a messenger of the express company—it was stipulated, as a term or condition of his employment, that neither the express company nor the railroad company should under any circumstances or in any case be liable for any injury which he might receive while on the railroad company's trains as such messenger, whether caused by negligence of the railroad company or otherwise, and that he would assume all and every risk incident to such employment, from whatever cause arising.

Promptly after Taylor sued the railroad company in the circuit court of Monroe county, and before the case was brought to trial, the express company presented to that court in that cause a petition wherein it set out the contracts just described and asked to be made *179 a party defend*ant. To this the railroad company assented, but Taylor evidently objected and the petition was denied. The railroad company by its answer and evidence sought to avail itself of the stipulation in the messenger's agreement, in connection with those in the other contract, but the court ruled against it and Taylor obtained the judgment before mentioned.

What has been recited will conduce to a right understanding of another suit the decree in which we are now to review.

The suit is in equity and was brought by the express company against Taylor in the District Court of the United States for the Northern District of Mississippi. The federal jurisdiction rests on diversity of citizenship—the express company being a corporation and citizen of Colorado, and Taylor a citizen of Mississippi residing in the Northern district. The bill, with a supplement and amendment, proceeds on the theory that, in suing the railroad company and obtaining a judgment against it, which as between that company and the express company must be paid by the latter as stipulated in their contract. Taylor not only violated the messenger's agreement, but perpetrated a legal fraud on the express company; that the judgment is therefore one which in equity and good conscience he has no right to enforce; that if he be permitted to enforce it the express company will be without any effective remedy in that he has no property which can be reached by legal process (a fact which is both alleged and proved); and that the express company, which was not a party to that case, and has not been in any wise negligent or at fault, is in equity and good conscience entitled to have the messenger's agreement respected and to demand that the claims embraced in the inequitable judgment be relinquished and the enforcement of the judgment enjoined. The prayer conforms to that theory and is in substance that Taylor be required specifically to *180 perform *and carry out the messenger's agreement, to execute a sufficient release of all claims on account of the injuries received, and to abstain from enforcing the judgment. General relief also is prayed.

Taylor challenged the bill by a demurrer, which was overruled, and after a hearing in due course the express company prevailed. On appeal to the Circuit Court of Appeals that decree was reversed and the suit remanded because in that court's opinion the bill did not show that Taylor was not in the employ of the railroad company or that he was solely in the employ of the express company. Taylor v. Wells Fargo & Co., 220 Fed. 796, 136 C. C. A. 402. After the mandate was received, Taylor conceiving that the decision of the Circuit Court of Appeals fully disposed of the merits and was final, requested the District Court to enter a decree dismissing the bill, and the express company requested leave to amend the bill by correcting the defect pointed out by the Circuit Court of Appeals. Taylor's request was denied and that of the express company was granted. The bill was accordingly amended so as to show that Taylor was not in the employ of the railroad company, but was on the train solely in virtue of his employment by the express company, and that in his declaration in the action against the railroad company he did not claim or allege any employment by that company, but, on the contrary, claimed and alleged that it permitted him to be on the train because he was accompanying the express matter as the express company's employé. Taylor then filed a new answer, and on a further hearing a decree for the express company was entered. By it the District Court found that the allegations of the bill, with its supplement and amendment, were all true; declared that the institution of the action against the railroad company and its prosecution to judgment constituted a violation of the messenger's agreement and a legal fraud on the express company; directed Taylor to carry out and perform the messenger's *181 *agreement and to execute, within a fixed time, an appropriate instrument releasing the express company and the railroad company from all claims for damages on account of his injuries; and enjoined him from collecting or attempting to collect the judgment against the railroad company. On a further appeal to the Circuit Court of Appeals that decree was reversed with directions to dismiss the bill. Taylor v. Wells Fargo & Co., 249 Fed. 109, 161 C. C. A. 161. A writ of certiorari was then granted by this court, 247 U. S. 515, 38 Sup. Ct. 581, 62 L. Ed. 1244.

On the second appeal the Circuit Court of Appeals put its decision entirely on the ground that the express company was a "common carrier by railroad" within the meaning of the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657–8665), and therefore under section 5 of the act (section 8661) the messenger's agreement was void. Taylor advanced that and other grounds in asking a reversal, but the court did not discuss the other grounds. All are pressed on our attention, and we take them up in what seems the natural order.

[1] 1. It is urged that the decision of the Circuit Court of Appeals on the first appeal was final in that it disposed of all questions in the suit and left nothing open to the District Court but to dismiss the bill. Had this been so, the Circuit Court of Appeals on the second appeal hardly would have failed to enforce its prior decision. But that decision did not go as far as is claimed. It turned on the sufficiency of the bill, and on that alone. The District Court had held the bill sufficient when challenged by a demurrer. The Circuit Court of Appeals held it insufficient, and for that reason reversed the decree and remanded the suit. Had the District Court taken that view when acting on the demurrer, it undoubtedly could, and probably would, have allowed an amendment curing the defect. Could it not equally allow the amendment after the Circuit Court of Appeals pointed out the defect and remanded the suit? It, of course, was bound to give *182 effect to the decision and *mandate of the Circuit Court of Appeals; but that court did not order the bill dismissed nor give any direction even impliedly making against the amendment. All that was disposed of was the matter of the sufficiency of the bill. And recognition of this is found in the last opinion of the Circuit Court of Appeals, where it is said that the first reversal was "based upon the insufficiency of the pleadings." We think the decision on the first appeal was not final and that the District Court was left free, in the exercise of its discretion, to per-

mit the amendment. Equity Rules Nos. 19 and 28 (32 Sup. Ct. xxiii, xxvi); In re Sanford Fork and Tool Co., 160 U. S. 247, 258, 259, 16 Sup. Ct. 291, 40 L. Ed. 414; Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 553, 24 Sup. Ct. 538, 48 L. Ed. 788; Smith v. Adams, 130 U. S. 167, 177, 9 Sup. Ct. 566, 32 L. Ed. 895. It appears that in denying a petition for a rehearing on the first appeal the Circuit Court of Appeals refused to direct the allowance of the amendment; but this signifies nothing more than that no occasion was perceived for controlling the District Court's discretion in the matter.

[2] 2. Section 265, Judicial Code, formerly section 720, Rev. Stat. (Comp. St. § 1242), provides that—

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

And this is relied on as showing that the District Court could not entertain the suit. That court held the provision not applicable, and the Circuit Court of Appeals said nothing on the subject on either appeal, possibly because in a similar case it had held the provision without application.

Is the suit one to stay proceedings in a state court in the sense of that provision? If it is, the District Court erred in not dismissing the bill on that ground. Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; United States v. Parkhurst-Davis Co., 176 U. S. 317, 20 Sup. Ct. 423, 44 L. Ed. 485. If it is not, the court rightly entertained the suit and proceeded to an adjudication of the merits, for *183 the citizenship of the *parties and the amount in controversy were within the jurisdictional requirements.

The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Missouri v. Chicago, Burlington & Quincy R. R. Co., 241 U. S. 533, 538, 543, 36 Sup. Ct. 715, 60 L. Ed. 1148), or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts (French v. Hay, 22 Wall. 250, note, 22 L. Ed. 857; Julian v. Central Trust Co., 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629; Chesapeake & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 219, 29 Sup. Ct. 430, 53 L. Ed. 765; Looney v. Eastern Texas R. R. Co., 247 U. S. 214, 221, 38 Sup. Ct. 460, 62 L. Ed. 1084), or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience (Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; Ex parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429; *184 *Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; Public Service Co. v. Corboy, 250 U. S. 153, 160, 39 Sup. Ct. 440, 63 L. Ed. 905; National Surety Co. v. State Bank of Humboldt, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394).

Marshall v. Holmes, just cited, was a suit in equity to enjoin one who had obtained judgments in a state court from enforcing them, that relief being sought on the ground that they were secured by fraud which was not discovered until after they were rendered; and the question distinctly presented was whether the suit was one which the Circuit Court of the United States could entertain and decide, the requisite diversity of citizenship and amount in dispute being present. This court—after adverting to prior decisions stating the familiar doctrine that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or its agents, will justify an application to a court of chancery," and also showing that such a suit is not one to review or revise the action of the court rendering the judgment, but is a new and independent suit for equitable relief—answered the question by saying:

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained

in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceed-

ings in a *state court. It would simply take from him the benefit of judgments obtained by fraud."

Simon v. Southern Ry. Co., supra, was a suit in a Circuit Court of the United States to enjoin the enforcement of a judgment in a state court on the ground that it was obtained by fraud and without notice, and the defendant invoked the provision in section 265. The Circuit Court took jurisdiction and awarded the relief sought. That decision was affirmed by the Circuit Court of Appeals and on a further appeal was sustained by this court. At that time this court considered the provision in the light of its origin and purpose, reviewed the prior decisions and in an extended opinion having the approval of the entire court reaffirmed the ruling in Marshall v. Holmes.

National Surety Co. v. State Bank of Humboldt, supra, was a suit in a federal court to obtain like relief in respect of a judgment in a state court on the ground that through a mistake of a public officer, for which he alone was responsible, the judgment had been rendered without opportunity for putting in a defense, and this when there was one which was both meritorious and complete. The suit was not brought by the judgment defendant, but by one who was obligated to pay the judgment if it was enforced. The bill was dismissed because of the provision now relied on; but that decision was reversed by the Circuit Court of Appeals in a well-considered opinion wherein it was said that in cases otherwise within the jurisdictional statute "the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment plaintiff from enforcing an unconscionable judgment of a state court, which has been procured through fraud, accident, or mistake, that they have to restrain him from collecting a like judgment of a federal court"; that the bill presented a new and justiciable case which had not been presented to nor decided by the state court and did not "fall under the ban of the section of the statute under consideration";

and *that—

> "In this case all these facts concur—the judgment which it is against conscience to allow to be used to extort money that is not owing from a defendant remediless at law, the complete meritorious defense to the claim on which this judgment is based, the fact that the defendant in the judgment was prevented from availing itself of its defense to the cause of action by an unavoidable accident, and the absence of any negligence of the defendant or of its agents. These facts appeal with compelling force to the conscience of a chancellor. They have been presented to a court to which the Constitution and the acts of Congress have granted the power, and upon which they have imposed the duty, to grant the relief to which the complainants are equitably entitled; and the decree which dismissed their bill must be reversed."

Without pursuing the subject further, we hold that the present suit is not one to stay proceedings in a state court in the sense of section 265.

3. Does the Employers' Liability Act affect the validity of the messenger's agreement?

The act provides that "every common carrier by railroad" shall be liable in damages for the injury or death of any of its employés occurring while it is engaged and he is employed in interstate commerce and resulting in whole or in part from the negligence of any of its officers, agents or employés, or from any defect or insufficiency, due to its negligence, "in its cars, engines, appliances, machinery, track, roadbed," etc.; and in section 5 it declares that any contract whereby a common carrier exempts itself from "any liability created by this act" shall to that extent be void.

[3] In his declaration in the state court Taylor did not claim that he was in the employ of the railroad company, and his judgment was not obtained on that theory. Here it is shown with certainty that he was not in that company's employ. True he urges

that the contract between the two *companies shows a coproprietorship or sort of partnership between them which made him an employé of both; but the contract discloses no basis for the claim or for distinguishing his case from that of the Pullman porter recently before us. Robinson v. Baltimore & Ohio R. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849. Here the businesses of the companies concerned were quite as distinct in point of control and otherwise as they were there. That here the railroad company provided the express car is not material, for it is measurably equalized by other differences. In both cases the railroad company provided the motive power and the train operatives. The messenger here, like the porter there, was on the train as an employé, not of the railroad company, but of another by whom he was employed, directed and paid, and at whose will he was to continue in service or be discharged.

[4] As respects the express company, it appears not merely that Taylor was in its employ, but also that the injuries were received while it was engaged and he was employed in interstate commerce; and so the question is presented whether the act embraces a common carrier by express which neither owns

nor operates a railroad, but uses and pays for railroad transportation in the manner before shown. The District Court answered the question in the negative and the Circuit Court of Appeals in the affirmative. A negative answer also has been given in a like situation by the Court of Errors and Appeals of New Jersey (Higgins v. Erie R. R. Co., 89 N. J. Law, 629, 99 Atl. 98), and a recent decision by the Supreme Court of Minnesota makes persuasively for that view (State ex rel. v. District Court, 142 Minn. 410, 172 N. W. 310).

In our opinion the words "common carrier by railroad," as used in the act, mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the ordinary *188 acceptation of the words, *but is enforced by the mention of cars, engines, track, roadbed, and other property pertaining to a going railroad (see Southern Pacific Co. v. Jensen, 244 U. S. 205, 212–213, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900); by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad employés (see San Antonio & Aransas Pass Ry. Co. v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 60 L. Ed. 1110); by the use of similar words in closely related acts which apply only to carriers operating railroads (27 Stat. 531, c. 196 [Comp. St. §§ §§ 8605–8612]; 35 Stat. 476, c. 225 [Comp. St. §§ 8624–8629]; 36 Stat. 350, c. 208 [Comp. St. §§ 8642–8647]); and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown (Burton Stock Car Co. v. Chicago, B. & Q. R. R. Co., 1 Interst. Com. Com'n R. 349; United States v. Morsman [D. C.] 42 Fed. 448; Southern Indiana Express Co. v. United States Express Co. [C. C.] 88 Fed. 659, 662; Id., 92 Fed. 1022, 35 C. C. A. 172). And see American Express Co. v. United States, 212 U. S. 522, 531, 534, 29 Sup. Ct. 315, 53 L. Ed. 635.

As Taylor was not an employé of the railroad company and the express company was not within the Employers' Liability Act, it follows that the act has no bearing on the liability of either company or on the validity of the messenger's agreement.

[5, 6] 4. There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions that the messenger's agreement was a valid and binding contract whereby Taylor agreed to assume all risk of injury incident to his employment, from whatever cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries. Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; Baltimore & Ohio Southwestern Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. *189 Ed. 560, and cases cited; Santa Fé, *etc., Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787; Robinson v. Baltimore & Ohio R. R. Co., supra; Perry v. Philadelphia, etc., Co., 24 Del. (1 Boyce) 399, 77 Atl. 725; McKay v. Louisville & Nashville R. R. Co., 133 Tenn. 590, 182 S. W. 874; Fowler v. Pennsylvania R. R. Co., 229 Fed. 373, 143 C. C. A. 493. In violation of that agreement he wrongfully sought and obtained a judgment against the railroad company, which as between the two companies the express company is bound to pay. The judgment was obtained in an action to which that company was not a party and wherein it could not be heard. He is financially irresponsible and if the judgment is collected the express company, which has not been in any wise negligent or at fault, will be remediless. In these circumstances, that company is entitled in equity and good conscience, as is shown by the cases before cited, to a decree holding him to his agreement and depriving him of his present inequitable advantage, and to that end enjoining him from collecting the judgment.

It follows that the decree of the District Court was right and that the Circuit Court of Appeals erred in reversing it.

Decree reversed.

(254 U. S. 189)

JIN FUEY MOY v. UNITED STATES.

(Argued Oct. 11, 1920. Decided Dec. 6, 1920.)

No. 44.

1. Courts 🔑385(1)—Supreme Court's jurisdiction on direct writ of error continues, notwithstanding determination of constitutional question.

The jurisdiction of the Supreme Court, on a direct writ of error brought on the ground of the unconstitutionality of the statute involved, continues for the purpose of disposing of other questions raised in the record, though the constitutional question has been set at rest by the decision in another case.

2. Poisons 🔑9—Indictment charging physician with selling opium by issuing prescription not repugnant.

Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), prohibiting the sale of prescribed drugs, but excepting the dispensing thereof to a patient by a physician, and Criminal Code, § 332 (Comp. St. § 10506), making one aiding or abetting the commission of an offense a principal, a physician may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription, and an indictment charging him with selling the drug by issuing the prescription is not repugnant.

3. Poisons 🔑9—Evidence held sufficient to support conviction of physician under Anti-Narcotic Act.

Evidence *held* sufficient to support a conviction of a physician for violating Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), by unlawfully issuing prescriptions not issued to patients in the course of professional practice.

4. Poisons 🔑4—Immunity of physician under Anti-Narcotic Act limited to appropriate bounds of physician's professional practice.

Under Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), excepting from the prohibition against sale the dispensing of the prohibited drugs to a patient by a physician in the course of his professional practice, the immunity of a registered physician is confined within the appropriate bounds of a physician's professional practice, and a prescription issued for a sale to a dealer or to cater to the appetite or satisfy the craving of an addict protects neither the physician nor the dealer knowingly filling it.

5. Witnesses 🔑52(7)—Wife incompetent to contradict testimony of witnesses for government.

A wife was incompetent to testify as a witness for her husband for the purpose of contradicting witnesses for the government, who testified that certain matters transpired in her presence, as the rule excluding a wife from testifying for her husband applies, irrespective of the kind of testimony she might give.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Jin Fuey Moy was convicted of a violation of the Harrison Anti-Narcotic Act, and he brings error. Affirmed.

For opinion below, see 253 Fed. 213.

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*Messrs. H. Ralph Burton, of Washington, D. C., John W. Dunkle, of Pittsburgh, Pa., and Blaine Mallan, of Washington, D. C., for plaintiff in error.

Mr. Solicitor General Frierson, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

[1] Plaintiff in error was indicted and convicted for violating section 2 of an Act of Congress approved December 17, 1914, commonly known as the Harrison Anti-Narcotic Act (38 Stat. 785, ch. 1 [Comp. St. § 6287h]).[1] His motion in arrest of judgment having *191 *been overruled (253 Fed. 213), he brought the case here by direct writ of error under section 238, Judicial Code, upon the ground of the unconstitutionality of the act. Afterwards this question was set at rest by our decision in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, sustaining the act; but our jurisdiction continues for the purpose of disposing of other questions raised in the record. Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544; Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542.

These questions relate to the sufficiency of the indictment, the adequacy of the evidence to warrant a conviction, the admissibility of certain evidence offered by defendant and rejected by the trial court, and the instructions given and refused to be given to the jury.

[2] The indictment contained twenty counts, differing only in matters of detail. Defendant was convicted upon eight counts, acquitted upon the others. Each count averred that on a date specified, at Pittsburgh, in the county of Allegheny, in the Western district of Pennsylvania, and within the jurisdiction of the court, defendant was a practicing physician, and did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away certain derivatives and salts of opium, to wit, a specified quantity of morphine sulphate, to a person named, not in pursuance of a written order from such person on a form issued in *192 blank for that purpose by the *Commissioner of Internal Revenue under the provisions of section 2 of the act, "in manner following, to-wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense" to the person named a certain prescription of which a copy was set forth, and that said person "was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only;

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[1] Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—

(*a*) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; * * *

(*b*) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act. * * *

contrary to the form of the act of Congress," etc.

It is objected that the act of selling or giving away a drug and the act of issuing a prescription are so essentially different that to allege that defendant sold the drug by issuing a prescription for it amounts to a contradiction of terms, and the repugnance renders the indictment fatally defective. The government suggests that the clause as to issuing the prescription may be rejected as surplusage; but we are inclined to think it enters so intimately into the description of the offense intended to be charged that it cannot be eliminated, and that unless defendant could "sell," in a criminal sense, by issuing a prescription, the indictment is bad. If "selling" must be confined to a parting with one's own property there might be difficulty. But by section 332 of the Criminal Code (Comp. St. § 10506):

> "Whoever directly commits any act constituting an offense, defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Taking this together with the clauses quoted from section 2 of the Anti-Narcotic Act, it is easy to see, and the evidence in this case demonstrates, that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser. Hence there is no necessary repugnance between prescribing and selling, and the indictment must be sustained.

[3] The evidence shows that defendant

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was a practicing *physician in Pittsburgh, registered under the act so as to be allowed to dispense or distribute opium and its derivatives without a written order in official form, "in the course of his professional practice only"; that he was in the habit of issuing prescriptions for morphine sulphate without such written order and not in the ordinary course of professional practice; that he issued them to persons not his patients and not previously known to him, professed morphine users, for the mere purpose, as the jury might find, of enabling such persons to continue the use of the drug, or to sell it to others; in some cases he made a superficial physical examination, in others none at all; his prescriptions called for large quantities of morphine—8 to 16 drams at a time—to be used "as directed", while the directions left the recipient free to use the drug virtually as he pleased. His charges were not according to the usual practice of medical men, but according to the amount of the drug prescribed, being invariably one dollar per dram. All the prescriptions were filled at a single drug store in Pittsburgh, the recipients being sent there by defendant for the purpose; and persons inquiring at that drug store for morphine were sent to defendant for a prescription. The circumstances strongly tended to show co-operation between defendant and the proprietors of the drug store. At and about the dates specified in the indictment—the spring of the year 1917—and for more than two years before, the number of prescriptions issued by defendant and filled at this drug store ran into the hundreds each month, all calling for morphine sulphate or morphine tablets in large quantities. In one case a witness who had procured from defendant two prescriptions—one in his own name for 10 drams, the other in the name of a fictitious wife for 6 drams—and had been directed by defendant to the specified drug store in order to have them filled, asked defendant to confirm the prescriptions by telephone so there would be no trouble; to which defendant replied:

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> *"Oh, never mind; we do business together; we understand each other."

On another occasion the same witness, having received from defendant two prescriptions for 8 drams each, one in his own name, the other in the name of the supposed wife, stating in one case a Cleveland address, in the other a Pittsburgh address, presented them at the drug store to be filled, and was told by the manager that he would not fill any more prescriptions under a Pittsburgh address; "they were taking too big a chance, and I must go back to the Chinaman and tell him what he told me, and he would understand—the Chinaman would understand." Witness returned the two prescriptions to defendant, told him what the manager had said, and defendant retained those prescriptions and issued to the witness a new one for 16 drams in place of them, with which the witness returned to the drug store and procured the specified quantity of the drug.

[4] In each case where defendant was found guilty the evidence fully warranted the jury in finding that he aided, abetted, and procured a sale of morphine sulphate without written order upon a blank form issued by the Commissioner of Internal Revenue, and that he did this by means of a prescription issued not to a patient and not in the course of his professional practice, contrary to the prohibition of section 2 of the act. Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. Webb v. United

States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497.

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*Errors assigned to the instructions given and refused to be given by the trial judge to the jury are disposed of by what we have said.

[5] But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by sec. 858, Rev. Stat. U. S., being confined to civil actions. Logan v. United States, 144 U. S. 263, 299–302, 12 Sup. Ct. 617, 36 L. Ed. 429; Hendrix v. United States, 219 U. S. 79, 91, 31 Sup. Ct. 193, 55 L. Ed. 102. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not "in behalf of her husband," that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.

The judgment under review is
Affirmed.

(254 U. S. 251)

UNITED STATES v. NORTHERN PAC. RY. CO.

(Argued Nov. 11 and 12, 1920. Decided Dec. 6, 1920.)

No. 88.

1. Commerce 🔑27(2)—Safety Appliance Act held to apply to terminal railroad.

A terminal railroad, 4 miles long, crossing other railroads and streets on which street cars run, and on which trains are run at a speed of from 3 to 18 miles an hour, is within Safety Appliance Act March 2, 1893, § 1 (Comp. St. § 8605), as amended by Act March 2, 1903, § 2 (Comp. St. § 8614), requiring a specified percentage of the train brakes to be coupled so as to be under engine control, assuming that use of the road as part of a main line is essential, where two independent companies use the road for freight trains under air control, and passenger trains of another company cross it.

2. Commerce 🔑27(2)—Safety Appliance Act not limited to main track operations.

Safety Appliance Act March 2, 1893, § 1 (Comp. St. § 8605), as amended by Act March 2, 1903, § 2 (Comp. St. § 8614), requiring train brakes to be coupled so as to be under engine control, is not limited to operations on main line tracks, but applies to all trains used on any railroad engaged in interstate commerce.

3. Commerce 🔑27(1) — Transfer trains on terminal railroad held "trains," within Safety Appliance Act.

Trains, consisting of a locomotive and 40 or 48 cars, and operated for a distance of 4 miles over a terminal railroad, not used for switching or assembling cars, were "trains," within Safety Appliance Act March 2, 1893, § 1 (Comp. St. § 8605), as amended by Act March 2, 1903, § 2 (Comp. St. § 8614).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Train.]

4. Commerce 🔑27(1)—Moving cars attached to locomotive are within Safety Appliance Act, except when they are not trains.

A moving locomotive with cars attached is without the provision of Safety Appliance Act March 2, 1893, § 1 (Comp. St. § 8605), as amended by Act March 2, 1903, § 2 (Comp. St. § 8614), only when it is not a train, as where the operation is that of switching, classifying, and assembling cars in yards in making up trains.

5. Railroads 🔑229—Application of Safety Appliance Act not dependent on dangers incident to particular operations.

Safety Appliance Act March 2, 1893, § 1 (Comp. St. § 8605), as amended by Act March 2, 1903, § 2 (Comp. St. § 8614), requiring brakes to be so coupled as to be under engine control, does not impose on the courts any duty to weigh the dangers incident to particular operations.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against the Northern Pacific Railway Company. A judgment for defendant was affirmed by the Circuit Court of Appeals for the Eighth Circuit (255 Fed. 655, 167 C. C. A. 31), and the United States brings certiorari. Reversed.

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*Assistant Attorney General Adams, for the United States.

Messrs. D. F. Lyons and Charles W. Bunn, both of St. Paul, Minn., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Northern Pacific Railway Company owns and uses in interstate commerce a terminal railroad along the water front of Duluth extending from Rice's Point to Furnace, a distance of 4 miles. It was sued in the District Court of the United States for the District of Minnesota for violating the Safety Appliance Act[1] by operating over the whole of this road, in September, 1916, two transfer trains, without complying with the requirement that 85 per cent. of the train brakes be coupled so as to be under engine control. One train consisted of a locomotive and 48 cars; the other, of a locomotive and 40 cars. The company contended that the provision of the Safety Appliance Act did not control the operation, because this terminal road was not part of a main line; that neither passenger nor freight trains, through or local, moved on it; that on it trains are not *253 operated by time-tables, train *orders, or time-cards, nor is the use of the track controlled by block signals; that on it no train has right of way over another; but that there the single operating rule applies which requires all trains to move at such speed that they can be stopped at vision, and that trains are under the yardmaster's orders. The company's contention was sustained by the District Court which directed a verdict for defendant; and the judgment entered thereon was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 225 Fed. 655, 167 C. C. A. 31. The case comes here on writ of certiorari. 249 U. S. 597, 39 Sup. Ct. 388, 63 L. Ed. 795.

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[1] Act March 2, 1893, c. 196, § 1, 27 Stat. 531 (Comp. St. § 8605) as amended by Act March 2, 1903, c. 976, § 2, 32 Stat. 943 (Comp. St. § 8614), and order of Interstate Commerce Commission dated June 6, 1910.

These additional facts are material: The road for a distance of a mile at the beginning and for less at the end is single track. It crosses at grade two streets, on one of which run street cars. It crosses at grade, at five places in all, lines of three independent railroad companies which run freight trains to piers situated between Rice's Point and Furnace. One of these companies also runs passenger trains across defendant's tracks. In addition, two other independent companies use, under the usual traffic right agreement, about a mile of this railroad as a part of their freight lines to piers situated between Rice's Point and Furnace. These 4 miles of railroad owned by the Northern Pacific are not used by it for switching or assembling cars. The switching, assembling, and classification of cars for its through and local freight is done in the Rice's Point yard, where there are 55 tracks, each 4,000 feet long, and at Furnace, where there are 15 tracks, cars are also switched and assembled. At Berwind and Boston, two intermediate points, where there are respectively 9 and 6 tracks, cars are frequently set out or picked up by transfer trains. The transfer trains here in question appear to have run solid between Rice's Point and Furnace. Trains are run by the Northern Pacific on this line at a speed varying from 3 to 18 miles an hour.

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[1-5] *The company contends that the rule applied in United States v. Erie Railroad Co., 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019, United States v. Chicago, Burlington & Quincy Railroad Co., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. 1023, and Louisville & Jeffersonville Bridge Co. v. United States, 249 U. S. 534, 39 Sup. Ct. 355, 63 L. Ed. 757,[2] is not applicable, because here, unlike those cases, no part of the trains' journey was performed on a track used as part of the main line of the Northern Pacific system. If use of the road as part of a main line were essential in order that operations on it be controlled by the Safety Appliance Act, the requirement would be satisfied in this case by the fact that two independent companies use the road for freight trains under air control and that the passenger trains of another company cross it. "Not only were these [the defendant's] trains subject to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect." United States v. Chicago, etc., Ry., supra. But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains * * * used on any railroad engaged in interstate commerce." It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within rail- *255 road yards for the purpose of making *up trains. Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented.

The judgment of the United States Circuit Court of Apppeals is

Reversed.

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[2] That case was decided by this court April 21 1919. The decision of the Circuit Court of Appeals in the case at bar was rendered January 15, 1919.

(254 U. S. 228)

NICCHIA v. PEOPLE OF STATE OF NEW YORK.

(Argued Nov. 17, 1920. Decided Dec. 6, 1920.)

No. 74.

1. Animals 🔑4—Constitutional law 🔑287—License fees on dogs can be paid to Society for Prevention of Cruelty to Animals.

Laws N. Y. 1894, c. 115, as amended by Laws 1895, c. 412, and Laws 1902, c. 495, does not deprive owner of dogs of property without due process of law, because it provides that the license fee shall be paid to the Society for the Prevention of Cruelty to Animals, which is charged with the duty of enforcing the laws to prevent such cruelty.

2. Constitutional law 🔑287 — Requirement that dogs' owner pay license fee not denial of due process of law.

Property in dogs is of an imperfect or qualified nature, and they may be subjected to peculiar and drastic police regulations by the state, so that a state law requiring such owners to pay license fees does not deprive the owners of property or liberty without due process of law.

In Error to the County Court of Kings County, State of New York.

Lillian Nicchia was convicted of keeping dogs without having obtained a license required by the Laws of New York, and the conviction was affirmed by the Appellate Division (People v. Nicchie, 182 App. Div. 897, 168 N. Y. Supp. 1122) and by the Court of Appeals of New York (People v. Nicchia, 224 N. Y. 637, 121 N. E. 884), and defendant brings error. Affirmed.

Messrs. Joseph Nicchia and George P. Foulk, both of New York City, for plaintiff in error.

Mr. Harry G. Anderson, of Brooklyn, N. Y., for the People of State of New York.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error owned two dogs which she harbored within New York City without having obtained the license required by chapter 115, Laws of New York of 1894, as amended by chapter 412, Laws 1895, and chapter 495, Laws 1902. She was charged with violating the statute on November 11, 1916, *229 *found guilty in the City Magistrates' Court, Brooklyn, and required to pay a fine. The Court of Appeals affirmed the judgment without opinion.

Chapter 115 as amended provides:

"Section 1. Every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over eight hundred thousand shall procure a yearly license and pay the sum of two dollars for each dog. * * *

"Sec. 8. The American Society for the Prevention of Cruelty to Animals is hereby empowered and authorized to carry out the provisions of this act, and the said society is further authorized to issue the licenses and renewals, and to collect the fees therefor, as herein prescribed; and the fees so collected shall be applied by said society in defraying the cost of carrying out the provisions of this act and maintaining a shelter for lost, strayed or homeless animals; and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the state as relate to the humane work in which the said society is engaged.

"Sec. 9. Any person or persons, who shall hinder or molest or interfere with any officer or agent of said society in the performance of any duty enjoined by this act, or who shall use a license tag on a dog for which it was not issued, shall be deemed guilty of a misdemeanor. Any person who owns or harbors a dog, without complying with the provisions of this act shall be deemed guilty of disorderly conduct, and upon conviction thereof before any magistrate shall be fined for such offense any sum not exceeding ten dollars, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid, but such imprisonment shall not exceed ten days."

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*The validity of the act was questioned upon the ground that it violates the Fourteenth Amendment, section 1, by "depriving a citizen of his liberty without due process of law, to wit, the liberty of owning and harboring a dog without procuring a license from and paying a fee therefor to the Society, a private corporation." In Fox v. Mohawk & H. R. Humane Society (1901) 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767, the Court of Appeals declared a statute essentially the same as chapter 115 before the amendment of 1902 invalid under the state Constitution because it appropriated public funds for the use of a private corporation and also because it conferred an exclusive privilege. But the court repudiated the suggestion that the statute deprived dog owners of property without due process or delegated governmental power to a private corporation. Thereafter (1902) the Legislature amended chapter 115 with the evident purpose of meeting objections pointed out in the Fox Case. Thus amended the law has been upheld. Our only concern is with the suggested federal question.

[1] The American Society for the Prevention of Cruelty to Animals was incorporated by chapter 469, Laws of New York 1866. "The purpose of the corporation was to enforce the laws enacted to prevent cruelty to animals." Davis v. American Society, 75 N. Y. 362, 366. It has long been recognized by the Legislature as a valuable and efficient aid toward the enforcement of those laws.

New York Penal Law (Consol. Laws, c. 40) art. 16, § 196. The payment of public funds to a similar corporation for assistance in enforcing penal statutes has been declared unobjectionable. People ex rel. State Board of Charities v. New York Society for the Prevention of Cruelty to Children, 161 N. Y. 233, 239, 250, 55 N. E. 1063.

[2] Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of

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any federal right. Sentell v. N. O. & C. *R. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169; Fox v. Mohawk & H. R. Humane Society, supra. Its power to require those who wish to keep dogs to secure licenses from and pay fees to a public officer is also clear. And when the state in the reasonable conduct of its own affairs chooses to entrust the work incident to such licenses and collection of fees to a corporation created by it for the express purpose of aiding in law enforcement, and in good faith appropriates the funds so collected for payment of expenses fairly incurred and just compensation for the valuable services rendered, there is no infringement of any right guaranteed to the individual by the federal Constitution. Such action does not amount to the taking of one man's property and giving it to another, nor does it deprive dog owners of liberty without due process of law.

The judgment below must be
Affirmed.

(254 U. S. 255)

UNITED STATES v. LEHIGH VALLEY R. CO. et al.

(Argued Oct. 12 and 13, 1916. Restored to Docket for Reargument May 21, 1917. Reargued Nov. 7, 1917. Restored to Docket for Reargument June 10, 1918. Submitted Oct. 17, 1919. Restored to Docket for Oral Argument May 17, 1920. Reargued Oct. 5, 1920. Decided Dec. 6, 1920.)

No. 1.

1. Monopolies 🔑16(1)—Contract for sale of coal to subsidiary corporation held contrary to Anti-Trust Act and commodities clause.

A contract between a coal company, which was only an instrumentality of a railroad company which owned all its stock, and a sales company, the stock ownership and management of which was the same as that of the railroad company, whereby the sales company purchased before transportation all the coal produced or purchased by the coal company at a percentage of the New York price and agreed to purchase coal from no one else, is void as violating Anti-Trust Act July 2, 1890 (Comp. St. §§ 8820–8823, 8827–8830), and the commodities clause of Act June 29, 1906, forbidding a carrier to transport commodities in which it had an interest.

2. Monopolies 🔑16(1)—Carrier held guilty of monopolizing coal produced along its lines.

A railroad company, which before the passage of the Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830) entered upon a policy through a subsidiary coal company of securing control of the production and sale of anthracite coal along its lines, to prevent and suppress competition in transportation of such coal, and which continued that policy, after the Anti-Trust Act was enacted, by various devices which were repeatedly held unlawful, so that at the time of suit it produced and purchased more than 85 per cent. of the anthracite coal it transported, which was more than one-fifth of the entire production of the country, was guilty of monopolizing interstate commerce in such coal, and the corporate relations between it and its subsidiary coal and sales companies and other railway companies must be dissolved.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the United States against the Lehigh Valley Railroad Company and others. Decree for defendants (225 Fed. 399), and the United States appeals. Reversed and remanded, with instructions.

Messrs. Solicitors General Frierson and Davis and G. Carroll Todd, Asst. Atty. Gen., all of Washington, D. C., for appellant.

Messrs. N. W. Hacker, of New York City, F. W. Wheaton, of Wilkes-Barre, Pa., E. H. Boles, of New York City, John G. Johnson, of Oneonta, N. Y., Everett Warren, of Scranton, Pa., John Hampton Barnes, of Philadelphia, Pa., and Allen McCulloh and Elihu Root, Jr., both of New York City, for appellees.

Mr. Justice CLARKE delivered the opinion of the Court.

This is an appeal from a decree entered in a suit to dissolve the intercorporate relations existing at the time it was commenced in March, 1914, between the defendant corporations, other than Girard Trust Company, for the reason, it is averred, that they were so united that they constituted a combination in restraint of interstate trade and commerce in anthracite coal and an attempt to monopolize and an actual monopolization of a part of such commerce, in violation of the Anti-Trust Act of Congress of July 2, 1890 (26 Stat. 209 [Comp. St. §§ 8820–8823, 8827–8830]); and also for the alleged reason that the Lehigh Valley Railroad Company was transporting over its lines of railway anthracite coal in which it had an interest, in violation of the commodities clause of the Act of June 29, 1906 (34 Stat. 585).

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*It will be necessary to consider only the relations and activities of the Lehigh Valley Railroad Company, hereinafter designated the Railroad Company, the Lehigh Valley

Coal Company, designated the Coal Company, and the Lehigh Valley Coal Sales Company, designated the Sales Company.

A condensed history, chiefly admitted, of the organization, stock ownership and conduct of these three companies, and the application to the facts thus developed of fully established principles of law, will be decisive of the case.

The limited area of anthracite producing territory, its relation to the interstate transportation system and markets of our country and the various attempts to monopolize and control the great railway tonnage originating therein have all been so often described in reported cases, that they need not be repeated here in detail.[1]

It will suffice for our present purpose to say that the anthracite producing territory is very restricted in area, it all being within seven counties of Eastern Pennsylvania with the known deposits underlying only 309,760 acres of land. For trade purposes it is divided into three fields; the northerly is called the Wyoming field, the next southerly the Lehigh or middle field, and the southerly the Schuylkill field. The lines of the Railroad Company extend into the Wyoming and Lehigh fields, but to only one colliery in the Schuylkill field. Much the greater part of its tonnage is derived from the Wyoming field, and four-fifths of it moves in interstate commerce.

The Railroad Company in 1913 owned 1,438 miles of main line and a total trackage of 3,354 miles, its capital *259 *stock was $60,600,000, its funded debt was $85,800,000, its total assets had a book value of $182,700,000, but a much greater actual value, and it carried a larger tonnage of anthracite coal than any other railroad in the country—over 13,000,000 tons in 1913, this being 18.84 per cent. of the total 69,000,000 tons shipped over all railroads in that year.

In 1864 the Railroad Company by merger with a coal company acquired a small acreage of anthracite containing land and thereupon added the mining, shipping, and selling of coal to its duties as a carrier.

The annual reports of the Railroad Company show that, as early as 1868, it entered upon the policy of acquiring by purchase and lease the control of as much as possible of the anthracite coal containing lands tributary to its lines of railroad for the purpose of preventing, or, when it had become established of suppressing, competition in the carrying of coal over its interstate lines to interstate markets.

Thus the annual report of the company for 1868 shows that, it having been determined that it was of "the utmost importance" to the future welfare of the company to secure "control of tonnage from regions having other outlets to markets," the company, by merger of two coal companies, obtained coal lands which secured to it the whole trade of the Hazelton coal field and "the withdrawal from competition" of a business so large as to greatly strengthen the "future prospects of the road."

In 1869 the policy of securing a proportion of the coal trade from each region by the purchase of interests in companies owning lands on or near the several branches of the company was approved and "continued."

In 1871 it is reported:

> "We have continued to acquire interests in coal lands situated in our various regions."

In 1872, after detailing the purchase for $2,000,000 of 5,800 acres of land having upon it 10 collieries, the report of the company declares that:

> *260
> "Should there be a corre*sponding increase for a year or two more the total consumption will so nearly equal the full capacity of the mines for production as to render unnecessary all attempts to regulate or control the trade."

After reciting that a contract had been entered into granting to the Delaware, Susquehanna & Schuylkill Railroad Company trackage rights to tidewater, the report of the Railroad Company for 1894 continues, saying that there is thereby assured to the company—

> "an important traffic * * * for which several outlets existed and which had been in contention for some time previous. It also removes an incentive to the construction of further new lines into the territory tributary to the Lehigh Valley system."

Although in 1875 it caused the Coal Company (hereinafter discussed) to be organized for the purpose of taking title to coal lands then owned or which might thereafter be purchased, and although the Anti-Trust Law was enacted in 1890, nevertheless, the Railroad Company continued its policy of purchasing for control and from time to time it acquired and took in its own name the title to extensive tracts of coal lands and to stocks in coal companies. Thus in 1885 it acquired the entire capital stock of the Wyoming Valley Coal Company, the owner of 1,657 acres of anthracite land, in 1900 it acquired the entire capital stock of the Westwood Coal Company, a considerable owner of anthracite land, in 1901 it acquired the entire capital stock of the Connell Coal Company, and in the same year the entire capital stock of the Seneca Coal Company, the owner of 1,308 acres of anthracite land.

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[1] United States v. Reading Co. et al. (C. C.) 183 Fed. 427; United States v. Reading Co. et al. (D. C.) 226 Fed. 229; United States v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; United States v. Lehigh Valley Railroad Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458; United States v. Delaware, Lackawanna & Western R. R. Co., 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760.

In the years prior to 1905 the Railroad Company made a number of other purchases of coal land, but in that year it made its largest single and most significant purchase, when it acquired, for the sum of $17,440,000 all of the capital stock of Coxe Bros. & Co., Incorporated. This company was the largest *261 independent coal operator then *on the line of the Railroad Company, and its production for 1905 exceeded 1,100,000 tons. It not only owned extensive areas of coal land, on which were located 8 collieries, but it was also owner of all of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, which owned 50 miles of railway which served other large independent mines in addition to those of Coxe Bros. & Co., Incorporated. This railroad had connections with the Reading, Pennsylvania, and New Jersey Central lines, which were taken up or fell into disuse when the control of it passed to the defendant Lehigh Valley Railroad Company. The Railroad Company continued to own all the capital stock of Coxe Bros. & Co., Incorporated, to the time the testimony was taken in this suit, and it is admitted that that company then held in fee or under long lease 36,490 acres of land in the anthracite field, 7,169 acres of which were known to contain anthracite coal. This purchase was confessedly made to prevent the diversion of traffic to other lines, and, while the company was continued in form as a separate corporation, the officers and directors of the coal company were made its officers and directors, and in June following the year of the purchase its directors by resolution provided that the net earnings of the company should be paid to the Railroad Company without the formality of declaring a dividend, and this practice continued until 1911.

Thus, this important coal company and its railroad became a mere coal producing and transporting agency of the defendant Railroad Company.

In 1874 the state of Pennsylvania adopted a constitution containing the provision that—

> "No incorporated company, doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles, for transportation over its works." Constitution of Pennsylvania, 1874, art. 17, § 5.

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*Prior to this time the Railroad Company had been a large owner, miner, shipper, and seller, as well as carrier, of anthracite coal, and, as if for the purpose of complying with the new constitution of the state from which it derived its franchise, it caused the Lehigh Valley Coal Company to be created in 1875 by the consolidation of two smaller companies. This company, which was organized for the purpose of taking title to coal lands and stocks in coal companies, then owned or thereafter to be acquired by the Railroad Company, and to conduct the business of mining, shipping, and selling coal, had an original capital of $650,000, which was afterwards increased to $1,965,000, all of which has been owned by the Railroad Company from the beginning. Coal-producing lands and stocks in various coal companies were purchased from time to time by the Railroad Company, directly or through advances of money to the new coal company for that purpose, title thereto being taken in the Coal Company, with the result: that when this suit was commenced that company admitted itself to be the owner of 54,229 acres of land in the anthracite producing regions, of which 24,748 acres were located along the lines of the Railroad Company; that the funded debt of the company had become $20,000,000; and that the value of its assets amounted to about $35,000,000. Eight and one-half million tons of anthracite, of the 13,000,000 carried by the Railroad Company in 1913, were produced by this Coal Company and by Coxe Bros. & Co., Incorporated, owned, as we have seen, by the Railroad Company. The combined acreage of lands owned by the Coal Company and by Coxe Bros. & Co., Incorporated, is admitted to be 90,719 acres, of which 61,238 acres are located along the lines of the Railroad Company. The annual reports of the Coal Company show that in 1903 56.77 per cent. of the coal transported over the railroad was produced by the Coal Company and its affiliated companies; that in 1906 the percentage produced and pur- *263 *chased was 85.25 per cent. of that transported; and in 1907 it was 87.11 per cent. The Interstate Commerce Commission found that in 1908 the company controlled 95 per cent. of the tonnage moving over its line to tidewater. Meeker v. Lehigh Valley R. R. Co., 21 Interst. Com. Com'n R. 129, 154.

The Railroad Company and the Coal Company had usually the same president, secretary, treasurer, and auditor, and the latter company admits, as it must, that the Railroad Company "as the owner of stock controls and long since has been controlling the election of its directors." The Railroad Company constantly advanced large sums of money to the Coal Company for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000, which amount, however, was reduced by operations of the Coal Company to $11,500,000. The Coal Company never paid any dividends, its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies were so intimate and interlaced that in argument it is admitted that "in the last analysis the assets of the Coal

Company are the assets of the Railroad Company."

There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy, that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railroad Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and in combination with its agency, the Coal Company, was consistently pursued, with in*creasing energy and scope after the passage of the Anti-Trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company and by the functions which it performed—which remain to be considered.

On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company "to consider the propriety of organizing a Sales Company" and of entering into a contract with it when formed "for a limited time" for the purchase and sale by it "of the coal mined, purchased and owned by the Coal Company." The board also requested that the privilege of subscribing for the stock of the new company be extended, "not to the Railroad Company, but, pro rata, to the common and preferred stockholders of the Railroad Company." As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous in perfecting the sales arrangement with the new company to be organized, and in aid of the enterprise a dividend of 10 per cent. on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

On the same day the board of directors of the Coal Company resolved: That the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should, "if possible," contract with it for a "limited time" for the sale to it "of all coal which shall be mined, purchased, owned, or acquired" by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales *Company "before the transportation thereof shall be commenced."

The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

The Sales Company was promptly organized and the minutes of the company show that slightly less than 97 per cent. of the stock was subscribed for by stockholders of the Railroad Company.

The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R. Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company; and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice president of the company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

It is too plain for discussion that, with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making a contract with itself, the terms of which it could determine in its discretion.

Immediately after the organization of the Sales Company the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for 10 years unless terminated in the manner which it provides for and its terms are so nearly identical with the earlier Lackawanna contract, which is considered in United States v. Delaware, Lackawanna & Western R. R. Co., 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438, that the judge who tried this case below, with *entire propriety, says that the differences between the two are "wholly unsubstantial." 225 Fed. 401. This court held that the contract in the Lackawanna Case was void, because violative of the provisions of the Anti-Trust Act and the commodities clause of the Act to Regulate Commerce.

[1] The discussion of the Lackawanna contract is so full and satisfactory in 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the provisions of the Lackawanna contract, which were clearly determinative of the former decision by this court, are plainly the same in substance, and almost exactly the same in form, as those in the contract we are considering, viz.: The agreement of the

Coal Company (1) to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; (2) that the prices to be paid for the more important grades of coal shall be 65 per cent. of the New York prices—the two contracts are in precisely the same words in this respect; (3) that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that "purchased" from the Coal Company; (4) that the Coal Company shall lease all of its facilities, structures and trestles to the Sales Company; (5) that either party shall have the right to abrogate and cancel the contract upon giving to the other 6 months' notice of its desire so to do; (6) that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911 in addition to that which it mined.

These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we *267 have *here—subject to be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated—was neither an "independent buyer nor a free agent."

Being entirely satisfied with the reasoning upon which the Lackawanna Case proceeds to its conclusion, we hold now, as it was there in principle held, that the purchase in form by the Sales Company did not so dissociate the Railroad Company from the transportation of coal in which it was interested as to meet the requirements of the law; that the contract, nominally of purchase, was so calculated to restrain interstate trade as to be obnoxious to the Anti-Trust Act of Congress; and that for this reason it is unlawful and void.

It will be of service, in determining the purposes of the defendant Railroad Company, with its corporate subsidiaries in the activities thus discussed, to recall the history of the defendant Railroad Company, as it appears in the decisions of this and of other courts.

In 1892 the defendant Railroad Company and the Central Railroad Company of New Jersey leased their lines of railway for the term of 999 years to the Reading Railroad Company, a parallel competing carrier, extensively engaged in mining, marketing and selling anthracite coal. This combination, had it become operative, would have gone far toward monopolizing the interstate transportation and trade in anthracite coal of our entire country, but all operations under the lease of the Central Railroad Company of New Jersey were enjoined by the New Jersey courts, for the reason that it was deemed to be in restraint of trade, against public policy and calculated to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the state. Stockton, Atty. Gen., v. Central R. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97. Thereupon the lease of defendant's property was abandoned and surrendered.

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*Six years later, in 1898, the defendant Railroad Company combined with the Reading and four other railway companies to contribute a large sum of money, which was successfully used to prevent the construction of a projected, competing line of railroad from the anthracite fields to tidewater. Of this enterprise this court said:

> "We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme to combine for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890." United States v. Reading, 226 U. S. 324, 355, 33 Sup. Ct. 90, 97 (57 L. Ed. 243).

Four years later, in 1902, the defendant Railroad Company united with the Reading and four other anthracite carriers in a combination to control the entire tonnage of coal produced by independent operators along the lines of their respective railways. The devise this time resorted to was a contract to purchase all the coal produced by independent mines, then opened or which might thereafter be opened by the vendors, and to pay therefor 65 per cent. of the market price prevailing at tidewater points at New York, to be computed from month to month by an arbitrator to be selected by agreement. These contracts were elaborately considered and unsparingly condemned by this court in the case which is cited, and the conclusion reached was that the defendants in that case had unlawfully combined, by and through the instrumentality of the 65 per cent. contract, for the purpose of controlling the sale at tidewater of the independent output of anthracite coal. The contracts were declared to be unlawful and were ordered canceled. 226 U. S. 370, 371, 373, 33 Sup. Ct. 90, 57 L. Ed. 243.

In 1911, in Meeker & Co. v. Lehigh Valley R. R. Co., 21 Interst. Com. Com'n R. 129, 154, 163, the Interstate Commerce Commission held that the only line of demarkation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company *269 was one of bookkeeping; that the Rail*road Company "had monopolized the coal field served by it," and that it had been guilty of unjust discrimination and of charging unreasonable rates for which reparation was awarded. 23 Interst. Com. Com'n R. 480. This decision was sustained by this court in Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691.

And yet again, in 1915, the Interstate Commerce Commission, after an investigation extending over three years, in which the defendant Railroad Company and all other initial carriers of anthracite were parties, held that the rates charged by the defendant and other carriers to tidewater and to certain interior points were unreasonable; that by trackage and other arrangements they had extended advantages to their subsidiary coal companies, to the prejudice of other shippers; and that concessions as obnoxious as "direct cash rebates" had been made to such coal companies. In the Matter of Rates, Practice, Rules, and Regulations Governing the Transportation of Anthracite Coal, 35 Interst. Com. Com'n R. 220.

This history of almost 25 years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued. Standard Oil Co. v. United States, 221 U. S. 1, 76, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

[2] Without further comment, this discussion of the record requires us to conclude that it is clearly established that, prior to the enactment of the Anti-Trust Act, the Railroad Company, in combination with its coal company subsidiary, deliberately entered upon a policy of making extensive purchases of anthracite land tributary to the Railroad Company's lines, for the purpose of controlling the mining, transportation and sale of coal to be obtained therefrom and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-Trust Act with increasing energy and tenacity of purpose, with the result that a *270 *practical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.

The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one-fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several states, and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-Trust Act as they have frequently been interpreted by this court. Standard Oil Co. v. United States, 221 U. S. 1, 61, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 393, 26 Sup. Ct. 272, 50 L. Ed. 515; United States v. Union Pacific R. R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; International Harvester Co. v. State of Missouri, 234 U. S. 199, 209, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; United States v. Delaware, Lackawanna & Western R. R. Co., 238 U. S. 516, 533, 35 Sup. Ct. 873, 59 L. Ed. 1438; United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425, 64 L. Ed. 760.

Since we have also found that the contract between the Coal Company and the Sales Company was a mere device to evade the commodities clause of the Interstate Commerce Act and therefore void, it results that the decree of the District Court must be reversed and the case remanded, with instructions to enter a decree, in conformity with this opinion, dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Bros. & Co., Incorporated, the Delaware, Susquehanna & Schuylkill Railroad Company, and the Lehigh Valley Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all *271 property *of any character, of any one of said companies owned or in any manner controlled by any other of them as may be necessary to establish their entire independence of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company must be decreed to be void and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business of buying and selling coal where and from and to whom it chooses with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company.

As to the New York & Middle Coal Field Railroad & Coal Company, the G. B. Markle Company, the Girard Trust Company, and the individual defendants, the bill must be dismissed.

Reversed and remanded, with instructions to enter a decree in conformity with this opinion.

The CHIEF JUSTICE and Mr. Justice HOLMES, while, if they exercised an independent judgment, would be for affirmance, nevertheless concur in the conclusion now announced by the court, because they consider that they are so constrained to do in virtue of the controlling effect of the previous decisions in the Lackawanna and

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*Reading Cases cited in the opinion of the court.

Mr. Justice McREYNOLDS and Mr. Justice BRANDEIS did not take part in the consideration and decision of this case.

(254 U. S. 245)

ANA MARIA SUGAR CO., Inc., v. QUINONES.

(Argued and Submitted Oct. 21, 1920. Decided Dec. 6, 1920.)

No. 54.

1. **Appeal and error 🔑544(1) — Errors at trial cannot be considered, unless brought into record by bill of exceptions.**

Errors in rulings of law in the course of the trial are not part of the record proper, and cannot be considered on writ of error, unless incorporated into the record by bill of exceptions.

2. **Courts 🔑387(4)—Errors of Porto Rico Supreme Court need not be brought into record by bill of exceptions.**

The rule that errors at the trial cannot be considered on writ of error, unless incorporated in a bill of exceptions, does not apply to errors of an intermediate appellate court, though such court, like the Supreme Court of Porto Rico, has power to review the evidence, make new findings of fact, and enter such judgment as to it may seem proper.

3. **Courts 🔑387(4) — Errors of Porto Rico Supreme Court reviewable, without request for rulings or exceptions.**

Assignments of error in the Circuit Court of Appeals, complaining of the findings of fact and measure of damages adopted by the Supreme Court of Porto Rico on appeal from the District Court, were reviewable without any request to the Supreme Court for rulings or any exceptions to the rulings made.

4. **Courts 🔑387(4)—Facts not reviewable in action at law on review of judgment of Porto Rico Supreme Court.**

Under Act April 12, 1900, c. 191, § 35 (Comp. St. § 3791), and Judicial Code, § 244 (see Comp. St. § 1215), relative to the review of judgments and decrees of the Supreme Court of Porto Rico by the United States Supreme Court and Act Jan. 28, 1915, c. 22, giving the Circuit Court of Appeals jurisdiction to review such judgments and decrees, the facts are not reviewable in actions at law, though the case was tried without a jury and was erroneously brought to the Circuit Court of Appeals by appeal, instead of writ of error.

5. **Appeal and error 🔑4—Writ of error proper remedy for review of judgment of Porto Rico Supreme Court in action for damages.**

A cause of action for damages for breach of a contract was in its nature a legal one, and, though the case was tried without a jury, it should have been brought to the Circuit Court of Appeals from the Supreme Court of Porto Rico by writ of error, instead of appeal.

6. **Appeal and error 🔑858 — Facts not reviewable in action at law, though appeal erroneously taken.**

Act Sept. 6, 1916, c. 448, § 4 (Comp. St. § 1649a), prohibiting dismissals of writs of error because appeals should have been taken, or appeals because writs of error should have been sued out, does not abolish the distinction between writs of error and appeals, or authorize a review of the facts in an action at law, though brought to the Circuit Court of Appeals by appeal.

7. **Courts 🔑387(4)—Matters not assigned in Circuit Court of Appeals or considered by it may not be urged in Supreme Court.**

Under rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) of the Circuit Court of Appeals for the First Circuit, providing for the disregard of errors not assigned, except that the court in its discretion may notice a plain error not assigned, where the grounds on which the Supreme Court of Porto Rico justified its allowance of damages were not assigned as errors in the Circuit Court of Appeals or considered by it, they cannot be insisted upon in the Supreme Court as grounds for reversal.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit by Thomas Quinones against the Ana Maria Sugar Company, Incorporated. A judgment of the Supreme Court of Porto Rico (24 P. R. 614), reversing a judgment for defendant was affirmed by the Circuit Court of Appeals for the First Circuit (251 Fed. 499, 163 C. C. A. 493), and defendant brings certiorari. Affirmed.

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*Mr. E. Crosby Kindleberger, of New York City, for petitioner.

Mr. Jorge V. Dominguez, of San Juan, P. R., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Quinones sued the Ana Maria Sugar Company, Incorporated, in a district court of Porto Rico to recover damages for breach of an oral contract to deliver sugar. Liability was denied on the ground that plaintiff had agreed to deposit the purchase price in a bank to defendant's credit before the time for delivery and failed to do so. The trial judge, sitting without a jury, found on conflicting testimony that this stipulation was part of the contract; and, as the deposit had not been made, entered judgment for the defendant. Quinones appealed to the Supreme Court of Porto Rico with a bill of exceptions which embodied all the proceedings taken and included the evidence. The Supreme Court did not, like the trial court, make specific findings, but it found as a fact upon a review of conflicting evidence that the stipulation relied upon by the company had not been made, reversed the judgment of the trial court, and itself entered judgment for Quinones in the full amount claimed with interest. 24 P. R. 614. From that judgment the company appealed to the United States Circuit Court of Appeals for the First Circuit and assigned 15 errors. Ten of them charged in different forms that the findings of fact on the main issue were erroneous; three related to the measure of damages; the others were that the complaint did not set *247 *forth a cause of action and that the facts found were insufficient to support the judgment. The Circuit Court of Appeals held that it could consider the last two errors assigned, since they appeared on the face of the record. It gave as the reason for declining to consider the others that the company had failed to submit to the Supreme Court any request for rulings and had taken no exceptions to rulings made. Concluding that the complaint set forth a good cause of action, that the Supreme Court had power to enter the judgment for Quinones and that the facts found supported its judgment, the Circuit Court of Appeals affirmed it. 251 Fed. 499, 163 C. C. A. 493. The case comes here on writ of certiorari. 248 U. S. 555, 39 Sup. Ct. 11, 63 L. Ed. 419.

[1-3] First. The rule relied upon by the Circuit Court of Appeals for refusing to consider errors assigned is well settled. Errors in rulings of law occurring in the court of the trial cannot be considered on writ of error, unless incorporated into the record by bill of exceptions (Rodriguez v. United States, 198 U. S. 156, 165, 25 Sup. Ct. 617, 49 L. Ed. 994), because they are not part of the record proper (Newport News & Mississippi Valley Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887). Compare Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439. But this rule applies only when the error complained of is that of the trial court. It has no application when the errors assigned are wholly those alleged to have been committed by an intermediate appellate court; for if the intermediate court has erred in its judgment, the error will appear by the record of that court without a bill of exceptions. Compare Morris v. Deane, 94 Va. 572, 27 S. E. 432. This is true, although the intermediate appellate court has, like the Supreme Court of Porto Rico, power to review the evidence, to make new findings of fact thereon and to enter such judgment as to it may seem proper. See Compilation of Revised Statutes and Codes of Porto Rico, § 1141, p. 241; section 5350, p. 867. Compare Andrews v. Cohen, 221 N. Y. 148, 152, 153, 116 N. E. 862. No complaint was made by the company of any *248 action taken by the court of first *instance, which had decided in its favor. The errors assigned in the Circuit Court of Appeals related wholly to action taken by the Supreme Court. The reason given by the Circuit Court of Appeals for refusing to consider the errors assigned was, therefore, unsound. But, for other reasons, which will be stated, its decision was right.

[4-6] Second. Under section 35 of the Act of April 12, 1900, c. 191, 31 Stat. 77, 85 (Comp. St. § 3791), the power to review final judgments and decrees of the Supreme Court of Porto Rico, then exercised exclusively by this court, was limited to matters of law. Garzot v. De Rubio, 209 U. S. 283; Gonzales v. Buist, 224 U. S. 126, 32 Sup. Ct. 463, 56 L. Ed. 693; Rosaly v. Graham, 227 U. S. 584, 33 Sup. Ct. 333, 57 L. Ed. 655; Ochoa v. Hernandez, 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. Ed. 1427; Porto Rico v. Emmanuel, 235 U. S. 251, 35 Sup. Ct. 33, 59 L. Ed. 215. When that act was superseded by section 244 of the Judicial Code (see Comp. St. § 1215), writs of error and appeals from the insular Supreme Court became subject to the same regulations which governed appeals from the district courts of the United States. Thereby this court acquired power to review questions of fact in cases coming to it on appeal in equity or admiralty (Elzaburu v. Chaves, 239 U. S. 283, 285, 36 Sup. Ct. 47, 60 L. Ed. 290); but in actions at law which are reviewable on writ of error, there was no right in this court to review the facts, although the case was tried without a jury (Behn v. Campbell, 205 U. S. 403, 407, 27 Sup. Ct. 502, 51 L. Ed. 857). The jurisdiction to review judgments and decrees of the Porto Rico courts conferred upon the Circuit Court of Appeals by Act of January 28, 1915, c. 22, 38 Stat. 803, is subject to the same limitation. The cause of action here sued on is in its nature a legal one. The review should therefore have been prosecuted by writ of error instead of by appeal, although the case was tried without a jury. Oklahoma City v. McMaster, 196 U. S. 529, 25 Sup. Ct. 324, 49 L. Ed. 587. By reason of section 4 of the Act of September 6, 1916, c. 448, 39 Stat. 727 (Comp. St. § 1649a), this failure to adopt the proper appellate proceeding is no longer fatal. But the provision does not abolish the distinction between writs of error and appeals. It merely provides that the party seeking re- *249 view *shall have it in the appropriate way, notwithstanding a mistake in choosing the mode of review. Gauzon v. Compañia General, etc., 245 U. S. 86, 38 Sup. Ct. 46, 62 L. Ed. 165.

It was not contended in the insular Supreme Court that there was no legal evidence to support the finding of the District Court. Its judgment was reversed solely because the insular Supreme Court reached a different conclusion on the issue of fact raised by conflicting testimony. Nor was it contended in the Circuit Court of Appeals that there was no legal evidence on which the insular Supreme Court could properly rest its finding. Ten of the assignments of error were directed to findings of fact by the Supreme Court. As these assignments of error raised no question of law and as the Circuit Court of Appeals had no power to review findings of fact in an action at law, it properly denied consideration to these 10 assignments of error.

Third. It is contended that the judgment of the Circuit Court of Appeals should be reversed because the Supreme Court adopted an erroneous measure of damages. The contract was made August 4, 1914, and the contract price was $3.22½ per hundred weight. All the sugar was to have been delivered before the close of the following week which ended on August 15. The Supreme Court allowed as damages the sum of $6,173.24, with interest. It is insisted here that the sugar was deliverable in installments; that there was a gradual rise in sugar between August 6 and August 15; and that the Supreme Court should have determined the amount recoverable by ascertaining the market price when each of the installments was deliverable.

In the Circuit Court of Appeals the company likewise assigned as error that the Supreme Court had allowed compensation based upon the difference between the contract price of the sugar and its market price at the end of the term fixed for delivery. This

assignment en*titled it to have that question considered in the Circuit Court of Appeals, although no exception had been taken in the Supreme Court. The Circuit Court of Appeals did not consider whether the Supreme Court had adopted the proper measure of damages. It decided only that the Supreme Court was not obliged to send the case back to the court of first instance to fix the damages; that it had power to do so itself upon a review of the evidence introduced below; and that its discretion in doing this could not be said to have been exercised unreasonably, since the question of damages had been tried fully below, citing Burnet v. Desmornes, 226 U. S. 145, 148, 33 Sup. Ct. 63, 57 L. Ed. 159.

[7] The difficulty with the company's contention is that it does not appear that the Supreme Court fixed the amount of the recovery by applying the measure of damages objected to. The contention that it did so finds some support both in the complaint and in the evidence. But the opinion which discusses the subject of damages at length rests the allowance on other grounds. The court found that the company had, during the month of August, sold at $6.52 large quantities of sugar, including the lot in question, and justified its allowance of damages on three grounds: (1) That on the facts the profits through sale at increased market prices were in contemplation of the parties when the contract was entered into, and the profit which would have been earned, being ascertainable, could be recovered at common law; (2) that the profits were earned by the company on sugar actually belonging to Quinones, and that under Civil Code of Porto Rico, § 1073, he was entitled to these profits either "as damages or as the proceeds of a resulting trust"; and (3) that if the company wished to limit the damages by the market price on August 6, it must have proved that other sugar was obtainable on that day in Porto Rico, at what it contended was the then market price, but that it had not done so. These rulings by

the Supreme Court on the *measure of damages were not assigned as error in the Circuit Court of Appeals and so far as appears objection to them was not otherwise called to its attention. Under rule 11 of that court (150 Fed. xxvii, 79 C. C. A. xxvii) errors not assigned are to be disregarded, except that the court, in its discretion, may notice a plain error not assigned. As the above rulings of the Supreme Court on the measure of damages were not assigned as errors in the Circuit Court of Appeals and were not considered by it they cannot be insisted upon here as grounds for reversal.[1]

The judgment of the Circuit Court of Appeals is

Affirmed.

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[1] Compare Davis v. Hines, 6 Ohio St. 473, 478; Litchtenstadt v. Rose, 98 Ill. 643; Taylor v. Pierce, 174 Ill. 9, 12, 50 N. E. 1109; Wilson v. Vance, 55 Ind. 584, 591.

(254 U. S. 143)

COCA-COLA CO. v. KOKE CO. OF AMERICA et al.

(Argued Nov. 18 & 19, 1920. Decided Dec. 6, 1920.)

No. 101.

1. Trade-marks and trade-names 🔑85(1) — Name held not such fraud on public as to be beyond protection.

The use of the name "Coca-Cola" for a beverage, after the compound had been changed so as to eliminate cocaine therefrom, though coca leaves, previously treated to remove the characteristic substances, were still used, and when cola nuts furnished only a small proportion of the caffein in the compound, and the picture on the trade-mark of coca leaves and cola nuts, with advertisements many years before that the beverage was a nerve tonic and stimulant, does not establish fraud on the public, which defeats the right to protection for the trade mark and name, which had acquired through expensive advertising a secondary signification as plaintiff's product, and especially when it appeared that the demand for the beverage had greatly increased after the changes in the compound were made.

2. Trade-marks and trade-names 🔑3(5) — Owner of coca-cola trade-mark cannot prevent competitor from using the word "dope."

The word "dope" is one of the most featureless known, even to the language of those who are incapable of discriminating speech, and the owner of the trade-mark "coca-cola" cannot restrain a competitor from using the word "dope," though in some places that word was used to call for coca-cola, since it equally would have been used to call for anything else having about it a faint aureole of poison.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Coca-Cola Company against the Koke Company of America and others to restrain infringement of a trade-mark and unfair competition. A decree for plaintiff (235 Fed. 408) was reversed by the Circuit Court of Appeals (255 Fed. 894, 167 C. C. A. 214), and plaintiff brings certiorari. Decree of the Circuit Court of Appeals reversed, and decree of the District Court modified and affirmed.

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*Messrs. Frederick W. Lehmann, of St. Louis, Mo., Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., and Harold Hirsch, of Atlanta, Ga., for petitioner.

Messrs. Richard E. Sloan, of Phœnix, Ariz., and Joseph W. Bailey, of Washington, D. C., for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the Coca-Cola Company to prevent the infringement of its trade-mark Coca-Cola and unfair competition with it in its business of making and selling the beverage for which the trade-mark is used. The District Court gave the plaintiff a decree. 235 Fed. 408. This was reversed by the Circuit Court of Appeals. Koke Co. v. Coca-Cola Co., 255 Fed. 894, 167 C. C. A. 214. Subsequently a writ of certiorari was granted by this Court. 250 U. S. 637, 39 Sup. Ct. 493, 63 L. Ed. 1183.

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*It appears that after the plaintiff's predecessors in title had used the mark for some years it was registered under the Act of Congress of March 3, 1881 (21 Stat. 502), and again under the Act of February 20, 1905, c. 592, 33 Stat. 724 (Comp. St. § 9485 et seq.). Both the Courts below agree that subject to the one question to be considered the plaintiff has a right to equitable relief. Whatever may have been its original weakness, the mark for years has acquired a secondary significance and has indicated the plaintiff's product alone. It is found that defendant's mixture is made and sold in imitation of the plaintiff's and that the word "Koke" was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods. The only obstacle found by the Circuit Court of Appeals in the way of continuing the injunction granted below was its opinion that the trade-mark in itself and the advertisements accompanying it made such fraudulent representations to the public that the plaintiff had lost its claim to any help from the Court. That is the question upon which the writ of certiorari was granted and the main one that we shall discuss.

[1] Of course a man is not to be protected in the use of a device the very purpose and effect of which is to swindle the public. But the defects of a plaintiff do not offer a very broad ground for allowing another to swindle him. The defence relied on here should be scrutinized with a critical eye. The main point is this: Before 1900 the beginning of the good will was more or less helped by the presence of cocaine, a drug that, like alcohol or caffein or opium, may be described as a deadly poison or as a valuable item of the pharmacopœia according to the rhetorical purposes in view. The amount seems to have been very small, but it may have been enough to begin a bad habit and after the Food and Drug Act of June 30, 1906, c. 3915 (Comp. St §§ 8717–8728), if not earlier, long before this *146 *suit was brought, it was eliminated from the plaintiff's compound. Coca leaves still are used, to be sure, but after they have been subjected to a drastic process that removes from them every characteristic substance except a little tannin and still less chlorophyl. The cola nut, at best, on its side furnishes but a small portion of the caffein, which now is the only element that has ap-

preciable effect. That comes mainly from other sources. It is argued that the continued use of the name imports a representation that has ceased to be true and that the representation is reinforced by a picture of coca leaves and cola nuts upon the label and by advertisements, which however were many years before this suit was brought, that the drink is an "ideal nerve tonic and stimulant," etc., and that thus the very thing sought to be protected is used as a fraud.

The argument does not satisfy us. We are dealing here with a popular drink not with a medicine, and although what has been said might suggest that its attraction lay in producing the expectation of a toxic effect the facts point to a different conclusion. Since 1900 the sales have increased at a very great rate corresponding to a like increase in advertising. The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words "Coca-Cola" probably means to most persons the plaintiff's familiar product to be had everywhere rather than a compound of particular substances. Although the fact did not appear in United States v. Coca-Cola Co., 241 U. S. 265, 289, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which perhaps the product is more emphasized than the producer but to which the producer is entitled. The coca leaves and whatever of *147 cola nut is *employed may be used to justify the continuance of the name or they may affect the flavor as the plaintiff contends, but before this suit was brought the plaintiff had advertised to the public that it must not expect and would not find cocaine, and had eliminated everything tending to suggest cocaine effects except the name and the picture of the leaves and nuts, which probably conveyed little or nothing to most who saw it. It appears to us that it would be going too far to deny the plaintiff relief against a palpable fraud because possibly here and there an ignorant person might call for the drink with the hope for incipient cocaine intoxication. The plaintiff's position must be judged by the facts as they were when the suit was begun, not by the facts of a different condition and an earlier time.

[2] The decree of the District Court restrains the defendant from using the word "Dope." The plaintiff illustrated in a very striking way the fact that the word is one of the most featureless known even to the language of those who are incapable of discriminating speech. In some places it would be used to call for Coca-Cola. It equally would have been used to call for anything else having about it a faint aureole of poison. It does not suggest Coca-Cola by similarity and whatever objections there may be to its use, objections which the plaintiff equally makes to its application to Coca-Cola, we see no ground on which the plaintiff can claim a personal right to exclude the defendant from using it.

The product including the coloring matter is free to all who can make it if no extrinsic deceiving element is present. The injunction should be modified also in this respect.

Decree reversed.

Decree of District Court modified and affirmed.

(254 U. S. 357)

GALVESTON, H. & S. A. RY. CO. v. WOODBURY et al.

(Submitted Nov. 15, 1920. Decided Dec. 13, 1920.)

No. 100.

1. Carriers 🔑405(1)—May limit liability for interstate baggage.

The Carmack Amendment (Comp. St. §§ 8604a, 8604aa), allowing carriers to limit liability by published tariff, applies to the baggage of a passenger carried in interstate commerce, though it does not apply to liability for personal injuries suffered by the passenger, and that act was not changed as affecting baggage by the Cummins Amendment of March 4, 1915, as amended by Act Aug. 9, 1916 (Comp. St. §§ 8592, 8604a).

2. Commerce 🔑47—Interstate Commerce Act applies to transportation from Canada to point within state.

Under Act to Regulate Commerce, § 1 (Comp. St. § 8563), declaring that it applies to any common carrier engaged in the transportation of passengers or property from any place in the United States to an adjacent foreign country, the transportation of a passenger's trunk from Canada to the United States is subject to the act, since the substantial feature of the commerce to which the act applies is the nature of the transportation, as determined by the field of the carrier's operation, not the direction of the movement, and the carrier can therefore, under the Carmack Amendment (Comp. St. §§ 8604a, 8604aa), limit its liability for loss of such baggage by provisions in its published tariff, fixing such limitation unless a greater value is declared and an excess charge paid.

On Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District, State of Texas.

Action by L. H. Woodbury and another against the Galveston, Harrisburg & San Antonio Railway Company. A judgment for the plaintiffs for only $100 was reversed by the Texas Court of Civil Appeals, which entered judgment for plaintiffs in the sum of

$500 (209 S. W. 432), and defendant brings certiorari. Reversed.

Mr. T. J. Beall, of El Paso, Tex., for petitioner.

Mr. Rufus B. Daniel, of El Paso, Tex., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On March 14, 1917, Mrs. Woodbury took the Galveston, Harrisburg & San Antonio Railway at San Antonio, *358 *Tex., for El Paso, Tex., and checked her trunk, which she took with her. It was lost and she sued the company in a state district court for the value of trunk and contents, which the jury found to be $500. Mrs. Woodbury was traveling on a coupon ticket purchased at Timmins, Ontario, from a Canadian railroad, entitling her to travel over it and connecting lines, from Timmins to El Paso and return, apparently with stop-over privileges. When the trunk was lost she was on her journey out. She was not told, when she purchased her ticket or when she checked her trunk, that there was any limitation upon the amount of the carrier's liability. It did not appear whether the ticket purchased contained notice of any such limitation, nor did it appear what was the law of Canada in this respect. The company insisted that Mrs. Woodbury was on an interstate journey, and that under the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended [Comp. St. § 8563 et seq.]), it was not liable for more than $100, since it had duly filed with the Interstate Commerce Commission and published a tariff limiting liability to that amount unless the passenger declared a higher value and paid excess charges, which Mrs. Woodbury had not done. She insisted that her transportation was not subject to the Act to Regulate Commerce, because it began in a foreign country, and that the liability was governed by the law of Canada, which should, in the absence of evidence, be assumed to be like the law of Texas, the forum, and that by the law of Texas the limitation of liability was invalid. The trial court held that she was entitled to recover only $100, and entered judgment for that amount. This judgment was reversed by the Court of Civil Appeals, which entered judgment for Mrs. Woodbury in the sum of $500. 209 S. W. 432. The case came here on writ of certiorari. 250 U. S. 637, 39 Sup. Ct. 493, 63 L. Ed. 1183. The only question before us is the amount of damages recoverable.

[1] If Mrs. Woodbury's journey had started *359 in New York, *instead of across the border in Canada, the provision in the published tariff would clearly have limited the liability of the carrier to $100; for her journey would have been interstate, although the particular stage of it on which the trunk was lost lay wholly within the state of Texas. Compare Texas & New Orleans Railroad Co. v. Sabine Tramway Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442. And the Carmack Amendment (Comp. St. §§ 8604a, 8604aa), under which carriers may limit liability by published tariff, applies to the baggage of a passenger carried in interstate commerce (Boston & Maine Railroad Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593), although it does not deal with liability for personal injuries suffered by the passenger (Chicago, Rock Island & Pacific Railway Co. v. Maucher, 248 U. S. 359, 39 Sup. Ct. 108, 63 L. Ed. 294). The subsequent legislation, the Cummins Amendment (Act March 4, 1915, c. 176, 38 Stat. 1196), as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441 (Comp. St. §§ 8592, 8604a), has not altered the rule regarding liability for baggage.

[2] But counsel for Mrs. Woodbury insists that solely because her journey originated in Canada the provisions of the Act to Regulate Commerce do not apply. The contention is that section 1 of the act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. Boston & Maine Railroad Co. v. Hooker, supra. The second is that the act does apply to the transportation of both passengers and property from an adjacent foreign country, such as Canada. Section 1 declares that the act applies to "any common carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country." A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of *360 the movement, but *the nature of the transportation as determined by the field of the carriers' operation. This is the construction placed upon the act by the Interstate Commerce Commission. International Paper Co. v. D. & H. Co., 33 Interst. Com. Com'n R. 270, 273, citing T. & P. Ry. Co. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. It is in harmony with that placed upon the words of section 1 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [Comp. St. § 8029]), "any vessel transporting merchandise or property from or between ports of the United States and foreign ports," which in Knott v. Botany Mills, 179 U. S. 69, 75, 21 Sup. Ct. 30, 45 L. Ed. 90, were construed to include vessels bringing cargoes from foreign ports to the United States. There is a later clause in section 1 which

deals specifically with the transportation of property to or from foreign countries; but cases arising under that clause are not applicable here. That clause applies where the foreign country is not adjacent to the United States. The cases which hold that the act does not govern shipments from a foreign country in bond through the United States to another place in a foreign country, whether adjacent or not, are also not in point. Compare United States v. Philadelphia & Reading Ry. Co. (D. C.) 188 Fed. 484; In the Matter of Bills of Lading, 52 Interst. Com. Com'n R. 671, 726–729; M. Canales v. Galveston, Harrisburg & San Antonio Railway Co., 37 Interst. Com. Com'n R. 573.

Since the transportation here in question was subject to the Act to Regulate Commerce, both carrier and passenger were bound by the provisions of the published tariffs. As these limited the recovery for baggage carried to $100, in the absence of a declaration of higher value and the payment of an excess charge, and as no such declaration was made and excess charge paid, that sum only was recoverable.

Reversed.

(254 U. S. 348)

VALLELY v. NORTHERN FIRE & MARINE INS. CO.

(Submitted Nov. 17, 1920. Decided Dec. 13, 1920.)

No. 96.

1. **Courts 🔑40—Acts beyond delegated authority are void.**

Though an erroneous judgment by a court is not void, but so long as it stands is binding on every one, an act by a court beyond the power delegated to it is a nullity, even prior to reversal.

2. **Bankruptcy 🔑72(1)—Involuntary adjudication of insurance company is void.**

Under Bankruptcy Act, § 4b, as amended by Act June 25, 1910, §§ 3, 4 (Comp. St. § 9588), providing that any moneyed business, or commercial corporation, except certain specified corporations, including insurance companies, may be adjudged an involuntary bankrupt, there is no power in the District Court to adjudge an insurance corporation a bankrupt, so that such adjudication is void and may be set aside on application by the insurance company, which defaulted before the adjudication, even though its motion was made after the expiration of the time to appeal from the adjudication.

3. **Bankruptcy 🔑440—Petition to revise proper remedy for review of order vacating adjudication.**

A petition to revise a matter of law under Bankruptcy Act, § 24b (Comp. St. § 9608), is the proper remedy to review an order of an inferior court of bankruptcy, vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Involuntary proceeding in bankruptcy against the Northern Fire & Marine Insurance Company, in which John Vallely was appointed trustee in bankruptcy. Adjudication was vacated on application by the company, and the trustee filed petition to revise the order in matter of law in the Circuit Court of Appeals, which certified questions to the Supreme Court. Questions answered, to sustain the order vacating the adjudication.

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*Mr. Rome G. Brown, of Minneapolis, Minn., for Vallely.

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*Mr. N. C. Young, of Fargo, N. D., for Insurance Co.

Mr. Justice McKENNA delivered the opinion of the Court.

The Insurance Company was adjudged an involuntary bankrupt May 3, 1917, upon petition of its creditors. The petition averred the corporate capacity of the company under the laws of North Dakota, and that it had been "engaged in the business of insuring property against loss by fire, hail," etc. Process was duly issued and served, and the company making default, an order of adjudication was entered against it. No appeal was taken from the order. The administration of the estate proceeded in due course, claims presented, assets collected and reduced to money, payments made to protect equities, and suits brought by the trustee in his official capacity. In the matters of the estate the trustee frequently conferred with the president and secretary of the bankrupt and received from them co-operation, assistance and information without question of the validity of the adjudication. Considerable moneys were paid out and expenses incurred by the trustee.

After the above course of administration, and on December 18, 1917, the company by its attorneys filed a motion in the District Court to vacate the adjudication as null and void, and to dismiss the proceedings, upon the ground that it appeared that the company

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was an insur*ance corporation and that the court was, therefore, without jurisdiction. The motion was sustained and an order entered vacating the adjudication and dismissing the petition of the creditors on authority of section 4b of the Bankruptcy Act as amended by the Act of June 25, 1910 (36 Stat. 839 [Comp. St. § 9588]), which provides that—

"Any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation * * * may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

The trustee filed a petition to revise the order of the District Court in a matter of law in the Circuit Court of Appeals, and the latter court certifies that it is indispensable to the determination of the case, and to the end that the court may properly discharge its duty, desires instruction upon the following questions:

> "1. Is a petition to revise in matter of law under section 24b of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealing from the adjudication?
>
> "2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation and therefore within the exceptions of section 4b of the Bankruptcy Act, as amended June 25, 1910 (36 Stat. 839), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?
>
> "3. Where an insurance corporation adjudged *353 bankrupt *in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910 (36 Stat. 839), upon due service of process and default, does not appeal from the adjudication, but acquiesces therein and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?"

[1] Of the construction of the statute there can be no controversy; what answer shall be made to the questions turns on other considerations, turns on the effect of the conduct of the company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that if objection had been made the company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled "that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate," and that section 4 does not relate to the jurisdiction of the court over the subject-matter. "It does not, therefore," is the further contention, "create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition," and that "the valid exercise of jurisdiction does not depend upon the correctness of the decision." And again, if the court in the exercise of its jurisdictional power, "reached a wrong conclusion, the judgment is not void, it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands it is binding on every one." There is plausibility in the propositions taken in their generality, but there are opposing ones. Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders *354 are regarded as nullities. They are *not voidable, but simply void, and this even prior to reversal. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345.

Which of the propositions shall prevail in a given case cannot be dogmatically asserted, and cases of their consideration and application can be cited against each other. There is such citation in the pending case. Plaintiff in error cites, among others, McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; First National Bank v. Klug, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. Ed. 1127.

McCormick v. Sullivant involved the effect of diversity of citizenship, and it was decided that an absence of its allegation did not impeach the judgment rendered in the case and preclude its being conclusive upon the parties. And it was said (as it has often been said) that the courts of the United States are "of limited jurisdiction, but not inferior courts, in the technical sense of those words, whose judgments taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon writ of error, or appeal, be reversed for that cause. But they are not absolute nullities."

In Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202, there came up to be considered also the effect of a prior adjudication as dependent upon an allegation of diversity of citizenship, and the ruling in McCormack v. Sullivant was affirmed.

The immediate comment on these cases is that the courts had jurisdiction of their subject-matter and necessarily power to pass upon the fact (diversity of citizenship) upon which that jurisdiction depended in the given case. The subject-matter of the suit was not withheld from them by explicit provision of the law which was their sole warrant of power.

First National Bank v. Klug is nearer to *355 the *question in the case at bar. It was a case in bankruptcy. The Act of July 1, 1898 (30 Stat. 544), provided that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil" might "be adjudged an involuntary bankrupt upon default or an impartial trial" and should "be subject to the provisions and entitled to the benefits" of the act.

A petition in involuntary bankruptcy was filed against Klug and a trial was had upon the issue, whether he was "engaged chiefly in farming" within the meaning of the act, and the jury having found accordingly, the District Court entered a judgment dismissing the petition. The question of the jurisdiction was certified to this court and it was held that the "District Court had and exercised jurisdiction." This further was said:

> "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned"—citing Mueller v. Nugent, 184 U. S. 15, 25, 22 Sup. Ct. 269, 46 L. Ed. 405; Smith v. McKay, 161 U. S. 355, 16 Sup. Ct. 490, 40 L. Ed. 731.

[2] It will be observed, therefore, that the act of 1898, made jurisdiction depend upon an inquiry of fact and necessarily jurisdiction was conferred to make the inquiry, and pronounce judgment according to its result. The case, therefore, is not pertinent to, or authority upon, the case at bar. The Act of June 25, 1910, which covers the present proceeding is peremptory in its prohibition. It excludes, by section 4, insurance corporations from the benefits of voluntary bankruptcy, and by subdivision "b" prohibits them from being adjudged involuntary bankrupts. The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of "municipal, rail-

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road, insur*ance, or banking" corporations to their creditors and their creditors to them, to other provisions of law. It is easy to see in what disorder a different policy would result. We may use for illustration a municipal corporation. Its creditors may be enterprising, its officers acquiescent or indifferent. Can, therefore, the allegations of the former and the default of the latter confer jurisdiction on the District Court to entertain a petition in bankruptcy against the corporation and render a decree therein, and, if not, why not? If consent can confirm jurisdiction, why not initially confer jurisdiction? It is not necessary to point out the disorder that would hence result and the difficulties that the officers of a bankrupt court would encounter in such situation. The legislative power thought care against the possibility of it was necessary, and in that care associated insurance corporations. For a court to extend the act to corporations of either kind is to enact a law, not to execute one.

[3] The first question concerns procedure only, and should be answered in the affirmative. First National Bank v. Klug, supra; Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

The second and third questions concern the merits and are respectively answered in the affirmative and negative.

So ordered.

(254 U. S. 300)

WALLS, Atty. Gen. of Wyoming, et al. v. MIDLAND CARBON CO. et al.

(Argued Oct. 13, 1920. Decided Dec. 13, 1920.)

No. 219.

1. Constitutional law 🔑212—Conservation by state of natural resources within prescribed limits not discrimination.

It is within the police power of the state to regulate the use of natural resources, so as not to conflict with the rights of others, so that the fact that such regulation applies only to specified limits does not establish discrimination between users.

2. Mines and minerals 🔑86—States may regulate use of gas from natural wells.

Natural gas, which has the property of circulating of its own accord underneath the surface, is not to be treated in law the same as other minerals fixed in place, to which the owner of the land has full right, but the state can regulate the use of gas drawn from such wells under its police power, to preserve the natural resources.

3. Mines and minerals 🔑86—Prevention of use of natural gas for carbon is within state's police power.

The enactment of Laws Wyo. 1919, c. 125, prohibiting the use of natural gas for the manufacture of carbon or other products, without using the heat generated thereby for other industrial or domestic purposes, which use was shown to require large volumes of gas for a small quantity of carbon, is within the police power of the state, to prevent waste of natural resources.

4. Mines and minerals 🔑86 — Comparative value of uses of natural gas is question for state.

The question of the relative value of the use of natural gas for the production of carbon and for industrial and domestic purposes is one for the state to decide, in the exercise of its police power, to conserve its natural resources, and it can prohibit the use of such gas for manufacturing carbon, even though it appears that the value of the carbon exceeds the value of the gas for fuel.

5. Constitutional law 🔑225(1)—Preventing waste of natural gas within 10 miles of town not discrimination.

The provision of Laws Wyo. 1919, c. 125, restricting the use of natural gas for carbon burning only in case of gas produced within 10 miles of an incorporated town or industrial plant, does not make that statute invalid as a discrimination between carbon manufacturers within its terms and those situated farther from towns.

6. Constitutional law 🔑42—Producer cannot object that state has not exercised full powers of conservation.

A producer of natural gas cannot object to a statute restricting the use of natural gas, on the ground that the statute does not exercise the full powers of the state for the conservation of such resource.

7. Mines and minerals 🔑86—Act held to require only practicable utilization of heat from natural gas.

Laws Wyo. 1919, c. 125, prohibiting consumption of natural gas for its products, without the heat therein contained being fully and actually utilized for other manufacturing or domestic purposes, requires only that the heat shall be utilized to its fullest practical and possible uses as in other fuel by the existing instrumentalities, so that the statute is not invalid as requiring a use of the heat which is impossible, since no instrumentalities are capable of utilizing the full heat value of the gas.

The Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

Appeal from the District Court of the United States for the District of Wyoming.

Suit by the Midland Carbon Company and another against William L. Walls, Attorney General of the State of Wyoming, and others, to restrain defendants from enforcing or attempting to enforce a statute of the state of Wyoming. From a decree granting an interlocutory injunction, defendants appeal. Reversed and remanded.

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*Mr. Henry E. Lutz, of Denver, Colo., for appellants.

Messrs. John W. Lacey, of Cheyenne, Wyo., and Reid L. Carr, of New York City, for appellees.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The complainants are corporations of Delaware and have their places of business in that state.

The defendants are officers of Wyoming, being respectively, its Attorney General, prosecuting officer of Big Horn county, and the Governor of the state.

It is alleged that jurisdiction of the District Court depends upon diversity of citizenship and the Constitution of the United States; the Constitution being violated by an act of the Legislature of the state. Chapter 125 of the Session Laws of 1919.

The object of the suit is to restrain defendants, and each of them, from enforcing or attempting to enforce the legislation.

It is declared by the act, which is attacked, that its purpose is "the conservation of natural gas." The first section is as follows:

> "The use, consumption or burning of natural gas taken or drawn from any natural gas well or wells, or borings from which natural gas is produced for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and shall be unlawful when such gas well or source of supply is located within ten miles of any incorporated town or industrial plant."

Section 2 prohibits the use, sale, or other distribution of *natural gas, the product of any well owned, leased, or managed by any person for the purpose of manufacturing or producing carbon or other resultant products from the burning or consumption of such gas, without the heat therein being fully and actually utilized for other manufacturing purposes or domestic purposes. Violations are made misdemeanors.

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The grounds of contention against the act are set forth in very voluminous pleadings, supplemented by a number of affidavits. But only a brief summary of them is necessary to present the question involved, which is, stated broadly, that the act transcends the police power of the state, its purpose and effect being not to regulate and conserve natural gas, but to prohibit its use, and make a discrimination between owners having equal rights, and thereby violates article 1, § 10, of the Constitution and the Fourteenth Amendment thereof.

Prior to the enactment of the statute, the Midland Company had erected a factory for the manufacture of carbon black, which factory is located about 1½ miles from the town of Cowley, Big Horn county, at an expenditure of $375,000. It is equipped for the manufacture of such carbon black, and can be used for no other purpose, and there is produced from it approximately 13,000 pounds of that article daily, which is sufficient for the manufacture of 117,000 pounds of printing ink. From the gas consumed to make the carbon black, there is first extracted approximately 1,600 gallons per day of high-gravity gasoline.

The uses of carbon black are enumerated, and it is alleged that no form of it possessing the same properties and the wide variety of uses can be commercially manufactured from any material or substance other than natural gas.

The origin of the industry and the uses of its product are variously detailed, and it is alleged that the company's *factory is so conducted as to permit no waste, that the best known processes and appliances are employed, and that the operation of the gasoline

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absorption plant and the recovery of gasoline from the gas supplied by the wells would be impossible if the carbon plant should cease to be operated, for the reason that the gas cannot be sold to other users in that locality in sufficient quantities to render the extraction of gasoline therefrom commercially profitable.

The Occidental Oil & Gas Company owns the land upon which are located the gas wells constituting the principal source of supply to the plant and carbon factory of the Midland Company. It, the Occidental Oil & Gas Company, also constructed, owns, and operates the pipe line by which the gas is conveyed to the factory, and delivers it to the factory, receiving from the Eastern Fuel Company, which owns and operates the gasoline extraction plant, a royalty of one-half of the gasoline extracted therefrom. The Oil Company also owns mineral leases covering 1,200 acres of proved gas territory within 10 miles of Cowley. Its business is an integral and inseparable part of that of the Midland Carbon Company, and all of its investments have been made in view of the carbon business.

In the construction of its pipe line it expended $65,000, and in the purchase of lands upon which the wells are located, a sum exceeding $30,000. Other gas lands are alleged to have been purchased and leased prior to the enactment of the law.

There are other allegations asserting the use of the gas and its products, and that such use is not a waste of the gas. Various ways in which the law violates complainants' rights under the Constitution of the United States are detailed; that under the guise of regulation the restrictions of the act are so framed as to abolish, ruin, and destroy complainants' business, while leaving it open to others to engage in carbon manufacture, without saving the gaso*line; that the penalties imposed by the act are harsh, unreasonable, and confiscatory; and that a dispute of its legality would impose a penalty of $1,000 for each separate daily violation of it. Other injuries are alleged.

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As already said, affidavits made by representatives of various trades and industries, displaying the qualities of carbon black and its uses, are attached to the bill. Other affidavits express the detriment, in the opinion of the affiants, of any restriction or regulation of the production of it; and others, from asserted experts, exhibit the source of the gas and the process of manufacture from it of carbon black, and that in its manufacture heat is necessarily evolved, but that as soon as any attempt is made to transform the heat into any other form of energy, such as light or mechanical power, an enormous, but inevitable, loss of heat results.

An injunction is prayed, interlocutory and permanent, restraining defendants from enforcing the act.

Upon the bill (it is verified), exhibits, and affidavits, it was ordered that the application for interlocutory injunction be heard by three judges, and that in the meanwhile a temporary restraining order be granted, upon filing a bond in the sum of $1,000.

The answer, in its admissions, denials, and independent averments, asserts waste of the gas by complainants' gas factory and processes, the depletion of the wells and their product, from which it is estimated that within three years all of the wells will have been utterly and completely depleted, and the depletion will relate, not only to the wells furnishing gas for the manufacture of carbon black, but will likewise relate to the entire region and vicinity.

And it is alleged that by preventing the use of the gas for the manufacture of carbon black, the towns of Lovell and Cowley and all industrial plants therein will be afforded a supply of gas for all domestic and industrial purposes for a period of 30 years.

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*The vice attributed to the act by complainants is denied, and a benefit and virtue asserted for it.

It is prayed that the bill be dismissed, and the restraining order be dissolved. The answer is verified.

A motion to dissolve the temporary restraining order was made, which was supported by affidavits, and opposed by others.

The affidavits are too long to quote. Those on the part of defendants represent the interest of the city of Lovell and other towns, and the necessity to their industries, if there are to be any, of a natural gas from the wells with which this case is concerned, and represent a depletion of the gas supply by the use made of the gas by complainants. Figures are given. Particulars are stated in one affidavit, and for a review of what are deemed the important tests and elements of judgment of the conditions which existed and would succeed the present practice it is said:

> "In conclusion, assuming that the present consumption of gas from this sand is 15,000,000 cubic feet per day (as I have been reliably informed), and that the decrease in pressure for the last year has been 150 pounds, and knowing that the present pressure is approximately 200 pounds, it is a simple problem in mathematics to ascertain the future life of the field. In other words, at the present rate of decrease in pressure, the field will be exhausted in 16 months, and there will be no pressure to force the gas out of the sand. On the same basis of reasoning there are approximately 1,200,000,000 cubic feet left in the sand, and the present consumption is 5,500,000,000 cubic feet per year."

The court sustained the application for temporary injunction.

The question in the case is, as we have said, whether the legislation of Wyoming is a valid exercise of the police power of the state, and brings into comparison the limits of the power as against the asserted rights of *314 property, *whether it, the legislation, is a legal conservation of the natural resources of the state, or an arbitrary interference with private rights. Contentions of this kind have been before this court in other cases, and their discussions and decisions have materiality here. We mean, not discussions or decisions on the police power in the abstract or generality, but discussions and decisions involving conditions and principles pertinent to the present case.

It will be observed that the act under review does not prohibit the use of natural gas absolutely. It prohibits, or to use its words, declares it to be a "wasteful and extravagant use of the gas when it is burned or consumed without the heat therein contained being fully and actually applied and utilized for either manufacturing or domestic purposes." But not even that unlimitedly, but only when the "gas well or source of supply is located within 10 miles of any incorporated town or industrial plant." Such is the prohibition upon the user or consumer. There is a prohibition upon the owner or lessee of wells within the designated distance from a town or industrial plant to sell or dispose of the gas, except under the specified conditions, "for the purpose of manufacturing carbon or other resultant products."

There are two elements, therefore, to be considered: (1) The distance of the wells from an incorporated town or industrial plant; (2) the element of heat utilization for manufacturing or domestic purposes. These elements are the determining ones in the accusations against the law. The first is the basis of the discrimination charged against it; the second is the basis of the charge that the law deprives the companies of their property by the ruin of their business and capital investments, and impairs the obligations of pre-existing contracts.

[1] In Bacon v. Walker, 204 U. S. 314, 27 Sup. Ct. 290, 51 L. Ed. 499, a statute of Idaho was considered which made it unlawful, with consequent liability to damages, *315 "for any person owning or having *charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim." The statute was sustained as a lawful exercise of the police power of the state against the assertion of the right of one citizen to use the public domain as much as another citizen, and that to impose damages upon him for the exercise of the right deprived him of his property without due process of law, and besides arbitrarily discriminated between sheep grazing and the grazing of other kinds of stock. We there said in substance that, the power of regulation existing, the imposition of some limit to a right, when its exercise would impinge upon the equal right of another, was the exercise of legislative power, and that the circumstances which induced it could not be pronounced illegal "on surmise or on the barren letter of the statute." And we said, further, that where equal rights existed the state has an interest in their accommodation. Pertinent cases were cited, and the exclusion from grazing within two miles of the possessory claim of another was decided to be legal, that "the selection of some limit is a legislative power," and that it was "only against the abuse of the power, if at all, that the courts could interpose." The mere distance expressed nothing.

[2] The case, and those it cites, are authority for the position that a state may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed. Of this Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, is especially illustrative and pertinent, and conducts naturally to the consideration of the second proposition; that is, to the element of heat utilization.

The suit was by the state, and was based upon a statute which was directed against *316 and prohibited one having *possession or control of any natural gas or oil well to permit the flow of gas or oil from any such well to escape into the open air for a longer period than two days after the gas or oil had been struck. From the standpoint of the law, to do so was a waste of gas. A right against the statute was set up, based upon the asserted or implied postulate that the owner of the land owned all beneath the surface and all that could be brought to the surface within the lines of the land. The postulate was rejected, upon the ground of the nature of the gas, the capability of its flow from place to place, the common right to domestic and industrial use of it, and the power of the state to regulate and conserve such right.

The Oil Company contended, as owner of the land (it was the lessee) and producer of the oil, that it had expended many thousands of dollars in purchasing and equipping machinery for the sole purpose of raising and producing oil, it not being engaged in producing or transporting natural gas, and that it used the gas as "power, force, and agency" to raise the oil to the surface of the ground, and that such was "the usual, natural, and ordinary method of saving oil in such cases," and, further, that no machinery or process of any kind had been devised by which the oil could be produced and saved otherwise, and by forbidding it, the company's business would be destroyed and the state deprived of the use and profits of the oil which was of vastly more value than the gas, and it was asserted that no more gas was permitted to escape than was consistent with the due operation of the well with the highest skill. It was hence urged against the act that it deprived of property without due process of law and denied to the Oil Company the equal protection of the laws. The answer was adjudged by the Supreme Court of the state not to constitute a defense. The adjudication was sustained by this court. We said, citing a case, "possession of the land is not necessarily *317 possession *of the gas," and again, on the authority of cases, "that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface." It was decided, however, that before that event occurs, indeed in prevention of it, the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner, in order to conserve the equal right of other owners and advance the public interest; and in support of this power of regulation a similarity between natural gas and other subsurface minerals was rejected. "True it is," it was said, "oil and gas, like other minerals, are situated beneath the surface of the earth; but, except for this point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission." Necessarily, therefore, it was adjudged that their use by one owner of the surface affected the use of other owners, and an excessive use by one diminished the use by others, and a similarity of other minerals, as we have seen, was rejected, and the analogy between oil and gas and animals feræ naturæ was declared. It was hence decided that the power of the state "can be manifested for the purpose of protecting all the collective owners, by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste."

To the contention that oil could not be taken at a profit by one who made no use of the gas, it was replied that such fact "went, not to the power to make regulations, but to their wisdom." And this can be said of the contention, in the case at bar, that one element is more valuable than another; that carbon black is more valuable than the gas from which it is extracted.

It will be observed that the basic principle of the Indiana statute is the same as the *318 basic principle of the *Wyoming statute; that is, the power of regulation dependent upon the natures of oil and gas, and that the absolute dominion of the surface of the land is not an unlimited dominion over them.

The case was cited in Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160, to defeat a suit brought to restrain the officers of the state of New York from enforcing against the gas company a statute which made it unlawful to pump from wells or otherwise draw by artificial appliances that class of mineral waters holding in solution carbonic acid gas, or producing an unnatural flow of such gas "for the purpose of extracting, collecting, compressing, liquefying, or vending such gas as a commodity otherwise than in conjunction with the mineral water and the other mineral ingredients with which it was associated."

The company alleged that the gas could be lifted to the surface only by means of pumps or other artificial appliances, and that many other landowners in Saratoga Springs had like wells which were operated in a like way with a like purpose. The utility of the gas was alleged, and a property right asserted, which the statute, it was further alleged, deprived of, in violation of the Constitution of the United States.

A demurrer was sustained to the bill; therefore its averments were admitted. The basis of the contention of the offense of the statute against the Constitution of the United States explicitly was that the company, being the owner of the land owned, had power and authority over all beneath the land's surface that it could reduce to possession. This was the same postulate, it will be observed, that was asserted in Oil Co. v. Indiana. It was rejected upon the authority of that case. We, however, said: "Were the question an open one, we should still solve it in the same way."

[3] May the principle and its justification be extended to the Wyoming statute? The *319 statute of Wyoming (we *repeat it to have it immediately before our eyes) declares it to be a "wasteful and extravagant use of natural gas" to use, consume, or burn it when taken or drawn from any gas well or wells or borings "for the products, where such natural gas is burned without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes." The declaration of illegality, however, only applies when the "gas or source of supply is located within 10 miles of any incorporated town or industrial plant." Section 2 explicitly mentions carbon black as within the illegality of the law, and as this case concerns its production we may accept its production as a test of the companies' case.

Of the range of the utility of carbon black there can be no controversy, and to this fact the companies give an especial emphasis in their averments, supplementary affidavits, and argument. The fact, however, is but of incidental importance. The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest to adjust and preserve; natural gas being one of the resources of the state. And in this consideration it is more important to consider, not for what a particular owner uses the gas, but the proportion of his use to that of others, or, it may be, the prevention of use by others; and the striking fact is presented by the companies' averments that by the processes and devices employed by them there is only obtained from each 1,000 cubic feet of natural gas consumed 1¾ pounds of carbon black and two-tenths of a gallon of high-gravity gasoline. To this averment the defendants add that every 1,000 cubic feet of gas contains from 33 to 40 pounds of carbon, and therefore "that the inefficiency of the process used by the complainants is very high, ranging only from 2.8 per cent. to 4.6 per

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cent." It is the further asser*tion of defendants that the companies are utilizing and withdrawing from the earth gas at the rate of approximately 10,000,000 cubic feet per day and that the same can never be replaced or restored.

To these averments we may add the affidavits. There is something in them, but not enough to reduce the importance of the facts averred. Those on the part of the companies are directed to a great extent to the value of carbon black and its use, and the detriment or disaster of the discontinuance or even reduction of its manufacture; and the explicit assertion is that it is absolutely impossible to utilize the heat generated as an incident to its manufacture. A comparison is made with other fuels, and the affidavits are explicit in statement that the requirement that the heat contained in them must be "fully and actually applied and utilized" (to use the words of the Wyoming statute) is not only unreasonable, but impossible. Figures are given, not only of gas engines, but of oil, air, and steam engines. This is dwelt on at great length, and it is declared that it is absolutely impossible to utilize heat generated as an incident to the manufacture of carbon black; and it is said:

> "If the true test of the waste of gas or any other fuel is whether or not the heat therein contained is fully utilized, it would follow that practically every industrial use of fuel must be characterized as wasteful."

There is also testimony, from those familiar with the geological formations and the production of natural gas in Wyoming, that there are very extensive deposits underlying 10 counties, and that their development has scarcely more than commenced, and that their potential capacity far exceeds the capacity of the wells now drilled. Further, that the aggregate capacity of the existing wells exceeds 650,000,000 cubic feet per day, and that this production could be largely augmented, if the demands for natural gas in the state warranted.

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*Opposing affidavits set forth the needs of the towns, present and prospective, and of industries other than carbon black, and that the wells of the companies are drilled into the same sand in which the wells of the Lovell Gas & Electric Company, an industry which furnishes gas and electricity to the town of Lovell, are drilled. The sand is a free, flowing sand; that is, one in which the gas has free access from one part of the field to the other. Consequently the gas pressure would be approximately the same at all the wells drilled into it. With the operation of the wells of the companies came a diminution of pressure, and—

> "if the present consumption of gas continues for another year, there will not be sufficient gas in this field in the particular sand in question to supply even the domestic uses of the town of Lovell."

And it is affirmed that the plant of the Midland Gas Company consists of about 90 separate buildings constructed of sheet iron and steel, in such a way that they can be moved more readily than almost any other character of construction, and were evidently designed with the idea of portability in mind, and at the present rate of consumption of the gas they will have to be moved, in any event, within a year. Corroborating figures of the supply and consumption are given, and it is said that if the wells now driven be allowed to flow at their full capacity they will be entirely exhausted in 90 days. The proof of this is said to be that the use of 15,000,000 cubic feet per day of gas produced within the last 18 months has caused a loss of 57 per cent. of the available gas in the producing sand. In contrast, it is estimated that, if the gas consumed at the carbon plant was conserved, the supply available for domestic and industrial use in the towns of Lovell and Cowley would last for a period of 10 years.

There is speculation as to other basins of deposits of gas and its utility for industries, but which cannot be undertaken against the

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depletion by the production of carbon *black. The process to make the latter is said to be simple, and is similar to holding a cold plate over an old-fashioned gas jet. In fact, it is said, the process used by the Midland Carbon Company is merely an incomplete combustion of gases in an insufficient amount of air; the flames from the different jets practically touching cast iron channel plates, which are suspended over the flames and are moved backward and forward at a very slow rate of speed. The carbon is scraped off the plates into hoppers and carried to the packing houses by conveyors. All of this is mechanical.

It is testified (by an engineer of the Bureau of Mines in the Interior Department, who had made a study of the making of carbon black) that the efficiency of the carbon black industry is very low; that the largest yield of which affiant had any knowledge did not exceed 1½ pounds per 1,000 cubic feet of natural gas, though it is a well known and chemically ascertained fact that 1,000 cubic feet of natural gas contains approximately from 33 to 45 pounds of carbon.

The companies replied with affidavits of opposing tendency, and made comparisons of the money value of carbon black with the money value of natural gas; the former being the more valuable. And there is contradiction of the asserted lower pressure of the wells and the tendency to the depletion of the gas, and assertion that other forms of industry can well use coal for fuel.

[4] The affidavits (which we have presented necessarily in barest outline), whether they may be regarded as presenting issues of fact or of judgment, exhibit the conditions which may have moved the policy and legislation of the state. Manifestly, conceding a power to the state of regulation, a comparison of the value of the industries and a judgment upon them as affecting the state, was for it to make. Such comparison may, therefore, be put aside. It may be, as it is deposed, that 1,000 cubic feet of natural gas converted into gasoline and carbon black may *be sold much higher than can be obtained from the same amount of gas sold for fuel purposes, but it does not follow from that fact that the state may not consider, and direct its legislation by the consideration that (and we take the averment of the companies) 1,000 cubic feet of natural gas is consumed to produce 1¾ pounds of carbon black and about two-tenths of a gallon of gasoline. That it may so consider depends upon the question whether its statute is within the principle of the statutes passed on in Oil Co. v. Indiana and Lindsley v. Natural Carbonic Gas Co. By reverting to these cases it will be immediately observed that the power of regulation over natural gas is possessed by a state, and in the first case (Oil Co. v. Indiana) it was exercised to prohibit the employment of the gas as a means or agency in the production of oil against an asserted right of property in the ownership of the land upon which the oil was produced, and therefore of the oil and gas as incidents of such ownership, and which could be used in such manner and quantity as the landowner might choose.

In the Lindsley Case the power of the state was exerted to prohibit the owner of the surface from pumping on his own land, water charged with gas. This was but an exertion, it was said, to preserve from depletion the subterranean supply common to him and other owners, and that the statute, therefore, was not unconstitutional as depriving owners of their property without due process of law. Oil Co. v. Indiana, as we have pointed out, was cited as a precedent, and its principle applied. The case at bar is, we think, within that principle; in other words, the power is exerted to prohibit an extravagant, or wasteful, or disproportionate use of the natural gas of the state.

We have seen that the method of production by natural gas is like holding a cold plate over a candle, or, as it is expressed by a witness, it can only be produced "by combustion and the impinging of the flame on the metallic sur*face"; and there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the state a comparison of utilities, which involved as well the preservation of the natural resources of the state and the equal participation in them by the people of the state; and the duration of this utility was for the consideration of the state, and we do not think that the state was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.

The cited cases determine otherwise, and that as the state of Indiana could prevent the exhaustive use of gas in the production of oil, and as the state of New York could prevent the owner of land from using artificial means to obtain the carbonated waters under his land, the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas and the consequent detriment of other uses.

[5] It may be said, however, indeed, is said, that the purpose of the act or its effect is a discrimination between producers of carbon black; those 10 miles from a town or industrial plant not being within its provisions. We think the classification is justified by the case of Bacon v. Walker, supra, and indeed by the principles which determine classification.

[6] To the contention that the statute is not one of conservation, because carbon black factories are permitted if 10 miles distant from a town or industrial plant, the immediate answer is that it is for the state to determine, not only if any conservation be necessary, but the degree of it, and certainly the companies cannot complain if the state has not exerted its full power.

[7] As we have seen, many affidavits were addressed to the *impossibility of complying with the statute; that is, of utilizing the heat of natural gas to the extent of the words of the statute. We say to the extent of the words of the statute, because we think the statute must be construed with reference to the facts of nature and their possibilities, and that all that was intended by the words employed was to require a practical and possible use of the heat, as in other fuels, and by the existing instrumentalities, and if this should be done it was a legal use of the gas —was an application and utilization of the heat contained in it. The statute was only intended to prevent the selection of a product whose production tended, and according to some of the affidavits, whose inevitable effect was, to exhaust the supply of gas in a very little while.

The decree granting the interlocutory injunction is reversed, and the case remanded to the District Court for further proceedings in conformity to this opinion.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS dissent.

(254 U. S. 325)

GILBERT v. STATE OF MINNESOTA.

(Argued Nov. 10, 1920. Decided Dec. 13, 1920.)

No. 79.

1. Army and navy 🔑40—States have interest in conduct of national war, which authorizes protection of recruiting.

Though the exclusive right to wage war and to raise and maintain armies is vested in the United States, the state of Minnesota has such an interest in the successful conduct of a war by the United States that it was authorized to enact a statute during the recent war with the German government, making it unlawful to interfere with or discourage the enlistment in the military or naval service of the United States.

2. Army and navy 🔑40—State statute against obstructing recruiting sustainable under power to preserve peace.

A state statute, making it unlawful to utter words in a public meeting which tend to discourage recruiting in the military or naval forces, is sustainable during time of war under the police power of the state to preserve the public peace, since statements of that character at a public meeting tend to provoke violence.

3. Constitutional law 🔑90—Prohibiting teaching against recruiting does not violate right of free speech.

Even if the right of free speech is a natural right protected by the United States Constitution against state action, that right is not an absolute one, and is not infringed by a state statute, making it unlawful to discourage enlistment in the military or naval forces at a public meeting.

Mr. Chief Justice White and Mr. Justice Brandeis dissenting.

In Error to the Supreme Court of the State of Minnesota.

Joseph Gilbert was convicted of violating a Minnesota statute making it unlawful to interfere with or discourage the enlistment of men in the military or naval service of the United States or of the state, the conviction was affirmed by the state Supreme Court (141 Minn. 263, 169 N. W. 790), and defendant brings error. Affirmed.

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*Messrs. George Nordlin and Frederick A. Pike, both of St. Paul, Minn., for plaintiff in error.

Messrs. James E. Markham, Asst. Atty. Gen., and Clifford L. Hilton, Atty. Gen., for State of Minnesota.

Mr. Justice McKENNA delivered the opinion of the Court.

A statute of Minnesota makes it unlawful "to interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the state of Minnesota."

Its second and third sections are as follows:

"Sec. 2. *Speaking by Word of Mouth against Enlistment Unlawful.*—It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota.

"Sec. 3. *Teaching or Advocating by Written or Printed Matter against Enlistment Unlawful.* *327 —It shall be un*lawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

Section 4 defines a citizen to be "any person within the confines of the state," and section 5 declares violations of the act to be gross misdemeanors and punishable by fine and imprisonment. (Gen. St. Supp. 1917, §§ 8521—2 to 8521—5).

The indictment charged that Gilbert at a time and place designated in the state, and under the conditions prohibited by section 2, the United States being then and there at war with the kingdom and imperial government of Germany, used the following language:

"We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy? I tell you what is the matter with it: Have you had anything to say as to who should be President? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours, * * *"

A demurrer to the indictment was overruled, and Gilbert was tried and convicted. The judgment was that he pay a fine of $500 and be imprisoned in the county jail of the county of Goodhue for one year, and pay the costs of the prosecution. The judgment was affirmed by the Supreme Court of the state.

The statute, it is contended, is repugnant to the Constitution of the United States in *328 that: (1) "All power of legis*lation regarding the subject-matter contained in the statute is conferred upon Congress and withheld from the states." (2) And that the statute is obnoxious to the "inherent right of free speech respecting the concerns, activities and interests of the United States of America and its government."

[1] We shall consider the objections in their order. It is said in support of the exclusive power in Congress, that Congress alone can under the Constitution "'provide for the common defense and general welfare of the United States,' 'declare war,' 'raise and support armies,' 'to make rules for the government and regulation of the land and naval forces.'" To these affirmative delegations of power to Congress, there is added, it is said, a prohibition to the states to "engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." And, "that the state of Minnesota is not a party to the war now [then] being waged. If it is not engaged in any war, and until it does so engage, legislation such as a belligerent sovereign might enact, is beyond its province." These specific grounds of objection to the statute are attempted to be reinforced by analogy to the power of Congress over interstate commerce to the exclusion of the interference of the states.

The bases of the objections seem to be that plaintiff in error had an accountability as a citizen of the United States different from that which he had as a citizen of the state, and that therefore he was not subject to the power or jurisdiction of the state exercised in the act under review. Manifestly, to support the contention something more is necessary than the letter of the cited constitutional provisions. The broader proposition must be established that a state has no interest or concern in the United States or its armies or power of protecting them from public enemies.

Undoubtedly, the United States can declare *329 war and it, *not the states, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them—whether it is repellant and adverse or eager and militant, and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States, is a service of patriotism, and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any co-operation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one, and that the constituted and constituting sovereignties must have power of co-operation against the enemies of all. Of such instance, we think, is the statute of Minnesota and it goes no farther. It, therefore, has none of the character of the illustrations adduced against it, nor the possibility of conflict of powers which they condemn. This was the view of the Supreme Court of the state, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in State v. Holm, 139 Minn. 267, 166 N. W. 181, L. R. A. 1918C, 304, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212h), abrogated or superseded the statute, the court declaring that the fact that the citizens of the state are also citizens of the United States and owe a duty to the nation, does not absolve them from duty *330 to the state nor preclude a state from *enforcing such duty. "The same act," it was said, "may be an offense or transgression of both" nation and state, and both may punish it without a conflict of their sovereignties. Numerous cases were cited commencing with Moore v. Illinois, 14 How. 13, 14 L. Ed. 306, and terminating with Halter v. Nebraska, 205 U. S. 34[1], 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525.

The latter case is especially pertinent in its sentiment and reasoning. It sustained a statute of Nebraska directed against the debasement of the national flag to trade uses against the contention that the flag being the national emblem was subject only to the control of the national power. In sustaining the statute it was recognized that in a degradation of the flag there is a degradation of all of which it is the symbol, that is, "the national power and national honor," and what they represent and have in trust. To maintain and reverence these, to "encourage patriotism and love of country among its people," may be affirmed, it was said, to be a duty that rests upon each state, and that "when, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state."

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[1] In Gustafson v. Rhinow, 175 N. W. 903, the Supreme Court of Minnesota sustained a law of the state giving to soldiers who served in the war against Germany $15 for each month or fraction of a month of service, against an attack that the soldiers were soldiers of the United States. The court expressed the concern and interest of the state as follows: "It is true that the federal government alone has power to declare war, but, having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a cerain field, they are also members of the family of states constituting the national organization."

And so with the statute of Minnesota. An army is an instrument of government, a necessity of its power and honor, and, it may be, of its security. An army, of course, can only be raised and directed by Congress; in neither *331 has the *state power, but it has power to regulate the conduct of its citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the nation and state. To do so is not to usurp a national power; it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.

We concur, therefore, in the final conclusion of the court, that the state is not inhibited from making "the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

[2] The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the state. As counsel for the state say:

> "The act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of seditious speech which the Legislature of the state has found objectionable. If the Legislature has otherwise power to prohibit utterances of the character of those here complained of, the fact that such suppression has some contributory effect on the federal function of raising armies is quite beside the question."

And the state knew the conditions which existed, and could have a solicitude for the public peace, and this record justifies it. Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder, and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence, and, when violence is once yielded to, before it can be quelled, tragedies may be enacted. *332 To preclude such result or a *danger of it is a proper exercise of the power of the state. Presser v. Illinios, 116 U. S. 267, 6 Sup. Ct. 580, 29 L. Ed. 615.

[3] The next contention is that the statute is violative of the right of free speech, and therefore void. It is asserted that the right of free speech is a natural and inherent right, and that it, and the freedom of the press, "were regarded as among the most sacred and vital possessed by mankind when this nation was born, when its Constitution was framed and adopted." And the contention seems necessary for the plaintiff in error to support. But without so deciding or considering the freedom asserted as guaranteed or secured either by the Constitution of the United States or by the Constitution of the state, we pass immediately to the contention, and for the purposes of this case may concede it; that is, concede that the asserted freedom is natural and inherent, but it is not absolute; it is subject to restriction and limitation. And this we have decided. In Schenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249, 63 L. Ed. 470, we distinguished times and occasions, and said that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic;" and in Frohwerk v. United States, 249 U. S. 204, 206, 39 Sup. Ct. 249, 250 (63 L. Ed. 561), we said:

> "That the First Amendment, while prohibiting legislation against free speech as such, cannot and obviously was not intended to give immunity to every posssible use of language."

See, also, Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173. In Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. 259, 64 L. Ed. 360, commenting on those cases and their contentions, it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it. It is a direct assault *333 upon *the statute of Minnesota, and a direct assertion in spite of the prohibition of the statute that one can by speech teach or advocate that the citizens of the state should not aid or assist "the United States in prosecuting or carrying on war with the public enemies of the United States," and be protected by the Constitution of the United States.

The same conditions existed as in the cited cases, that is, a condition of war and its emergency existed, and there was explicit limitation to section 3 in the charge of the trial court to the jury. The court read sections 2 and 3 of the statute to the jury, and said:

> "I take it from the reading of the whole indictment that it is prosecuted under section 3, which I have just read to you."

Gilbert's speech had the purpose they denounce. The nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that—its purpose was necessarily the discouragement of that. It was not an advocacy of policies or a censure of actions that a citizen had the right to make. The war was flagrant; it had been declared by the power constituted by the Constitution to declare it, and in the manner provided for by the Constitution. It was not declared in aggression, but in defense, in defense of our national honor, in vindication of the "most sacred rights of our nation and our people."[2]

This was known to Gilbert for he was informed in affairs and the operations of the government, and every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It would be a travesty on the constitutional privilege he invokes to assign him its protection.

Judgment affirmed.

*Mr. Justice HOLMES concurs in the result.

The CHIEF JUSTICE, being of the opinion that the subject-matter is within the exclusive legislative power of Congress, when exerted, and that the action of Congress has occupied the whole field, therefore dissents.

Mr. Justice BRANDEIS, dissenting.

Joseph Gilbert, manager of the organization department of the Nonpartisan League was sentenced to fine and imprisonment for speaking on August 18, 1917, at a public meeting of the league, words held to be prohibited by chapter 463 of the laws of Minnesota, approved April 20, 1917 (Gen. St. Supp. 1917, §§ 8521—1 to 8521—6). Gilbert was a citizen of the United States, and apparently of a state other than Minnesota. He claimed seasonably that the statute violated rights guaranteed to him by the federal Constitution. This claim has been denied; and, in my opinion, erroneously.

The Minnesota statute was enacted during the World War; but it is not a war measure. The statute is said to have been enacted by the state under its police power to preserve the peace; but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the federal Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a—10212h), it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism, and the Legislature in effect proscribes it for all time. The statute does not in terms prohibit the teaching of the doctrine. Its prohibition is more specific and is directed against the teaching of certain applications of it. This specification operates, as will be seen, rather to extend, than to limit, the scope of the prohibition.

*Sections 1 and 2 prohibit teaching or advocating by printed matter, writing, or word of mouth that men should not enlist in the military or naval forces of the United States. The prohibition is made to apply whatever the motive, the intention, or the purpose of him who teaches. It applies alike to the preacher in the pulpit, the professor at the university, the speaker at a political meeting, the lecturer at a society or club gathering. Whatever the nature of the meeting and whether it be public or private, the prohibition is absolute, if five persons are assembled. The reason given by the speaker for advising against enlistment is immaterial. Young men, considering whether they should enter these services as a means of earning a livelihood or as a career, may not be told that, in the opinion of the speaker, they can serve their country and themselves better by entering the civil service of state or nation, or by studying for one of the professions, or by engaging in the transportation service, or in farming or in business, or by becoming a workman in some productive industry. Although conditions may exist in the army or the navy which are undermining efficiency, which tend to demoralize those who enter the service and would render futile their best efforts, the state forbids citizens of the United States to advocate that men should not enlist until existing abuses or defects are remedied. The prohibition imposed by the Minnesota statute has no relation to existing needs or desires of the government. It applies although recruiting is neither in process nor in contemplation. For the statute aims to prevent, not acts, but beliefs. The prohibition imposed by section 3 is even more far-reaching than that provided in sections 1 and 2. Section 3 makes it punishable to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, *of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them.

That such a law is inconsistent with the conceptions of liberty hitherto prevailing seems clear. But it is said that the guaranty against abridging freedom of speech contained in the First Amendment of the federal Constitution applies only to federal action; that the legislation here complained of is that of a state; that the validity of the statute has been sustained by its highest court as a police measure; that the matter is one of state concern; and that consequently this court cannot interfere. But the matter is not one merely of state concern. The state law affects directly the functions of the federal government. It affects rights, privileges, and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty. These are rights which are guaranteed protection by the federal Constitution; and they are invaded by the statute in question.

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[2] Words of President Wilson in his war message to Congress, April 2, 1917.

Congress has the exclusive power to legislate concerning the army and navy of the United States, and to determine, among other things, the conditions of enlistment. It has likewise exclusive power to declare war, to determine to what extent citizens shall aid in its prosecution and how effective aid may best be secured. Congress, which has power to raise an army and naval forces by conscription when public safety demands, may, to avert a clear and present danger, prohibit interference by persuasion with the process of either compulsory or voluntary enlistment. As an incident of its power to declare war it may, when the public safety demands, require from every citizen full support, and may, to avert a clear and present danger, prohibit interference by persuasion with the giving of such support. But Congress might conclude that the most effective army or navy would be one composed wholly of men who *337 had enlisted with full appreciation of *the limitations and obligations which the service imposes, and in the face of efforts to discourage their doing so.[3] It might conclude that the most effective army would be one composed exclusively of men who are firmly convinced that war is sometimes necessary if honor is to be preserved, and also that the particular war in which they are engaged is a just one. Congress, legislating for a people justly proud of liberties theretofore enjoyed and suspicious or resentful of any interference with them, might conclude that even in times of great danger, the most effective means of securing support from the great body of citizens is to accord to all full freedom to criticize the acts and administration of their country, although such freedom may be used by a few, to urge upon their fellow citizens not to aid the government in carrying on a war, which reason or faith tells them is wrong, and will therefore bring misery upon their country

The right to speak freely concerning functions of the federal government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a state was powerless to curtail. It was held in Crandall v. Nevada, 6 Wall. 35, 44, 18 L. Ed. 745, that the United States has the power to call to the seat of government or elsewhere any citizen to aid it in the conduct of public affairs; that every citizen has the correlative right to go there or anywhere in the pursuit of public or private business; and that "no power can exist in a state to obstruct this right which would not enable it to defeat the purpose for which the government was established." The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own *338 opinion concerning laws existing *or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so, "the right of the people to assemble for the purpose of petitioning Congress for a redress of grievance or for anything else connected with the powers or duties of the national government" would be a right totally without substance. See United States v. Cruikshank, 92 U. S. 542, 552, 23 L. Ed. 588; The Slaughterhouse Cases, 16 Wall. 36, 79, 21 L. Ed. 394. Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril. There are times when those charged with the responsibility of government, faced with clear and present danger, may conclude that suppression of divergent opinion is imperative; because the emergency does not permit reliance upon the lower conquest of error by truth. And in such emergencies the power to suppress exists. But the responsibility for the maintenance of the army and navy, for the conduct of war and for the preservation of government, both state and federal, from "malice domestic and foreign levy," rests upon Congress. It is true that the states have the power of self-preservation inherent in any government to suppress insurrection and repel invasion; and to that end they may maintain such a force of militia as Congress may prescribe and arm. Houston v. Moore, 5 Wheat. 1, 5 L. Ed. 19. But the duty of preserving the state governments falls ultimately upon the federal government. Luther v. Borden, 7 How. 1, 77, 12 L. Ed. 581; The Prize Cases, 2 Black, 635, 668, 17 L. Ed. 459; Texas v. White, 7 Wall. 700, 727, 19 L. Ed. 227. And the superior responsibility carries with it the superior right. The states act only under the express direction of Congress. See National *339 Defense Act, June 3, 1916, c. 134, 39 Stat. *166; Selective Service Act, May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k). The fact that they may stimulate and encourage recruiting, just as they may stimulate and encourage interstate commerce, Monongahela Nav. Co. v.

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[3] See General John A. Logan, "The Volunteer Soldier of America," pp. 89-91; Col. F. N. Maude in the Contemporary Review, v. 189, p. 37.

United States, 148 U. S. 312, 329, 13 Sup. Ct. 622, 37 L. Ed. 463, does not give them the power by police regulations or otherwise to exceed the authority expressly granted to them by the federal government. See Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. Ed. 1060. Congress, being charged with responsibility for those functions of government, must determine whether a paramount interest of the nation demands that free discussion in relation to them should be curtailed. No state may trench upon its province.

Prior to the passage of the Minnesota statute it had been the established policy of the United States, departed from only once in the life of the nation,[4] to raise its military and naval forces in times of war as in peace conclusively by voluntary enlistment. Service was deemed a privilege of Americans, not a duty exacted by law. Specific provision had been made to ensure that enlistment should be the result of free, informed, and deliberate choice.[5] The law of the United States left an *340 American as *free to advise his fellows not to enter the army or the navy as he was free to recommend their enlistment. The government had exacted from American citizens no service except the prompt payment of taxes. Although war had been declared, such was still the policy, and the law of the United States when Minnesota enacted the statute here in question.

The Minnesota statute was, when enacted, inconsistent with the law of the United States, because at that time Congress still permitted free discussion of these governmental functions. Later, and before Gilbert spoke the words complained of, the federal Espionage Law was enacted, but the Minnesota statute was also inconsistent with it. The federal act did not prohibit the teaching of any doctrine; it prohibited only certain tangible obstructions to the conduct of the existing war with the German Empire committed with criminal intent. It was so understood and administered by the Department of Justice.[6] Under the Minnesota law, teaching *341 or advice that men *should not enlist is made punishable although the jury should find (1) that the teaching or advocacy proved wholly futile and no obstruction resulted; (2) that there was no intent to obstruct; and the court, taking judicial notice of facts, should rule (3) that, when the words were written or spoken, the United States was at peace with all the world. That this conflict was not merely a technical one, but a cause of real embarrassment and danger to the federal government, we learn from one of the officials intrusted with the administration of the Espionage Act:

> "In the state of Minnesota because of what was claimed to be either inadequate federal law or inadequate federal administration, state laws of a sweeping character were passed and enforced with severity. Whether justified or not in adopting this policy of repression, the result of its adoption increased discontent, and the most serious cases of alleged interference with civil liberty were reported to the federal government from that state."[7]

In Johnson v. Maryland, 254 U. S. 51, 41 Sup. Ct. 16, 65 L. Ed. —, decided November 8, 1920, this court held that the power of Congress to establish post roads precluded the state from requiring of a post office employé using the state highway in the transportation of mail the customary evidence of competency to drive a motortruck, although the danger to public safety was obvious and it did not appear that the federal government had undertaken to deal with the matter by statute or regulation. The prohibition of state action rests, as the court pointed out there, "not upon any consideration of degree, but upon the entire absence of power on the part of the states to touch the instrumentalities of the United States." As exclusive power over enlistments in the army and the navy of the United States and the responsibility for the conduct of war is vested by *342 the federal Constitution in Congress, *legislation by a state on this subject is necessarily void unless authorized by Congress. It is so when Congress makes no regulation, because by omitting to make regulations Congress signifies its intention that, in this respect, the action of the citizen shall be untrammeled. This would be true, even if the subject in question were one over which Congress and the states have concurrent power. For where Congress has occupied a field theretofore open also to state legislation, it necessarily excludes all such. Southern Railway v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; Chicago, Rock Island & Pacific Railway Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203. Here Congress not only had exclusive power to act on the subject; it had exercised that power directly by the Espionage Law before Gilbert spoke the words for which he was sentenced. The provisions of the Minnesota statute and its title preclude a contention that its purpose was to prevent breaches of the peace. Compare Ex parte Meckel (Tex. Cr. R.) 220 S. W. 81. But neither the fact that it was a police regulation, New York Central Railroad Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, nor the fact that it was legislation in aid of congressional action, would, if true, save the statute. For "when the United States has exercised its exclusive powers * * * so far as to take possession of the field, the states no more can supplement its requirements than they can annul them." Penna. R. R. Co. v. Pub. Service Comm., 250 U. S. 566, 569, 40 Sup. Ct. 36, 37 (63 L. Ed. 1142); Northern Pacific Railway Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237. The exclusiveness of the power of the federal government with which this state legislation interferes springs from the very roots of political sovereignty. The states may not punish treason against the United States, People v. Lynch, 11 Johns. (N. Y.) 549; Ex parte Quarrier, 2 W. Va. 569; although indirectly acts of treason may affect them vitally. No more may they arrogate to themselves authority to punish the teaching of pacifism which the Legislature of Minnesota appears *343 *to have put into that category. Compare Schaefer v. United States, 251 U. S. 466, 494, note, 40 Sup. Ct. 259, 64 L. Ed. 360.

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[4] Act of March 3, 1863, c. 75, 12 Stat. 731.

[5] Recruiting officers were required to explain to every man before he signed the enlistment paper the nature of the service, the length of the term, the amount of pay, clothing, rations and other allowances to which a soldier is entitled by law; and to read and explain to the applicant many of the articles of war before administering to him the oath of enlistment. U. S. Army Regulations, 1913, paragraphs 854, 856.

The following is contained in the instructions sent to all officers and men assigned to recruiting duty:

"All progress and success rests fundamentally on truth. Hence never resort to indirection or misrepresentation or suppression of part of the facts in order to push a wavering case over the line. Recruits signed up on misrepresentated facts or partial information do not make good soldiers. They resent being fooled just as you would, and will never yield their full value to a government whose agents obtained their services in a way not fully square. Therefore tell your prospect anything he wants to know about the army. If the real facts are not strong enough to win him, you don't want him anyway." Recruiters Handbook, United States Army, p. 16.

[6] "The general policy of the Attorney General (Mr Gregory) toward free speech has been well understood and adhered to by his subordinates with a good deal of consistency From the outset, recognizing that free expression of public opinion is the life of the nation, we have endeavored to impress on our subordinates the necessity of keeping within the limits of policy established by Congress and bearing in mind at all times the consitutional guaranties. Repeatedly their attention has been called to the fact that expression of private or public opinion relating to matters of governmental policy or of political character must not be confused with willful attempts to interfere with our conduct of the war. At all times we have had before us the dangers which follow attempts to restrain public discussion; and, so far as instructions issued by the Attorney General have been concerned, they have consistently and at all times emphasized this general policy." John Lord O'Brian, "Civil Liberty in War Time," Report of New York State Bar Ass'n, vol. 42, p. 308.

[7] Report of New York Bar Ass'n, vol. 42, p. 296.

As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizen of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment. But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960, the right of a business man to conduct a private employment agency, Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, or to contract outside the state for insurance of his property, Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832, although the Legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

(254 U. S. 343)

UNITED STATES ex rel. HALL v. PAYNE, Secretary of the Interior.

(Argued Nov. 17, 1920. Decided Dec. 13, 1920.)

No. 95.

Mandamus 🔑85—Construction of land statute by Secretary of the Interior held not controllable, as arbitrary.

A construction by the Secretary of the Interior that Act Aug. 18, 1894 (Comp. St. § 4876), reserving lands from adverse appropriation for 60 days after application by the state for survey, did not require the rejection of an application filed within the 60 days, but merely its suspension until the rights of the state were determined, which construction was applied in other cases also, was not an arbitrary act by the Secretary, which can be corrected by mandamus proceedings on behalf of a subsequent applicant, whose application was rejected after the suspended application was approved.

In Error to the Court of Appeals of the District of Columbia.

Proceeding for mandamus by the United States, on the relation of Verdine R. Hall, against John Barton Payne, Secretary of the Interior. A judgment of the Supreme Court of the District of Columbia, dismissing the petition, was affirmed by the Court of Appeals of the District of Columbia (United States ex rel. Hall v. Lane, 48 App. D. C. 279), and relator brings error. Affirmed.

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*Mr. Patrick H. Loughran, of Washington, D. C., for plaintiff in error.

The Attorney General and Assistant Attorney General Nebeker, for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

This case involves the consideration of a mandamus brought by plaintiff in error, hereinafter called relator, against the Secretary of the Interior.

The proceedings were instituted in the Supreme Court of the District of Columbia by petition, and its essential allegations stated narratively are as follows:

The lands in question are within a township which was reserved under an act passed August 18, 1894 (28 Stat. 394 [Comp. St. § 4876]) from adverse appropriation by settlement or otherwise except under rights found to exist of prior inception, for a period to extend from the application for survey until the the expiration of 60 days from the date of the filing of the township plat of the survey in the proper district land office.

The plat of the survey was filed in the proper district land office May 17, 1915. During the 60-day period, nor since, the described land has not been selected by the state. On June 15, 1915, the relator settled on the land and on July 17, 1915, was still *345 actually residing thereon *with the bona fide intention and purpose of appropriating and entering it under the homestead laws of the United States, in the event that the state of Montana did not select the same in accordance with the statute.

On the latter date relator filed in the land office perfect application for the land as a homestead, which the register and receiver rejected for the stated reason that on July 16, 1915, they had permitted one George E. Kennedy to make a homestead entry of the lands.

The permission for the entry of Kennedy rested wholly upon an application made May 25, 1915, at a time when the lands were reserved as before stated.

On May 25, 1915, the register and receiver rejected Kennedy's application in the following terms:

> "Rejected May 25, 1915, because land not open to entry until July 17, 1915, except to state of Montana and settlers prior to March 10, 1910."

On June 4, 1915, the register and receiver made the following notation upon Kennedy's application:

> "Suspended June 4, 1915, pending preference right of state of Montana. Rejection of May 25, 1915, hereby revoked."

Theretofore it had been the consistent and uniform practice of the General Land office to reject any and all filings such as Kennedy's.

Relator appealed from the rejection of his application to the General Land Office and that office affirmed the decision of the register and receiver, and relator appealed to the Secretary of the Interior, who on July 28, 1916, affirmed the decision of the General Land Office and held that "Kennedy's application, being prior in time, is also prior in right."

The Secretary in his decision did not refer to any of the asserted prior decisions or practice, but arbitrarily disregarded the mandate and will of Congress expressed in the Act of August 18, 1894.

Relator at the moment of the expiration of *346 the 60-day *limit was actually residing on the land with the intention of making entry thereof under the homestead laws, and the right to make such entry after the 60-day period was secured to him by such residence by the provisions of the third section of the Act of May 14, 1880 (21 Stat. 140 [Comp. St. § 4538]), and the uniform decisions of the Department of the Interior under said act, and the Secretary of the Interior has arbitrarily denied to him the exercise and enjoyment of that right; and in ruling that Kennedy had acquired a right under the homestead laws relator is deprived of the benefit to him of performance by the Secretary of the Interior of a purely ministerial duty, and he prays that a writ of mandamus be issued, directed to the Secretary to approve his, the relator's application, and deliver to him the proper evidence thereof. General relief is also prayed.

An order to show cause against the petition was issued and served on the Secretary, to which he made reply affirming the legality of the action of the local land office, and the decision of the General Land Office affirming it, and his decision of concurrence.

He denies that there had been any ruling by the Secretary of the Interior that during the 60-day period applications for homestead entry must be rejected. Such, however, he admits, may have been the ruling by the local land office and even by the Commissioner of the General Land Office, but he stated that from August 31, 1910, the construction of the act was pending before the Secretary upon an appeal from a decision of the Commissioner, that a decision upon said appeal is reported in 45 Land Dec. 37, under the title of Northern Pacific Railway Company v. State of Idaho, dated April 12, 1916, and that he decided that selections during such period should not be rejected, but held suspended until final adjudication of the rights of the state.

He avers that such is the proper construction of the act, and that the act being one of the land laws of the United States, its construction as well as the determination of all *347 *equitable rights of parties under it, is within the jurisdiction of the Secretary of the Interior so long as the legal title of the land yet remains in the United States (and that it appears on the face of relator's petition that the legal title of the land in controversy is still in the United States) and involves the exercise of judgment and discretion, not reviewable by any court on direct proceeding either by mandamus or in equity.

He prays that the rule to show cause be discharged.

Relator demurred to the return and in passing upon it the court observed that there were two questions in the case—one, whether the facts exhibited a case for mandamus of the Secretary, that is, "in apparent defiance of the law, acting capriciously or arbitrarily or beyond the scope of the administrative authority confided to him"; the other, the construction of the act of 1894.

To the first question the court answered negatively, and to the second question replied, that "independently of the question of the propriety of reviewing the action of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissible under the law." The demurrer to the return was therefore overruled. Relator electing to stand upon it, the rule was discharged and the petition dismissed.

This action was affirmed by the Court of Appeals.

It is manifest from this statement that the petition presents a controversy over the true construction of the act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any adverse appropriation" means necessarily an appropriation adverse to the state, and this gives color to the Secretary's view. He could not administer or apply the act without construing *348 *it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074; Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

We need not consider the fact that Kennedy, whose application was sustained, is not a party to the petition (see Litchfield v. Register and Receiver, 9 Wall. 575, 578, 19 L. Ed. 681); nor need we consider whether a more appropriate remedy will be open to the relator. See Brown v. Hitchcock, 173 U. S. 475, 19 Sup. Ct. 485, 43 L. Ed. 772; Minnesota v. Lane, 247 U. S. 243, 249, 250, 38 Sup. Ct. 508, 62 L. Ed. 1098.

Judgment affirmed.

(254 U. S. 281)

UNITED STATES v. WHEELER et al.

(Argued April 28, 1920. Decided Dec. 13, 1920.)

No. 68.

1. Constitutional law 🔑207(1)—States can regulate residence therein, subject to equal privileges clause.

Const. art. 4, § 2, giving citizens of the several states the privileges and immunities of citizens of each state, merely limits the power which each state had before the Articles of Confederation, which contained a similar limitation in article 4 thereof, to exclude citizens of other states from privileges granted to its own citizens, but did not deprive the states of their power to deal with the right of residence and of ingress and egress therein, except to the extent of that limitation.

2. Constitutional law 🔑207(1)—Equal privileges clause protects against state action.

Const. art. 4, § 2, guaranteeing to citizens of the several states the privileges and immunities of citizens of each state, is intended to protect those privileges against state action, and is not violated by a wrongful prevention by an individual of the enjoyment of such privilege by a citizen of another state, so that an indictment in United States District Court against individuals for conspiring to deprive citizens of such privileges and immunities was properly quashed.

Mr. Justice Clarke, dissenting.

In Error to the District Court of the United States for the District of Arizona.

Harry C. Wheeler and others were indicted for conspiring to deprive citizens of their right and privilege to reside and remain in a state immune from unlawful deportation. There was a judgment quashing the indictment (254 Fed. 611), and the United States brings error. Affirmed.

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*The Attorney General and W. C. Herron, of Washington, D. C., for the United States.

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*Messrs. Charles E. Hughes, of New York City, E. E. Ellinwood and John Mason Ross, both of Bisbee, Ariz., and Clifton Mathews, of Globe, Ariz., for defendants in error.

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*Mr. Chief Justice WHITE delivered the opinion of the Court.

The case is here under the Criminal Appeals Act (Comp. St. § 1704) to directly review a judgment quashing an indictment against the 25 persons who are defendants in error. The indictment contained four counts, but as the fourth is now abandoned by the government we need not consider it.

The first count charged the accused with conspiring, in violation of section 19 of the Criminal Code (Comp. St. § 10183), to injure, oppress, threaten, or intimidate 221 named persons, alleged to be citizens of the United States residing in Arizona, of rights or privileges secured to them by the Constitution or laws of the United States; that is to say, the right and privilege pertaining to citizens of said state peacefully to reside and remain therein and to be immune from unlawful deportation from that state to another. And the overt acts alleged were: The arming of the conspirators; the seizure and holding of the persons named until by means of a railway train procured for that purpose they were forcibly transported into New Mexico, and in that state released under threat of death or great bodily harm should they ever return to the state of Arizona.

The second count was the same as the first, except that only 25 of the persons alleged in the first count to have been injured were named, and they were stated to be citizens of the United States residing in, but not citizens of, the state of Arizona.

The third count was also identical with the first, except that it embraced only 196 of the *293 injured persons named in *the first count and 1 additional person not therein named, all being declared to be citizens of the United States and of the state of Arizona, residing in that state.

The court quashed the indictment, on the ground that no power had been delegated by the Constitution to the United States to forbid and punish the wrongful acts complained of, as the right to do so was exclusively within the authority reserved by that instrument to the several states. As the entire case will be disposed of by testing the accuracy of this view, we come immediately to consider that subject.

In argument, the asserted error in the conclusion is based, not upon the direct result of any particular provision of the Constitution, but upon implications arising from that instrument as a whole, the conditions existing at the time of its adoption, and the consequences inevitably produced from the creation by it of the government of the United States. A wide field of inquiry common to all the contentions is thus opened. In order, therefore, to afford a common basis by which to measure the correctness of the various implications insisted upon, we state under separate headings doctrines which are applicable to all the contentions, and which are in reason so well founded and so conclusively sustained by authority as to be indisputable.

[1] (a) In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right. Corfield v. Coryell, 4 Wash. C. C. 371, 380, 381, Fed. Cas. No. 3,230; Slaughterhouse Cases, 16 Wall. 36, 76, 21 L. Ed. 394.

(b) Whether, in disregard of the principles of comity, any of the states recognized in *294 their own citizens rights on *this subject which they refused to grant to citizens of other states, we need not consider, in view of the provision of the Articles of Confederation on the subject. By that provision uniformity was secured, not by lodging power in Congress to deal with the subject, but, while reserving in the several states the authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power from being used to discriminate. The text of article 4 which provides for this subject is as follows:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, * * *"

Thus, while power remained in the several states, the boundaries demarking them became, at least for the purpose of the enjoyment of the right here in question, negligible, and the frontiers of the Confederation became the measure of the equal right secured to the inhabitants of each and all the states.

(c) That the Constitution plainly intended to preserve and enforce the limitation as to discrimination imposed upon the states by article 4 of the Confederation, and thus necessarily assumed the continued possession by the states of the reserved power to deal with free residence, ingress and egress, cannot be denied for the following reasons: (1) Because the text of article 4, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and (2) because that view has been so conclusively settled as to leave no room for controversy. *295 Thus *in Paul v. Virginia, 8 Wall. 168, 180, 19 L. Ed. 357, considering the operation and effect of article 4, § 2, of the Constitution, it was said:

> "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit

> of happiness; and it secures them in other estates the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.
>
> "Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

Again, in Ward v. Maryland, 12 Wall. 418, 430 (20 L. Ed. 449), upon the same subject, the court declared:

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> "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire per*sonal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

In the Slaughterhouse Cases, 16 Wall. 36, 75, 76, 21 L. Ed. 394, the court, after reciting both the provisions of article 4 of the Confederation and article 4, § 2, of the Constitution, said:

> "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.
>
> "Fortunately we are not without judicial construction of this clause of the Constitution. The first and leading case on the subject is that of Corfield v. Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823.
>
> " 'The inquiry,' he says, 'is, What are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'
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> *"This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of Ward v. State of Maryland, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure."

The controlling influence of the opinion in the Slaughterhouse Cases, as well as that of Mr. Justice Washington in Corfield v. Coryell, stand out in bolder relief when it is observed that in the latter case, following the statement of the general principles contained in the passage quoted in the Slaughterhouse Cases, there is found, by way of illustration, an enumeration of particular rights declared to be clearly embraced by the general principles, one of which is described as:

> "The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."

[2] Applying these doctrines, let us come to test the soundness of the implications from the Constitution relied upon to establish the absence of all state authority to deal with the individual wrongs complained of, and the possession by the federal government of power for that purpose, and, as pertinent thereto, to refer briefly to the authorities which it is assumed sustained those implications.

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Undoubtedly the right of citizens of the states to reside peacefully in, and to have free ingress into and egress from, *the several states had, prior to the Confederation, a twofold aspect: (1) As possessed in their own states; and (2) as enjoyed in virtue of the comity of other states. But although the Constitution fused these distinct rights into one, by providing that one state should not deny to the citizens of other states rights given to its own citizens, no basis is afforded for contending that a wrongful prevention by an individual of the enjoyment by a citizen of one state in another of rights possessed in that state by its own citizens was a violation of a right afforded by the Constitution. This is the necessary result of article 4, § 2, which reserves to the several states authority over the subject, limited by the restriction against state discriminatory action, hence excluding federal authority, except where invoked to enforce the limitation, which is not here the case; a conclusion expressly sustained by the ruling in United States v. Harris, 106 U. S. 629, 645, 1 Sup. Ct. 601, 27 L. Ed. 290, to the effect that the second section of article 4, like the Fourteenth Amendment, is directed alone against state action. And this was but a summary of what had been previously pointed out in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, where, in dealing with the privileges and immunities embraced by article 4, § 2, of the Constitution, it was observed (page 77):

> "It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But, with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power *299 *of the states, and without that of the federal government."

Nor is the situation changed by assuming that as a state has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of article 4 against discrimination, apply a like rule to citizens of other states, and hence engender, outside of article 4, a federal right. This must be so, since the proposition assumes that a state could, without violating the fundamental limitations of the Constitution, other than those of article 4, § 2, enact legislation incompatible with its existence as a free government and destructive of the fundamental rights of its citizens, and, furthermore, because the premise upon which the proposition rests is state action and the existence of federal power to determine the repugnancy of such action to the Constitution, matters which, not being here involved, are not disputed.

This leads us furthermore to point out that the case of Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions; and hence it also follows that the observation made in Twining v. New Jersey, 211 U. S. 78, 97, 29 Sup. Ct. 14, 53 L. Ed. 97, to the effect that it had been held in the Crandall Case that the privilege of passing from state to state is an attribute of national citizenship, may here be put out of view as inapposite.

With the object of confining our decision to the case before us, we say that nothing we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving in- *300 gress or *egress into or from a state, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the Crandall Case, supra.

Judgment affirmed.

Mr. Justice CLARKE dissents.

(254 U. S. 379)

ARNDSTEIN v. McCARTHY, U. S. Marshal.

(Motion Submitted Nov. 20, 1920. Decided Dec. 20, 1920.)

No. 575.

Habeas corpus 🔑113(13)—Petition of trustee in bankruptcy to intervene and recall mandate on appeal denied.

Where the court, on appeal from dismissal of petition for writ of habeas corpus to secure the discharge of a bankrupt from commitment for contempt for refusal to testify, merely held that the petition was adequate, and ordered the writ to issue because the Constitution plainly authorized the bankrupt's refusal to testify if the facts were as stated in the petition, a petition of the trustee in bankruptcy to intervene to have the entire record certified, and for reargument and recall of the mandate, will be denied, since the court below, under the mandate, can issue the writ, and thereafter the true facts can be set up, if the petition does not correctly state them.

Petition of Trustee in Bankruptcy for Leave to Intervene, for Certification of the Entire Record, and for Reargument.

Habeas corpus proceeding by Jules W. Arndstein against Thomas D. McCarthy, United States Marshal for the Southern District of New York, to procure discharge from commitment for contempt for refusal to answer questions in bankruptcy proceedings. From a judgment denying the writ, petitioner appeals. On petition of the trustee in bankruptcy, after the judgment was reversed (254 U. S. 71, 41 S. Ct. 26, 65 L. Ed. ——), for leave to intervene, for reargument of the appeal, for certification of the entire record to the Supreme Court, for recall of the mandate or stay of proceedings, and for further and proper relief. Petition denied.

See, also, 41 S. Ct. 61.

Messrs. Saul S. Myers, Francis M. Scott, and Walter H. Pollak, all of New York City, for the motion.

Memorandum for the Court by Mr. Justice McREYNOLDS.

The trustee in bankruptcy has filed an earnest petition asking that we (a) allow him to intervene; (b) permit reargument of the appeal; (c) direct that the entire record be certified to this court; (d) recall the mandate; (e) stay all proceedings in respect thereto; and (f) grant further and proper relief.

The court below heard the cause as upon demurrer and held the petition for habeas corpus insufficient. Disagreeing with the result, we concluded that the bankrupt did not waive his constitutional privilege merely by filing sworn schedules, that the petition was adequate, and that the writ should have issued. The mandate only requires the trial court to accept our decision upon the point of law, to issue the writ, and then to proceed as usual. If the petition does not correctly set forth the facts, or if proper reasons exist for holding the prisoner, not shown by the petition, neither our opinion nor mandate prevents them from being set up in the return and duly considered.

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*Alleged defects in the record appear to be based upon a misconception.

Our conclusion concerning the constitutional question presented, we think, is so plainly correct that a reargument would be unprofitable.

The petition is denied.

Mr. Justice DAY took no part in the consideration or decision of this cause.

(254 U. S. 361)

THORNTON et al. v. DUFFY et al., Industrial Commission of Ohio.

(Argued Nov. 8, 1920. Decided Dec. 20, 1920.)

No. 76.

1. Courts 🔑366(1)—State court's construction of state statute and Constitution is binding.

The United States Supreme Court must accept the decision of a state Supreme Court construing a state statute and Constitution as the declaration of the legislation and requirement of the Constitution, as much a part of both as if expressed in them.

2. Constitutional law 🔑154(3), 301—Master and servant 🔑347—Statute withdrawing employer's privilege of insuring in private company held valid.

Under the Workmen's Compensation Law of Ohio (Page & A. Gen. Code Supp. §§ 1465—41a to 1465—106), which originally permitted employers to pay compensation to their employés themselves, instead of contributing to the state insurance fund, but section 22 (section 1465—69) of which, as construed by the state Supreme Court, permitted the commission to withdraw that privilege, the amendment (Page & A. Gen. Code Supp. § 1465—69) by Act March 20, 1917 (107 Ohio Laws, p. 159) § 1, so as to require the commission to withdraw that privilege from an employer who insured himself against liability for compensation to his employés, did not deprive an employer who had already made a contract for such insurance of his property, contrary to Const. U. S. Amend. 14, or impair his contract, contrary to Const. U. S. art. 1, § 10.

3. Constitutional law 🔑113, 251—Exercise of state's public policy does not become fixed by contracts in reliance thereon.

An exercise of public policy by a state cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of the policy, on the ground that the later exercise thereof deprives persons of property or invalidates those contracts.

Mr. Justice McReynolds dissenting.

In Error to the Supreme Court of the State of Ohio.

Suit by Frank C. Thornton against Thomas J. Duffy and another, composing the Industrial Commission of Ohio, in which the Cleveland Stamping & Tool Company filed an answer and cross-petition. A judgment sustaining demurrers to the petition and to the answer and cross-petition was affirmed by the Supreme Court of Ohio (99 Ohio St. 120, 124 N. E. 54), and the plaintiff and cross-petitioner bring error. Affirmed.

Messrs. Judson Harmon, of Cincinnati, Ohio, and Arthur I. Vorys, of Columbus, Ohio, for plaintiffs in error.

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*Messrs. Timothy S. Hogan and B. W. Gearhart, both of Columbus, Ohio, for defendants in error.

Mr. Justice McKENNA delivered the opinion of the Court.

This suit was brought by the plaintiff in error, Thornton, against defendants in error,

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hereinafter called defendants, *composing the Industrial Commission of Ohio. The Cleveland Stamping & Tool Company filed an answer and cross-petition. From a judgment sustaining demurrers to the petition of Thornton, and to the answer and cross-petition of the Cleveland Stamping & Tool Company, there was an appeal to the Court of Appeals, and thence by proceeding in error to the Supreme Court of the state, by which court the judgment was affirmed. These writs of error are prosecuted by Thornton and the Cleveland Company.

Thornton's petition and the pleadings of the Cleveland Company are substantially the same. We use, for convenience, Thornton's petition, and state its allegations narratively as follows: He is a manufacturer at Cleveland, Ohio, employing more than 40 men. The Industrial Commission determined, as required by the act of the General Assembly of the state, passed February 26, 1913, and comprised in sections 1465—41a to 1465—106, General Code of Ohio, that he was of sufficient financial ability to render certain the payment of compensation to injured employés, the benefits provided by that act. He, on the ——— day of January, 1914, elected to accept the act and proceed under it, has since complied with its provisions, has abided by the rules of the commission and all that is required of him by the act.

January, 1914, he made a written contract with the Ætna Insurance Company of Hartford, Conn., a duly licensed company, wherein that company agreed to pay to his injured employés the compensations required by the act of the assembly for injuries or upon death, and agreed to indemnify him against the liabilities and requirements of the act.

December 1, 1917, the commission adopted a resolution which recited the act of the Assembly of the state of February 16, 1917, amending section 1465—101, General Code of Ohio, and an act of the General Assembly *365 passed *March 20, 1917, amending section 1465—69, General Code of the state, and an act passed March 21, 1917, and resolved and declared that no employers should be permitted to pay or furnish directly to injured employés, or the dependents of killed employés, the compensation and benefits provided for in sections 1465—41a to 1465—106, General Code of Ohio, if such employers by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof. The commission revoked its previous findings and authorizations, the revocation to stand as of January 10, 1918, and directed notices of the revocation and the resolution of the commission to be given to all employers, including Thornton, and these notices will be sent unless restrained.

The resolution of the commission, the revocation of its previous action, and the notices which it threatens to send, are based upon the sole ground that it is its duty so to do under the laws of the state indicated above.

The contract of Thornton with the Ætna Company is a valid, subsisting contract, and he has a right to continue it until it be canceled, and that the sending of the notices as above stated, and the revocation of the findings of fact that the commission had made and its refusal to certify to Thornton its findings of fact, as provided for in section 1465—69, will cause him irreparable injury and damage, for which he has no adequate remedy at law. Further, that there are more than 675 employers situated as Thornton is, and that, therefore, the questions involved are of common and general interest, and as it is impractical to bring them all into court, he sues for the benefit of all.

The laws invoked by the commission do not justify its action, and if it be determined that they do, then they, and the acts of the commission under them, are in contravention of the Fourteenth Amendment of the Con- *366 stitution *of the United States, and of article 1, § 10, of that Constitution, and also of the Constitution of the state of Ohio.

An injunction, temporary and permanent, against the action of the commission, was prayed, and a temporary restraining order granted, but it was subsequently dissolved, and, as we have said, a demurrer was sustained to the petition and judgment entered dismissing the suit. It, as we have also said, was affirmed by the Supreme Court of the state.

The various acts of legislation of the state were sustained by the courts of the state and hence their validity under the Constitution of the state is removed from the controversy, and our inquiry is confined to the effect upon them of the Constitution of the United States.

In support of the contention that the Constitution of the United States makes the legislation and the action under it illegal, it is said that insurance against loss is the right of everybody, and specifically it is the right of employers to indemnify themselves against their liability to employés, and that the right is so fixed and inherent as to be an attribute of liberty removed from the interference of the state.

The provisions of the legislation are necessary elements in the consideration of the contention: (1) The Constitution of Ohio authorizes Workmen's Compensation Laws. Explicitly it provides for the passage of laws establishing a state fund to be created by compulsory contributions thereto by employers, the fund to be administered by the state. The constitutionality of a law passed under that authorization was sustained by this court in Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364, against the charge that its classifications were arbitrary and unreasonable. And Workmen's Compensation Laws of other states have been declared inoffensive to the Fourteenth Amendment of the Constitution of the United States. New York Central Railroad Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. *367 Ed. 685, Ann. Cas. 1917D, 642. (2) *The law that was passed provided that every employer (there were exceptions not necessary to mention) in the month of January, 1914, and semiannually thereafter, should pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the particular employment or occupation of the employer. It was, however, also provided (we quote from the opinion of the Supreme Court):

> "That certain employers under certain conditions might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death, or injury received in the course of their employment."

This was an alternative granted, and its conditions were fulfilled, it was contended, and that upon the faith of the fulfillment of it and in indemnity against contingencies, plantiff entered into a contract of insurance with the Ætna Company. It was further contended that the alternative and the insurance against its requirements became property, and inviolable; became contracts with immunity from impairment. To the contention the Supreme Court replied that the alternative of contribution to the state fund of dealing with the employés directly was a privilege that need not have been granted and that, therefore, to effect the purpose of the Constitution and law, could be withdrawn, that the right to withdraw the privilege depended not merely upon the police power of the state, "but rather directly upon the constitutional grant of power," and that, besides, the right was reserved in that provision of section 22 of the original act which gave to the commission power to "'at any time change or modify its findings of fact * * * if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of this act. * * *'" And it was said that the experience of four years demonstrated the necessity or desirability of a change and that, therefore, it was made.

*The meaning thus ascribed to section 22 we must accept. It expressed a continuing condition upon the concession to employers to deal directly with their employés, and the Industrial Commission by the power reserved could terminate the concession at any time.

There was besides, subsequent and empowering legislation in the amendment of March 20, 1917, as the Supreme Court pointed out. That act specifically limits the privilege of electing between directly dealing with employés and contribution to the state fund to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof." The court hence decided that it became the duty of the commission to change or modify its findings. And it was also decided that the act was not only clearly within the power of the state, but was "in furtherance of the purpose and intention of the Constitution and the law, to create and maintain one insurance fund, to be administered by the state."

[1-3] We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the Constitution of the state, as much a part of both as if expressed in them (Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the state, or in any way violates the Constitution of the United States. The law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employé, or be dependent upon or influenced by the hazards of controversy or litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their employés, but there was precaution

against failure in the *provision of section 22 giving discretion to the commission to withdraw the concession. After a few years' experience, that discretion was turned into a duty, and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to execute the policy of the state, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it. Complying, we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

We are not disposed to extend the discussion. Indeed, we think the case is in narrow compass. We are not called upon to controvert the right to insure against contingent losses or liabilities, or to minimize the value of insurance to business activities and enterprises, or discuss the general power or want of power of the state over it. We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law and we can readily see that it may be, as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions. This was the view of the

Supreme Court of the state, and by it the court justified the power conferred upon and exercised by the commission. See Mountain Timber Co. v. Washington, supra.

Judgment affirmed.

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*The CHIEF JUSTICE, concurring.

To compel an employer to insure his employé against loss from injury sustained in the course of the employment without reference to the negligence of the employé and at the same time to prohibit the employer from insuring himself against the burden thus imposed, it seems to me, if originally considered, would be a typical illustration of the taking of property without due process and a violation of the equal protection of the law.

But in view of the decision in Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, sustaining the constitutionality of a law of the state of Washington which necessarily excluded the possibility of the insurance by the employer of the burden in favor of his employés, which the statute in that case imposed, I do not think I am at liberty to consider the subject as an original question, but am constrained to accept and apply the ruling in that case made, and for that reason I concur in the judgment now announced.

Mr. Justice McREYNOLDS dissents.

(254 U. S. 370)

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. WASHBURN LIGNITE COAL CO.

(Argued Jan. 29, 1920. Decided Dec. 20, 1920.)

No. 55.

Courts 🔑394(15)—State decision as to carrier's rates held not to authorize writ of error of United States Supreme Court.

Where an injunction restraining a carrier from charging more than the rate permitted by state statute was affirmed by the United States Supreme Court, without prejudice to reopening the case after trial of the rates, and thereafter the rate was held confiscatory by the United States Supreme Court, and the injunction dismissed, a decision by the state Supreme Court, in a subsequent suit by the carrier to recover from the shipper the difference between the statutory rate and a reasonable rate while the injunction was in force, denying the relief prayed for, because there was no contract to pay such difference, because the injunction was not accompanied by bonds to protect the carrier, and was not conditioned on such payments to the carrier, if the rate was thereafter found confiscatory, and because the shipper was no more responsible than the carrier for the situation, did not uphold the statutory rate as such, so as to deny the carrier's contention that it was contrary to Const. Amend. 14, and even if the grounds of the decision, which were broad enough to sustain it, were not well taken, they were not without substantial support, and did not involve such a federal question as authorized writ of error by the United States Supreme Court under Judicial Code, § 237 (Comp. St. § 1214).

In Error to the District Court, Sixth Judicial District, State of North Dakota.

Action by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against the Washburn Lignite Coal Company to recover compensation for carriage of coal, in addition to the compensation demanded and paid when the service was rendered. A judgment for the defendant was affirmed by the Supreme Court of North Dakota (168 N. W. 684), and plaintiff brings error. Writ of error dismissed.

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*John L. Erdall, of Minneapolis, Minn., for plaintiff in error.

Andrew Miller and Alfred Zuger, both of Bismarck, N. D., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court. This was an action by a railroad company against a shipper, for whom it had carried many carloads of coal between points in the state of North Dakota, to recover for that service a compensation in addition to what was demanded and paid when the service was rendered. Judgment went against the carrier in the court of first instance, and again in the Supreme Court of the state (168 N. W. 684); and this writ of error was sued out on the theory that the judgment upheld and gave effect to a local rate statute which the carrier was contending was repugnant to the due process of law clause of the Fourteenth Amendment. If this theory is not right, the writ of error must be dismissed, for it is without other support. See section 237, Judicial Code, as amended by Act Sept. 6, 1916, c. 448, 39 Stat. 726 (Comp. St. § 1214).

To show what was involved and decided it is necessary to refer with some particularity to a prior litigation out of which the present case arose.

In 1907 the state of North Dakota, by an act of its Legislature prescribed a schedule of

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maximum rates for carry*ing coal in carload lots between points within the state (chapter 51, Laws 1907); and this and other carriers refused to put the schedule into effect. Suits for injunctions against further disobedience were brought by the state in its Supreme Court, and the carriers defended on the ground that the schedule was confiscatory and therefore in conflict with the due process of law clause of the Fourteenth Amendment. On the hearing that court sustained the schedule and directed that the injunctions issue. State v. N. P. Ry. Co., 19 N. D. 45 and 57, 120 N. W. 869, 25 L. R. A. (N. S.) 1001. The carriers brought the cases to this court on writs of error and it affirmed the judgments, but did so without prejudice to the right of the carriers to reopen the cases if an adequate trial of the schedule in the future enabled them to prove that it was confiscatory. N. P. Ry. v. N. D., 216 U. S. 579, 581, 30 Sup. Ct. 423, 54 L. Ed. 624. Mandates to that effect issued and the state court modified its judgments accordingly. In obedience to the injunctions the carriers then put the schedule into effect in accordance with local laws (Rev. Code 1905, §§ 4339–4342); that is to say, they printed and filed coal tariffs based on the maximum rates named in the schedule and gave public notice of their purpose to apply those tariffs. After trying the schedule for a year or more the carriers presented in the state court petitions wherein they told of the trial made, asserted their ability and readiness to prove that the schedule was confiscatory, and prayed permission to do so. The petitions were entertained, proofs were taken, and on a hearing the schedule was sustained and the existing injunctions continued. State v. N. P. R. Co., 26 N. D. 438, 145 N. W. 135. On writs of error prosecuted by the carriers those judgments were reversed by this court, because the proofs satisfied it that the schedule was not adequately remunerative, and the cases were remanded for further proceedings not inconsistent with the opinion. Nor. Pac. Ry. v. N. D., 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1. On receiving the mandates the state court set aside its judgments and dismissed the cases."

The injunctions in those cases were awarded *373 without *taking any bond and without imposing any terms or conditions other than reserving to the carriers, as before shown, a right to reopen the cases and again attack the schedule after subjecting it to a fair trial. When this right was exercised the carriers did not ask a suspension of the injunctions pending a hearing and decision, and the injunctions remained in force until the cases were dismissed. Neither at the time of the dismissal nor at any prior stage of the proceedings was there any order saving or securing to the carriers a right to demand or collect additional compensation in respect of shipments whereon the schedule rate was demanded and paid while the injunctions were effective.

The shipments as to which additional compensation is sought in the present case were made while the injunction against this carrier was in force; that is to say, after the schedule was sustained by the first judgments and before it was adjudged unremunerative as a result of the attack made after it had been in effect for a year or more. At the time of the shipments the carrier demanded and the shipper paid the maximum rate named in the schedule, it being the duly filed and published rate. The carrier did not then protest that it was entitled to more; nor did the shipper engage to pay more.

In suing for further compensation the carrier took the position that the schedule was confiscatory and therefore invalid under the Fourteenth Amendment; that the coal was carried at the schedule rate because the injunction in the prior litigation compelled it; that the schedule ultimately was adjudged unremunerative and invalid and the injunction dissolved; and that in these circumstances there arose an obligation on the part of the shipper to pay an additional sum, such as with that already paid would amount to a reasonable compensation.

The Supreme Court of the state put its judgment against the carrier on the following grounds:

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*1. There was no contract, express or implied, on the part of the shipper to pay any rate other than that shown in the tariff filed and published according to law—the court saying on this point:

> "Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary. In our judgment, it is wholly improper, in the absence of clear allegations of the rendition of services under a distinct protest, for a court to find that a shipper had, in effect, undertaken conditionally to pay according to a rate different from that published in compliance with the statute."

2. The injunction, in obedience to which the schedule was put into effect and maintained during the period covered by the shipments, was awarded without taking any bond or imposing any terms or conditions for the security of the carrier; and in these circumstances the damage arising from the injunction was damnum absque injuria, for which no recovery could be had—the court citing on this point Russell v. Farley, 105 U. S. 433, 437–438 (26 L. Ed. 1060)[1], and saying:

> "In reality the plaintiff's [carrier's] whole case seems properly hinged upon the real meaning and effect of the first decree of the United States Supreme Court. The matter that was settled in that suit [meaning by that decree] was the right of the state to an injunction, and it was found that the state was entitled to the relief sought. Neither the state court nor the United States Supreme Court saw fit to impose

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[1] See also Meyers v. Block, 120 U. S. 206, 211, 7 Sup. Ct. 525, 30 L. Ed. 642; Lawton v. Green, 64 N. Y. 326, 330; Palmer v. Foley, 71 N. Y. 106, 108; City of St. Louis v. St. Louis Gas Light Co., 82 Mo. 349, 355; Hayden v. Keith, 32 Minn. 277, 278, 20 N. W. 195; Scheck v. Kelly (C. C.) 95 Fed. 941; Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 145, 39 Sup. Ct. 237, 63 L. Ed. 517.

any terms or conditions. * * * The error in the plaintiff's [carrier's] contention inheres in the failure to recognize the injunction as being the continuing expression of the court until *375 such time as it *may be modified or dissolved by a new judgment or decree. During such time it is impossible that there could have been any other measure of the rights and obligations of the parties than that provided in the decree itself. * * * When that court finally dissolved the injunction, it did not reverse its prior judgment, nor, it seems to us, did it profess to give to the carriers any rights with respect to past shipments that did not exist at the time they were made. These rights were governed by the former decree."

3. The principle that one who has been unjustly enriched at the expense of another may be made to respond to the latter was without application, for here the shipper was responsible in no greater degree for what occurred than was the carrier.

The opinion rendered by that court shows that it did not uphold or give effect to the statutory rate as such, but rested its decision on other independent grounds which appeared to it to preclude a recovery by the carrier. These grounds are broad enough to sustain the judgment, and, if not well taken, are not without substantial support. See Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 163–165, 37 Sup. Ct. 318, 61 L. Ed. 644. Some may possibly involve federal questions, but under the jurisdictional statute, as amended in 1916, they are not such as entitle the carrier to a review of the judgment on a writ of error.

Writ of error dismissed.

(254 U. S. 376)

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. C. L. MERRICK CO.

(Argued Jan. 29, 1920. Decided Dec. 20, 1920.)

No. 15.

Courts ⚷394(15)—State court decision, that dissolution of injunction by United States Supreme Court did not prevent collection of excess rates, held not reviewable.

In a suit by a shipper to recover freight collected by the carrier in excess of the rate permitted by a state statute on shipments made prior to the granting of an injunction against charging more than the statutory rate, which injunction was thereafter affirmed by the United States Supreme Court, without prejudice to reopening the question, if the rate proved confiscatory in practice, a decision by the state Supreme Court that a subsequent decision of the United States Supreme Court, finding the rate confiscatory and ordering the dissolution of the injunction, did not determine that the statutory rate was invalid when the shipments were made, which decision was based on a prior United States Supreme Court decision settling the question as to the effect of a similar holding, cannot be reviewed on writ of error.

In Error to the District Court of the Sixth Judicial District of the State of North Dakota.

Action by the C. L. Merrick Company against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to recover charges exacted by the carrier in excess of the rate fixed by state statute. A judgment for defendant was reversed by the Supreme Court of North Dakota, with a direction to award the plaintiff the amount claimed (35 N. D. 331, 160 N. W. 140), and defendant brings error. Writ of error dismissed.

Mr. John L. Erdall, of Minneapolis, Minn., for plaintiff in error.

Messrs. Andrew Miller and Alfred Zuger, both of Bismarck, N. D., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a companion case to Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Washburn Lignite Coal Co., 254 U. S. 370, 41 Sup. Ct. 140, 65 L. Ed. —, just decided and was brought by a shipper to recover charges exacted in excess of the statutory rate. The shipments were made prior to the first judgment in the injunction suit, when the carrier was refusing to give effect to the schedule; *377 and the excess was paid under pro*test and because the carrier would not deliver the coal on payment of the statutory rate. In the trial court there was a judgment against the shipper, and this was reversed by the Supreme Court with a direction to award the shipper the amount claimed. Merrick Co. v. Minneapolis, St. P. & S. S. M. R. Co., 35 N. D. 331, 160 N. W. 140. The carrier prosecutes this writ of error.

The pleadings, the opinion of the Supreme Court, and the briefs in this court, show that the only controversy in that court was over the meaning and effect of the first judgment in the injunction suit as affirmed by this court "without prejudice," etc. On the part of the shipper it was insisted that that judgment finally and conclusively determined the validity of the statutory rate in respect of the period preceding its rendition; and on the part of the carrier it was insisted that the judgment was interlocutory merely and was entirely superseded and held for naught by the subsequent judgment of this court in the later proceeding. The court sustained the shipper's contention and rejected that of the carrier, saying:

"The fallacy in respondent's [carrier's] contention, as we view it, lies in the unwarranted assumption that the latter judgment relates back and supersedes the first. When respondent [carrier] applied for and was granted leave to make a new showing as to the confiscatory character of the statutory rates, it amounted in legal effect to the commencement of a new action to determine a new issue; to wit, whether as applied to and in the light of facts *subsequently arising*, such statutory rates are confiscatory. The case was not reopened for the purpose of relitigating the issues formerly decided, nor was the former decree in any way affected. This is made clear by the recent decision of the Supreme Court in Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533."

In support of that view the court quoted portions of the opinion in the case cited, including the following:

"In a rate case where an assertion of *378 confiscation was *not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt, and which it concluded, but in order not to prejudice rights of property in the future if from future operation and changed conditions arising in such future, it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose. * * * A complete illustration of the operation of the qualification is afforded by the North Dakota case, just cited [216 U. S. 579], since in that case as a result of the qualification 'without prejudice,' the case was subsequently reopened, and upon a consideration of new conditions arising in such future period, a different result followed [236 U. S. 585] from that which had been previously reached."

When we have in mind the question which the Supreme Court was called on to decide, and did decide, and the fact that the question was no longer an open one in this court, as is shown by our opinion in the Missouri Case (241 U. S. 533, 36 Sup. Ct. 715, 60 L. Ed. 1148), it is apparent that this writ of error is without any adequate basis.

Writ of error dismissed.

(254 U. S. 380)

MARSHALL v. PEOPLE OF STATE OF NEW YORK.

(Submitted Oct. 12, 1920. Decided Dec. 20, 1920.)

No. 294.

1. States 🔑110 — New York, as sovereign state, has priority over unsecured creditors.

Under the New York Constitution, adopting the provisions of the common law, as construed by the highest court of that state, the state succeeded to the prerogative of the sovereign of Great Britain to have debts due the state paid before unsecured claims of other creditors were payable, regardless of any state statute making its claims a lien.

2. Courts 🔑359, 365—Whether state priority is prerogative right is question of local law, concluded by state decision.

Whether the priority in payment of claims due it over unsecured claims due other creditors enjoyed by the state of New York is a prerogative right or merely a rule of administration is a matter of local law, so that the decisions of the highest court of the state that it is a prerogative right are conclusive on the United States courts.

3. States 🔑110—Priority of state extends to property of nonresident debtors therein.

The prerogative right of the state of New York to have its claims paid from the assets of a debtor before unsecured claims of other creditors extends to all property of the debtor within its borders, whether the debtor is a resident or a nonresident.

4. Receivers 🔑153—Priority attaches to property in hands of receiver appointed by federal court.

The prerogative right of a state to have claims due it paid from the assets of the debtor within the state before unsecured claims of other creditors applies, whether the property is in the possession of the debtor or in custody of the court, and is therefore enforceable against property in the hands of a receiver appointed by a federal court within the state.

5. Receivers 🔑78—Application for payment from receiver's funds proper remedy to enforce state's priority.

Where the state could not issue a warrant for the amount of the tax due it, on the levy of which a lien would attach on the debtor's property, under Tax Law N. Y. § 201, because the property was in the hands of a receiver appointed by a federal court within the state, an application by the state to the court appointing the receiver for payment of the debt was the proper remedy.

6. Receivers 🔑153—Priority in payment not strictly a "lien," but equivalent to one.

The prerogative right of the state to have the amount due it for license fees paid from the assets of the debtor before unsecured claims of other creditors, though the state statute did not make such fees a lien on the debtor's property, is not an express lien on the property, but is equivalent to an equitable lien, and is a lien within the broad sense of that term, which includes preferred or privileged claims given by statute or by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lien.]

7. Courts 🔑372(1)—State prerogative right at common law enforceable in federal courts.

The fact that the prerogative right of the state to preferred payment of its claims rests on the common law, independently of any statute, does not affect the right of enforcement of such claim in the federal courts.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit in equity by William L. Sweet, Jr., against the All Package Grocery Stores Company. A decree denying the petition of the People of the State of New York to have certain debts due it payable as preferred claims out of the assets in the hands of H. Snowden Marshall, as receiver of the defendant company, was reversed by the Circuit Court of Appeals (262 Fed. 727), and the receiver brings certiorari. Affirmed.

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*Messrs. A. S. Gilbert and Francis Gilbert, both of New York City, and William J. Hughes, of Washington, D. C., for petitioner.

Messrs. Cortland A. Johnson and Robert P. Beyer, both of New York City, for the People of State of New York.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On December 4, 1917, the District Court of the United States for the Southern District of New York appointed H. Snowden Marshall general receiver of the property of the All Package Grocery Stores Company, a corporation organized under the laws of Delaware, but having a place of business and property in the state of New York. The latter state asked to have certain debts due to it declared payable as preferred claims out of the assets in the hands of the receiver. These debts consisted of (a) amounts due for annual franchise taxes assessed under section 182 of the New York Tax Law (Consol. Laws, c. 60); and (b) amounts due for license fees or taxes for the privilege of doing business within the state, assessed under section 181 of that law, and payable but once. The state asserted in its claim:

> "That said taxes accrued and became a lien on all the property of defendant corporation, pursuant to the provisions of the Tax Law of the state of New York, prior to the appointment of a receiver herein."

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The District Court held that both *classes of claims were taxes, but that the lien created by section 197 of the Tax Law applied only to annual franchise taxes, and that no provision of the law gave a lien for license taxes until a levy was made therefor. It accordingly allowed the preference as to the amounts due for annual franchise taxes, and denied it as to the amounts due for license taxes. Upon appeal by the state, the Circuit Court of Appeals held that, independently of specific statutory provisions, the law of New York as declared by its courts gave to the state as sovereign a lien or priority for payment of taxes over unsecured creditors, that this priority was a prerogative right, not a mere rule of administration, and that it applied, therefore, in the federal courts. Sweet v. All Package Grocery Stores Co. (C. C. A.) 262 Fed. 727. The case came here on writ of certiorari. Marshall v. People of the State of N. Y., 252 U. S. 577, 40 Sup. Ct. 396, 64 L. Ed. 725. The propriety of allowing to the state a preference as to amounts due for the annual franchise taxes is admitted by the receiver. No question of the relative priority of the state and the United States is involved. Nor does any question arise as to priority of the state over incumbrances. The single question is presented whether the state of New York has priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state Legislature or otherwise.

[1] At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in custodia legis. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. Giles v. Grover, 9 Bing. 128, 139, 157, 183. In re Henley & Co., 9 Ch. D. 469. Compare

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United States v. *National Surety Co., 254 U. S. 73, 41 Sup. Ct. 29, 65 L. Ed. —, decided by this court November 8, 1920. The first Constitution of the state of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the colony on April 19, 1775, should be and continue the law of the state, subject to such alterations as its Legislature might thereafter make. This provision was embodied, in substance, in the later Constitutions. The courts of New York decided that, by virtue of this constitutional provision, the state, as sovereign, succeeded to the crown's prerogative right of priority, and that the priority was not limited to amounts due for taxes, but extended alike to all debts due to the state; e. g., to amounts due on a general deposit of state funds in a bank. Matter of Carnegie Trust Co., 151 App. Div. 606, 136 N. Y. Supp. 466; Id., 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260. This priority has been enforced by the courts of New York under a great variety of circumstances in an unbroken series of cases extending over more than half a century.[1] It has been enforced as a right and not as a rule of administration.

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[1] See, in addition to cases cited in the text, Matter of Receivership of Columbian Insurance Co., 3 Abb. Dec. (N. Y.) 239, 242 (1866); Central Trust Co. v. New York City & Northern R. R. Co., 110 N. Y. 250, 259, 18 N. E. 92, 1 L. R. A. 260 (1888); Matter of Atlas Iron Construction Co., 19 App. Div. 415, 419, 46 N. Y. Supp. 467 (1897); Niederstein, 154 App. Div. 238, 246, 138 N. Y. Supp. 952

This priority arose and exists independently of any statute. The Legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgement of the priority.[2] The only changes of the right made by statute have been by way of enlarging its scope in *384 *certain cases. Thus, while by the common law of England (King [in aid of Braddock] v. Watson, 3 Price, 6) and by that of New York (Wise v. L. & C. Wise Co., 153 N. Y. 507, 511, 47 N. E. 788) the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the Legislature of New York extended the prerogative right, so as to give certain taxes priority over prior incumbrances. An extension of this nature is found in section 197 of the Tax Law which declares in respect to the annual franchise tax, that—

> "Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full."

By reason of that provision the annual franchise tax takes priority over incumbrances on the corporate property. New York Terminal Co. v. Gaus, 204 N. Y. 512, 98 N. E. 11. Under the earlier law a debt for franchise taxes was not "a technical lien on specific property" and had been ordered paid out of moneys in receivers' hands. Central Trust Co. v. New York City & Northern R. R. Co., 110 N. Y. 250, 259, 18 N. E. 92, 1 L. R. A. 260. In the case at bar the District Judge relied upon section 197 as justifying him in giving priority for the claim for annual franchise taxes; and in denying priority for the claim for license fees, because in respect to the latter no corresponding provision is to be found in the Tax Law. But he had no occasion to seek statutory support for the priority sought by the state; since here it does not seek to displace any prior lien. It asks merely to have its prerogative right enforced against property on which there is no prior lien and upon which it is impossible to levy, because the property has been taken out of the hands of the debtor and placed in the custody of the court for purposes of protection and distribution.

[2-5] Whether the priority enjoyed by the state of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such, the decisions of *385 the *highest court of the state as to the existence of the right and its incidents will be accepted by this court as conclusive. Compare Lewis v. Monson, 151 U. S. 545, 549, 14 Sup. Ct. 424, 38 L. Ed. 265; St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U. S. 349, 358, 18 Sup. Ct. 157, 42 L. Ed. 497; Archer v. Greenville Gravel Co., 233 U. S. 60, 68, 69, 34 Sup. Ct. 567, 58 L. Ed. 850; Guffey v. Smith, 237 U. S. 101, 113, 35 Sup. Ct. 526, 59 L. Ed. 856. The priority of the state extends to all property of the debtor within its borders, whether the debtor be a resident or nonresident and whether the property be in his possession or in custodia legis. The priority is therefore enforceable against the property in the hands of a receiver appointed by a federal court within the state. Duryea v. American Woodworking Machine Co. (C. C.) 133 Fed. 329; Conklin v. United States Shipbuilding Co. (C. C.) 148 Fed. 129, 130. Compare Franklin Trust Co. v. New Jersey, 181 Fed. 769, 104 C. C. A. 629; Washington-Alaska Bank v. Dexter Horton National Bank (C. C. A.) 263 Fed. 304. For a receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state. In the case at bar a warrant for the amount of the license tax might have issued but for the appointment of the receiver, and if the levy had been made it would have become, under section 201 of the Tax Law, a lien on all the property of the company from "the time an actual levy shall be made by virtue thereof." Since the prerogative right of the state could not be enforced by levy and seizure, an application to the court for payment of the debt due was the appropriate remedy. In re Tyler, 149 U. S. 164, 184, 13 Sup. Ct. 785, 37 L. Ed. 689.

[6, 7] The state's right to be paid out of the assets prior to other creditors does not, as pointed out in In re Tyler, supra (quoting Greeley v. Provident Savings Bank, 98 Mo. 458, 11 S. W. 980), arise from an express lien on the assets existing at the time they passed into the receiver's hands. State v. Rowse, 49 Mo. 586, 592; George v. St. Louis Cable & Western Railway Co. (C. C.) 44 Fed. 117, *386 118; Hamilton *v. David C. Beggs Co. (C. C.) 171 Fed. 157; Coy v. Title Guarantee & Trust Co. (D. C.) 212 Fed. 520, 523; Id., 220 Fed. 90, 135 C. C. A. 58, L. R. A. 1915E, 211. The right of priority has been likened to an equitable lien. State v. Rowse, supra. The analogous preference in payment given to claims for labor by state statutes, and to which the Bankruptcy Act gives priority, have been described as being "tantamount" to a lien. In re Laird, 109 Fed. 550, 555, 48 C. C. A. 538; In re Bennett, 153 Fed. 673, 677, 82 C. C. A. 531. The priority is a lien in the broad sense of that term which includes "those preferred or privileged claims given by statute or by admiralty law." 2 Bouvier, Law Dict. (15th

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(1912); Matter of Wesley, 156 App. Div. 403, 405, 141 N Y. Supp. 1031 (1913); People v. Surety Co., 158 App. Div. 647, 650, 144 N. Y. Supp. 201 (1913); Mixter v. Mohawk Clothing Co., Inc. (Sup.) 155 N. Y. Supp. 647 (1915).

[2] See Matter of Niederstein, 154 App. Div. 238, 244, 246, 138 N. Y. Supp. 952; Matter of Wesley, 156 App. Div. 403, 405, 141 N. Y. Supp. 1031.

Ed. 1883) 88. The prerogative right of the state resembles the privilege accorded by the civil law of Louisiana to certain classes of debts which it was assumed in Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127, 17 Sup. Ct. 754, 42 L. Ed. 105, would be enforced against property in the custody of a receiver appointed by a federal court. The fact that the right rests on the common law independently of any statute, does not, of course, affect the right of enforcement in the federal courts.

City of Richmond v. Bird, 249 U. S. 174, 39 Sup. Ct. 186, 63 L. Ed. 543, relied upon by the petitioner is not in point. The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right since neither the laws of the United States nor those of Virginia accorded such priority. Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed, and the priority over unsecured creditors is granted by the common law of New York.

Affirmed.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(254 U. S. 615)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Dec. 6, 1920. See, also, 41 Sup. Ct. 60; 254 U. S. 280, 41 Sup. Ct. 146, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for State of Texas. Order. The receiver is hereby authorized and directed to make the following payments and to charge the same as expenses of the receivership: To Nagel & Kirby the sum of seven thousand five hundred dollars as compensation for services heretofore rendered by them as counsel and attorneys for the receiver; to McKenney & Flannery the sum of fifteen thousand dollars on account of services rendered by them as attorneys for the receiver; and to Frederic A. Delano the sum of twenty-five thousand dollars on account of his services as receiver.

(254 U. S. 280)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Dec. 6, 1920. See, also, 254 U. S. 615, 41 Sup. Ct. 146, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for State of Texas. Order. Upon consideration of the motion of the General Oil Company, filed herein November 15, 1920, for an order authorizing Frederic A. Delano, Esq., receiver herein, to return to said company certain lands claimed under patents from the State of Texas, and the consent of T. P. Roberts and R. S. Allen, owners of patented lands, filed on the date last mentioned, and the response of the receiver to said motion filed November 20, 1920. It is ordered that said receiver do return to said General Oil Company one certain well known by receiver's number one hundred and seventy-six (176), which lies south of the south edge of the sand bed of the Red River, as it was on the first day of April, 1920 (marked generally by the border line of vegetation along the edge of the flood plain), together with the land appurtenant thereto lying to the south of the south edge of the sand bed of said river, and the structures, equipment, and material pertaining to said well, and the net proceeds of the production thereof that have come to the hands of said receiver, less operating expenses and reservations, upon terms that said General Oil Company comply with the provisions contained in the order of this court made June 7, 1920, respecting the return of certain lands lying south of the south edge of the sand bed of said river which were on the first day of April, 1920, in the possession of persons claiming under patents from the State of Texas, and not included in the river bed lands as in said order defined.

It is further ordered that except as herein above granted the motion of said General Oil Company for the return of lands, filed November 15, 1920, be, and it is hereby, denied.

(254 U. S. 614)

No. 61. Ada C. MONGRAIN, plaintiff in error, v. W. H. AARON et al. Dec. 6, 1920. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 174 Pac. 755. Mr. Preston A. Shinn, of Pawhuska, Okl., for plaintiff in error. Messrs. Nathan B. Williams, of Washington, D. C., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726 (Comp. St. § 1214).

(254 U. S. 664)

No. 162. The UNITED STATES of America, plaintiff in error, v. Theodore RAY. Dec. 6, 1920. In error to the District Court of the United States for the District of Wyoming.

Mr. W. L. Frierson, Solicitor General, of Washington, D. C., for the United States. Dismissed, on motion of Mr. Solictor General Frierson for the plaintiff in error.

(254 U. S. 615)

No. 197. Louis WUNDER, plaintiff in error, v. The UNITED STATES of America. Dec. 6, 1920. In error to the District Court of the United States for the District of Maryland. Messrs. George Louis Eppler and Fuller Barnard, Jr., both of Cumberland, Md., for plaintiff in error. The Attorney General, for the United States.

PER CURIAM. Affirmed upon the authority of Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194; Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260.

(254 U. S. 664)

No. 350. CLARK COUNTY NATIONAL BANK, plaintiff in error, v. The COMMONWEALTH of Kentucky. Dec. 6, 1920. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 187 Ky. 151, 219 S. W. 175. Mr. D. L. Pendleton, of Winchester, Ky., for plaintiff in error. Dismissed with costs, on motion of plaintiff in error.

(254 U. S. 650)

No. 583. PRODUCERS COKE COMPANY, petitioner, v. McKEEFRY IRON COMPANY. Dec. 6, 1920. For opinion below, see 267 Fed. 22. Messrs. W. J. Brennen, of Pittsburgh, Pa., and W. J. Sturgis and S. J. Morrow, both of Uniontown, Pa., for petitioner. Messrs. Samuel McClay and William M. Robinson, both of Pittsburgh, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 627)

No. 605. Arthur J. DAHN, petitioner, v. Walker D. HINES, Director General of Railroads. Dec. 6, 1920. For opinion below, see 267 Fed. 105. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(254 U. S. 650)

No. 611. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY. Dec. 6, 1920. For opinion below, see 268 Fed. 4. Messrs. Alexander Pope Humphrey, of Louisville, Ky. (Rush Taggart and Francis R. Stark, both of New York City, and W. Overton Harris, Edward P. Humphrey, and William W. Crawford, all of Louisville, Ky., of counsel), for petitioner. Messrs. Helm Bruce, Henry L. Stone, and Edward S. Jouett, all of Louisville, Ky., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 650)

No. 616. R. L. AMMERMAN et al., petitioners, v. The UNITED STATES. Dec. 6, 1920. For opinion below, see 267 Fed. 136. Mr. E. G. McAdams, of Oklahoma City, Okl., for petitioners. Messrs. Thomas J. Spellacy and Leonard B. Zeisler, both of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

No. ——, Original. Ex parte. In the matter of D. H. RIDDLE, petitioner. Dec. 13, 1920. Motion for leave to file petition for a writ of mandamus granted, and rule to show cause awarded returnable Monday, January 10 next.

(254 U. S. 615)

No. 115. Isadore WORKIN et al., plaintiffs in error, v. The UNITED STATES of America. Dec. 13, 1920. In error to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 260 Fed. 137. See, also, 250 U. S. 659, 40 Sup. Ct. 9, 63 L. Ed. 1194. Messrs. Lawrence B. Cohen and I. Maurice Wormser, both of New York City, for plaintiffs in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of MacFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801. And see Boise Water Co. v. Boise City, 230 U. S. 98, 100, 33 Sup. Ct. 1003, 57 L. Ed. 1409; Chott v. Ewing, 237 U. S. 197, 35 Sup. Ct. 571, 59 L. Ed. 913; Alaska Pacific Fisheries v. Alaska, 249 U. S. 53, 60–61, 39 Sup. Ct. 208, 63 L. Ed. 474.

(254 U. S. 665)

No. 127. Morris ZUCKER, plaintiff in error, v. The UNITED STATES of America. Dec. 13, 1920. In error to the District Court of the United States for the Eastern District of New York. See, also, 40 Sup. Ct. 585. Mr. Louis B. Boudin, of New York City, for plaintiff in error. Mr. W. L. Frierson, Solicitor General of Washington, D. C., for the United States. Dismissed, pursuant to the sixteenth rule, on motion of Mr. Solicitor General Frierson, for defendant in error.

(254 U. S. 616)

No. 140. David LAMAR et al., plaintiffs in error, v. The UNITED STATES of America. Dec. 13, 1920. In error to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 260 Fed. 561. See, also, 250 U. S. 673, 40 Sup. Ct. 16, 63 L. Ed. 1200. Mr. Elijah N. Zoline, of New York City, for plaintiffs in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of MacFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801. And see Boise Water Company v. Boise City, 230 U. S. 98, 100, 33 Sup. Ct. 1003, 57 L. Ed. 1409; Chott v. Ewing, 237 U. S. 197, 35 Sup. Ct. 571, 59 L. Ed. 913; Alaska Pacific Fisheries v. Alaska, 249 U. S. 53, 60–61, 39 Sup. Ct. 208, 63 L. Ed. 474.

(254 U. S. 616)

No. 164. Truman A. KETCHUM, appellant, v. PLEASANT VALLEY COAL COMPANY et al. Dec. 13, 1920. Appeal from the United States Circuit Court of Appeals for the Eighth

Circuit. For opinion below, see 257 Fed. 274. See, also, 250 U. S. 668, 40 Sup. Ct. 14, 63 L. Ed. 1198. Messrs. Charles C. Dey and E. A. Walton, both of Salt Lake City, Utah, for appellant. Messrs. A. C. Ellis, Jr., and L. F. Adamson, both of Salt Lake City, Utah, for respondents.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Shulthis v. McDougal, 225 U. S. 561, 568, 32 Sup. Ct. 704, 56 L. Ed. 1205; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; L. & N. R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 302, 35 Sup. Ct. 598, 59 L. Ed. 965; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Devine v. Los Angeles, 202 U. S. 313, 333, 26 Sup. Ct. 652, 50 L. Ed. 1046; St. Anthony's Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 578, 35 Sup. Ct. 729, 59 L. Ed. 1119; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186.

(254 U. S. 616)

No. 232. Benjamin HOROWITZ et al., plaintiffs in error, v. The UNITED STATES of America. Dec. 13, 1920. In error to the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 262 Fed. 48. See, also, 252 U. S. 586, 40 Sup. Ct. 396, 64 L. Ed. 729. Messrs. John J. Fitzgerald and Elijah N. Zoline, both of New York City, for plaintiffs in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of MacFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801. And see Boise Water Co. v. Boise City, 230 U. S. 98, 100, 33 Sup. Ct. 1003, 57 L. Ed. 1409; Chott v. Ewing, 237 U. S. 197, 35 Sup. Ct. 571, 59 L. Ed. 913; Alaska Pacific Fisheries v. Alaska, 249 U. S. 53, 60–61, 39 Sup. Ct. 208, 63 L. Ed. 474.

(254 U. S. 665)

No. 402. Willard B. BRYNE, petitioner, v. Helen F. MARTELL, Administratrix, etc. Dec. 13, 1920. On petition for a writ of certiorari to the Superior Court of the State of Massachusetts. For opinion below, see 235 Mass. 35, 126 N. E. 354. Mr. James T. Loyd, of Washington, D. C., for petitioner. Dismissed for the want of prosecution.

(254 U. S. 665)

No. 446. Rubie C. CONNOR and her husband, Claude E. Connor et al., petitioners, v. Mena Kyle ELLIOTT, as executrix, etc. Dec. 13, 1920. On petition for a writ of certiorari to the Supreme Court of the State of Florida. For opinion below, see 85 South. 164. Mr. William E. Richardson, of Washington, D. C., for petitioners. Mr. Benjamin Micou, of Washington, D. C., for respondent. Dismissed for the want of prosecution.

(254 U. S. 651)

No. 585. LAMBERT RUN COAL COMPANY, appellant, v. The BALTIMORE & OHIO RAILROAD COMPANY. Dec. 13, 1920. For opinion below, see 267 Fed. 776. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(254 U. S. 651)

No. 589. Fred LASITER, Administrator, etc., petitioner, v. Walter FERGUSON. Dec. 13, 1920. For opinion below, see 192 Pac. 197. Messrs. C. Dale Wolfe, J. Read Moore, Allen G. Nichols, Geo. C. Crump, S. S. Orwig, and E. W. Whitney, all of Wewoka, Okl., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(254 U. S. 651)

No. 598. FEDERAL MINING & SMELTING COMPANY, petitioner, v. STAR MINING COMPANY. Dec. 13, 1920. For opinion below, see 265 Fed. 881. Messrs. John A. Marshall, of Salt Lake City, Utah, and Frederick W. Lehmann, of St. Louis, Mo., for petitioner. Messrs. John P. Gray, of Cœur d'Alene, Idaho, and James A. Wayne, of Wallace, Idaho, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 664)

No. 601. CHANSLOR-CANFIELD MIDWAY OIL COMPANY et al., appellants, v. The UNITED STATES of America. Dec. 13, 1920. For opinion below, see 266 Fed. 145. Joint motion of Recovery Oil Company and the United States that this cause be remanded to the District Court of the United States for the Southern District of California to carry into effect the settlement of the case reached pursuant to act of Congress of February 25, 1920, granted.

(254 U. S. 651)

No. 606. MOHAWK OIL COMPANY et al., petitioners, v. Mrs. Eula McFadin LAYNE, Sole Heir, etc. Dec. 13, 1920. For opinion below, see 86 South. 322. Messrs. W. P. Hall, J. D. Wilkinson, and B. F. Roberts, all of Shreveport, La., for petitioners. Mr. S. L. Herold, of Shreveport, La., for respondent Eula M. Layne. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

(254 U. S. 628)

No. 617. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, petitioner, v. J. B. McGINN. Dec. 13, 1920. For opinion below, see 265 Fed. 81. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 628)

No. 629. William R. CASTLE et al., Trustees, etc., petitioners, v. Julia White CASTLE. Dec. 13, 1920. For opinion below, see 267 Fed. 521. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 628)

No. 635. NG FUNG HO, otherwise known as Ung Kip, et al., petitioners, v. Edward WHITE, as Commissioner of Immigration for the port of San Francisco. Dec. 13, 1920.

For opinion below, see 266 Fed. 765. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(254 U. S. 617)

No. 1. The UNITED STATES of America, appellant, v. LEHIGH VALLEY RAILROAD COMPANY et al. Dec. 20, 1920. The Attorney General, for appellant. Messrs. John G. Johnson and Edgar H. Boles, both of Philadelphia, Pa., Everett Warren, of Scranton, Pa., John Hampton Barnes, of Philadelphia, Pa., Allan McCulloh and Elihu Root, Jr., both of New York City, Frank W. Wheaton, of Wilkes Barre, Pa., and Nicholas W. Hacker, of New York City, for respondents. Motion to modify the decree of this Court (254 U. S. 255, 41 Sup. Ct. 104, 65 L. Ed. —) denied.

(254 U. S. 651)

No. 579. Jessie L. WAYMIRE, administratrix, etc., petitioner, v. The ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY. Dec. 20, 1920. For opinion below, see 107 Kan. 90, 190 Pac. 588. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(254 U. S. 652)

No. 615. W. W. CASEY et al., petitioners, v. A. EIKLAND et al. Dec. 20, 1920. For opinion below, see 266 Fed. 821. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 652)

No. 621. PERFECTION DISAPPEARING BED COMPANY, Inc., et al., petitioners, v. MURPHY WALL BED COMPANY et al. Dec. 20, 1920. For opinion below, see 266 Fed. 698. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 652)

No. 626. John HEDENSKOY, petitioner, v. ALASKA PACKERS' ASSOCIATION. Dec. 20, 1920. For opinion below, see 267 Fed. 154. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 652)

No. 634. Solomon ROTHMAN et al., petitioners, v. The UNITED STATES of America. Dec. 20, 1920. For opinion below, see 270 Fed. 31. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 653)

No. 637. Adelbert L. SPITZER et al., as Spitzer-Rorick & Company, petitioners, v. The BOARD OF TRUSTEES FOR THE REGINA PUBLIC SCHOOL DISTRICT NO. 4 OF SASKATCHEWAN. Dec. 20, 1920. For opinion below, see 267 Fed. 121. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(254 U. S. 653)

No. 639. L. W. BOEHNER, petitioner, v. The UNITED STATES of America. Dec. 20, 1920. For opinion below, see 267 Fed. 562. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 653)

No. 642. Henry BRIGGS, petitioner, v. UNITED SHOE MACHINERY CORPORATION. Dec. 20, 1920. For opinion below, see 114 Atl. 538. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.

(254 U. S. 423)

ATWATER v. GUERNSEY et al.

(Submitted under Twentieth Rule Dec. 14, 1920. Decided Jan. 3, 1921.)

No. 511.

Release ⚷22—Father, releasing son to satisfy rules of Stock Exchange, held to have no enforceable claim in bankruptcy.

Where a father advanced money to his son with which to purchase a seat on a Stock Exchange, and, as required by the rules of the exchange, executed a release to the son on account of the advance, and both parties acted in good faith, and understood that there was no legal obligation on the son to repay the money advanced, the father had no claim against the son, enforceable on his bankruptcy, though the son had paid interest on the amount.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Proceeding on the claim of Edward S. Atwater against Stephen G. Guernsey and others, trustees in bankruptcy of Morton Atwater and others. An order expunging the claim was affirmed by the Circuit Court of Appeals for the Second Circuit (In re Atwater, 266 Fed. 278), and the claimant brings certiorari. Affirmed.

See, also, 254 U. S. 624, 41 Sup. Ct. 13, 65 L. Ed. —.

Mr. Abram J. Rose, of New York City, for petitioner.

Mr. R. Dulany Whiting, of New York City, for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an appeal from an order expunging a claim of the petitioner, Edward Atwater, against his son, Eliot Atwater, a member of the firm of Atwater, Foote and Sherill, adjudicated bankrupts. The claim is for $75,000 furnished by the father to the son, to enable him to buy a seat in the New York Stock Exchange and to pay his initiation fee. The *424 seat was bought and the use of it was *contributed to the firm by Eliot Atwater, the seat remaining his individual property, as the Master and both Courts have found, and as we see no reason to doubt. In connection with the purchase, as required by the rules of the Stock Exchange, Edward Atwater executed a release of all claims against Eliot Atwater, "and more particularly by reason of an advance of the sum of ($73,000) Seventy-Three Thousand Dollars, made to said Eliot Atwater, to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange." There was a second release with a similar special clause covering $2,010, to enable the son "to pay his initiation fee to the New York Stock Exchange." The Master and both Courts considered the release a bar to the appellant's claim.

It hardly was necessary to reach that point, as it seems to us obvious that whatever moral obligation was considered to remain, both father and son understood at the time of the transaction that no legal obligation arose from the advance, and the release expressed the fact. There is no doubt that the release was intended to be an operative instrument, at least so far as creditors who were members of the Stock Exchange were concerned. That being so it would be going very far to allow a cotemporaneous parol understanding to be shown that it should not do the very thing that on its face it specifically purported to effect. But we find no such understanding. It is admitted that no document ever was given to show it. The father testified that his son never agreed to repay the money and that nothing was said about repayment; the son testified that he understood that there was no claim against himself legally. It is true, no doubt, and natural that he should have considered that there was a moral obligation, and in pursuance of it interest was paid to the father until the bankruptcy. It is true, also, that father and son in their testimony use some phrases that favored the present *425 claim. But we are satisfied that, *at the time, the release was given in good faith, and meant what it said without equivocation or reserves. It is unnecessary to consider whether the Circuit Court of Appeals were successful in distinguishing Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158, from the present case, on the assumption that the parties attempted to qualify the release. More need not be said to show that the decree should be affirmed.

Decree affirmed.

(254 U. S. 489)

BRACHT v. SAN ANTONIO & A. P. RY. CO.

(Argued and Submitted Dec. 16, 1920. Decided Jan. 3, 1921.)

No. 118.

Commerce ⚷33—Federal statute and interstate tariffs not applicable to intrastate shipment, though delivering carrier issued new interstate bill of lading.

Where a carrier issued a bill of lading for transportation of goods to a point within the state on the line of another carrier without notice or reason to suppose that the shipment would pass beyond the destination specified, but the other carrier took up the bill of lading and issued a new one covering transportation to a point in another state, the provisions of the Interstate Commerce Act (Comp. St. § 8563 et seq.) or the tariff schedules for interstate shipments permitting change of destination did not apply as a matter of federal law so as to make the first carrier liable for damage beyond the original point of destination.

On Writ of Certiorari to the Kansas City Court of Appeals of the State of Missouri.

Action by A. L. Bracht against the San Antonio & Aransas Pass Railway Company. A judgment for plaintiff was reversed by the Kansas City Court of Appeals (200 Mo. App. 655, 209 S. W. 579), and plaintiff brings certiorari. Affirmed.

Mr. I. N. Watson, of Kansas City, Mo., for petitioner.

Messrs. Samuel Herrick, of Washington, D. C., and R. J. Boyle, of San Antonio, Tex., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

June 10, 1918, the petitioner delivered to respondent railway company at Ingleside, Tex., a carload of vegetables consigned to himself at Dallas, Tex., a point off its lines, where he intended to sell them. He accepted a bill of lading upon the face of which was plainly printed: "For use only between *490 points within the State of Texas." *It contained no reference to a diversion or reshipment; and the record discloses no rule or regulation by the state statutes or authorities on that subject.

The car moved over respondent's road to Waco and then over the Missouri, Kansas & Texas Railway to Dallas, where it appears to have arrived promptly with contents in good condition. Upon petitioner's request, made after such arrival, the Missouri, Kansas & Texas Railway forwarded the car to Kansas City over its own lines, took up the original bill of lading, and issued an interstate one acknowledging receipt of the vegetables at Dallas. When the car reached Kansas City the contents were in bad condition, and thereupon petitioner sued respondent as the initial carrier claiming a right to recover damages under the Carmack Amendment to the Interstate Commerce Act (34 Stat. 584, c. 3591 [Comp. St. §§ 8604a, 8604aa]).

The court below held that the provisions in interstate tariffs permitting reconsignment or change of destination did not apply; that the carrier only agreed to transport to Dallas and was not liable for damage sustained beyond that point.

Respondent's contract appears to have related only to a movement between points in the same state. It had no notice or reason to suppose that the freight would pass beyond the destination specified. The original undertaking was an intrastate transaction, subject, of course, to any applicable rules and regulations prescribed by state authority. The record discloses none; and we are unable to say as a matter of federal law that the tariff schedules for interstate shipments or the provisions of the Interstate Commerce Act (Comp. St. § 8563 et seq.) constituted part of the agreement. The general principles announced in Gulf, Colorado & Sante Fé Ry. Co. v. Texas, 204 U. S. 403, 411, 27 Sup. Ct. 360, 51 L. Ed. 540, are applicable. R. R. Commission of Ohio v. Worthington, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004, Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 33 Sup. Ct. 229, 57 *491 L. Ed. 442, and similar cases are not *controlling. They involved controversies concerning carriage between points in the same state which was really but part of an interstate or foreign movement reasonably to be anticipated by the contracting parties—a recognized step towards a destination outside the state. The distinctions are elucidated in Texas & N. O. R. R. Co. v. Sabine Tram Co. Here neither shipper nor respondent had in contemplation any movement beyond the point specified, and the contract between them must be determined from the original bill of lading and the local laws and regulations.

Affirmed.

(254 U. S. 498)

DIRECTOR GENERAL OF RAILROADS et al. v. VISCOSE CO.

(Argued Dec. 8, 1920. Decided Jan. 3, 1921.)

No. 424.

1. Railroads 🔑5½, New, vol. 6A Key-No. Series—Action of Director General of Railroads in changing freight tariff schedule held to be treated as if taken by carrier.

Though the power to suspend classifications or regulations issued by the President was taken from the Interstate Commerce Commission by the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), the power over them after hearing remained, and the power to suspend was restored by Transportation Act Feb. 28, 1920, and the action of the Director General of Railroads on January 28, 1920, in filing a supplement to the freight tariff schedule, effective February 29, 1920, may be treated as if taken by a carrier in passing on the jurisdiction of the courts to annul such change without resort being had to the commission.

2. Commerce 🔑89 — Change of freight tariffs to include artificial silk in prohibited class held not within jurisdiction of courts, but of Interstate Commerce Commission; "classification."

A proposed change in a carrier's tariffs, so as to cancel the published classification and rates on artificial silk, and include it among articles that would not be accepted for shipment, constituted a change of classification, or of regulation affecting classifications, and under Interstate Commerce Act, §§ 1, 3, 6, 13, 15 (Comp. St. §§ 8563, subd. 4, 8565, 8569, 8581, 8583, subd. 2), the exclusive initial jurisdiction to suspend or annul such proposed change was in the Interstate Commerce Commission, and

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not in the courts, as "classification," in carrier rate-making practice, is grouping or associating in a designated list of commodities, which because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Classification.]

Mr. Justice McKenna, Mr. Justice Van Devanter, Mr. Justice Pitney, and Mr. Justice McReynolds, dissenting.

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Suit by the Viscose Company against the Director General of Railroads and others. From a judgment for complainant, defendants appealed to the Circuit Court of Appeals for the Third Circuit, which certified a question to the Supreme Court. Question answered in the negative.

See, also, 263 Fed. 726.

Messrs. Henry Wolf Bikle, Theodore W. Reath, and F. M. Rivinus, all of Philadelphia, Pa., and Frederic D. McKenney, of Washington, D. C., for carriers.

Mr. Harold S. Shertz, of Philadelphia, Pa., for Viscose Co.

Mr. Justice CLARKE delivered the opinion of the Court.

Silk, artificial and natural, had been accepted by the railway carriers of the country

for transportation as *freight for many years prior to the action which gave rise to the question which the Circuit Court of Appeals for the Third Circuit has certified herein to this Court and it had been classified in tariffs as first class. On January 21, 1920, Walker D. Hines, as Director General of Railroads, authorized an amendment or supplement to the appropriate freight tariff schedule so as to cancel the published classification and rates on such silk and to so amend rule 3 of "Consolidated Freight Classification No. 1" as to include it among the articles "that will not be accepted for shipment."

On the 28th of January, 1920, the supplement thus authorized was filed with the Interstate Commerce Commission, to become effective on the 29th day of February following, and if no other action had been taken the result would have been to have excluded such silks from shipment as freight after the effective date, for after that date there would not have been any published rate applicable to them.

The appellee, the Viscose Company, is an extensive manufacturer of artificial silk, 80 per cent. of which "it maintains" must be shipped as freight, and, claiming that it would suffer great and irreparable damage if the supplement to the tariff proposed by the appellants were allowed to become effective, on February 26th, three days before it would have taken effect, the company applied for and obtained a temporary, and later on a permanent, injunction from the District Court of the United States for the Eastern District of Pennsylvania, restraining the Director General of Railroads and the other appellants:

> "(1) From putting into effect and enforcing the provisions of the said supplement No. 2 to 'Consolidated Freight Classification No. 1, designed to cancel the existing classification of artificial silk as a commodity of freight,' and
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>
> *"(2) From refusing to accept from the Viscose Company artificial or fibre silk for transportation under classifications which existed prior to the effective date of said supplement, or under such other classification as may be put into effect thereafter."

An appeal from the District Court carried the case to the Circuit Court of Appeals, which certifies to this court the question:

> "Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?"

Appellants contend that exclusive initial jurisdiction over the controversy here involved is in the Interstate Commerce Commission and that the appellees should have applied to that tribunal for relief. It is argued that the proposed supplement, striking silks from the first class in the tariffs filed was a change in classification and that the change in rule 3, adding them to the list of commodities which would not be accepted for shipment as freight, was a change of regulation and that over the reasonableness of both of these the Interstate Commerce Commission is given exclusive initial jurisdiction by sections 1, 3, 6, 13 and 15 of the Interstate Commerce Act (34 Stat. 584, as amended 36 Stat. 539 [Comp. St. §§ 8563, subd. 4, 8565, 8569, 8581, 8583, subd. 2]).

On the other hand, it is argued by the appellees that for a common carrier to exclude a commodity from the tariffs and to refuse to accept it for shipment is neither classification nor regulation, and that an attempt to do such a thing presents a question of law for the courts—that exclusion is not classification nor regulation.

Section 1 of the Interstate Commerce Act makes it the duty of all carriers subject to its provisions to provide and furnish transportation upon reasonable request therefor, " * * * to establish, observe and enforce just and reasonable classifications of prop-

erty for trans*portation * * * and just and reasonable regulations and practices affecting classification, rates or tariffs * * * and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property." 36 Stat. 539, 545, 546 (Comp. St. § 8563, subd. 4).

Section 3 of the act makes it unlawful for any carrier to subject "any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 379, 380 (section 8565).

Section 6 requires every carrier to print and file with the commission schedules in form prescribed, showing the classification of freight in force and any rules or regulations which in any wise change, affect or determine the value of the service rendered to the shipper. 34 Stat. 584, 586 (section 8569).

Section 13 gives to any person or corporation the right to apply to the commission for relief on account of "anything done or omitted to be done" by any common carrier subject to the provisions of this act "in contravention of the provisions thereof." 36 Stat. 539, 550 (section 8581).

And section 15 declares that whenever there is filed "a new individual or joint classification or any new individual or joint regulation or practice" the commission shall have power to suspend the operation of such schedule, classification, regulation or practice until, upon complaint or upon its own initiative, an investigation shall be made, and if the proposed classification or regulation is found to be unreasonable or otherwise in violation of the act, the commission may find what will be just and reasonable in the premises and may require the carrier thereafter to conform to its finding. 36 Stat. 539, 552 (section 8583, subd. 2).

[1] The power to suspend classifications or regulations when issued by the President was taken away from the Interstate Commerce Commission by the "Act to Provide for the Operation of Transportation Systems While under Federal Control," etc. (40 Stat. 451, 456 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p]), but the
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*power over them after hearing remained, and the power to suspend was restored when "the Transportation Act 1920," approved February 28, 1920, became effective (41 Stat. 456, 487). The action of the Director General of Railroads, under consideration in this case, may therefore be treated as if it had been taken by a carrier subject to the act.

[2] Without more, these references to the Interstate Commerce Act are sufficient to show that if the proposed change in the tariffs, and in the rule, which we are considering, constituted a change of classification or of regulation within the meaning of the Commerce Act, there was ample and specific provision made therein for dealing with the situation through the commission—for suspending the supplement or rule or annulling either or both if investigation proved the change to be unreasonable, and for providing for just treatment of shippers in the future. Strangely enough, it is a shipper not a carrier which here seeks to exclude the latter from this extensive jurisdiction of the commission.

The certificate does not state what the purpose of the Director General of Railroads was in attempting to make the proposed change, but whether it was to permanently refuse to carry artificial silk as freight because of its value or of the risk involved, or for any other reason, or whether the action was taken to clear the way for putting into effect a commodity rate higher than the first-class rate (as might be done under appropriate conditions, Chamber of Commerce, Houston, Texas, v. I. & G. N. Railway Co., 32 Interst. Com. Com'n R. 247, 255; Wheeling Corrugating Co. v. Baltimore & Ohio Railroad Co., 18 Interst. Com. Com'n R. 125, 126), in either case it was necessary that the published classification of rates should be withdrawn by change of the tariffs on file and that notice should be given, through rule or regulation, that the silk would not be accepted for shipment in the future. Thus the supple-
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*ment involved a change in the contents of previously filed classification lists and in a rule or regulation of the carriers.

That "exclusion is not classification" is an arresting but illusory expression. Classification in carrier rate-making practice is grouping—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates. To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes. To strike artificial silk from the first class and to include it in the "prohibited list" which, for any cause, the carrier refuses to accept as freight, classifies it and sets it apart in a group subject to special treatment, as much as if it had been changed to the second class. We cannot doubt that the "exclusion" in this case was an attempted "classification," and that the proposed change in rule 3 was an attempted change of regulation, applicable to artificial silks, and that when challenged by the shipper the reasonableness of both presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission.

Confirmation of this conclusion may be found in Lake and Rail Butter and Egg Rates, 29 Interst. Com. Com'n R. 45. There carriers on the Great Lakes issued a supplement to their tariffs (as was done here) adding to the list of commodities which would not be accepted for shipment among other articles, butter, poultry and eggs. This was defended on the ground that such traffic required refrigeration at a cost greater than it would bear. Upon complaint by shippers to the Interstate Commerce Commission that the proposed action was unreasonable, the supplement was promptly suspended and upon *504 full hearing it was held *that the refusal to carry such commodities in the past and the attempt to fortify such refusal for the future by filing tariffs declining in terms to receive them, were unduly prejudicial to the traffic involved, and, the request of shippers for such transportation being held reasonable, an order that it be furnished was authorized.

The contention of the carriers, faintly made, that the common law and not the Interstate Commerce Act furnished the measure of their obligation to the public was promptly overruled by the commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.

The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Baltimore & Ohio R. R. Co. v. United States, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; Morrisdale Coal Co. v. Pennsylvania R. R. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18; Texas & Pacific Ry. Co. v. American Tie Co., 234 U. S. 138, 146, 34 Sup. Ct. 855, 58 L. Ed. 1255; Pennsylvania R. R. Co. v. Clark Coal Co., 238 U. S. 456, 469, 35 Sup. Ct. 896, 59. L. Ed. 1406; and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 49, 36 Sup. Ct. 228, 60 L. Ed. 517), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative.

Question answered, No.

Mr. Justice McKENNA, Mr. Justice VAN DEVANTER, Mr. Justice PITNEY, and Mr. Justice McREYNOLDS dissent.

(254 U. S. 425)

NATIONAL BRAKE & ELECTRIC CO. v. CHRISTENSEN et al.

(Argued Dec. 10, 1920. Decided Jan. 3, 1921.)

No. 111.

1. Equity 🔑451—After affirmance on appeal, defeated party, prevailing in another circuit, entitled to petition appellate court for leave to file bill of review.

Where, after affirmance of a decree for plaintiff in a suit for infringement of a patent and pending an accounting, the patent was adjudged invalid by the Circuit Court of Appeals for another circuit, defendant had a right to petition the court affirming the decree for leave to file in the court of original jurisdiction a bill in the nature of a bill of review, setting up the new matter as a bar to further proceedings.

2. Equity 🔑455 — Application to appellate court for leave to file bill of review addressed to court's sound discretion.

An application to the Circuit Court of Appeals, after affirmance of a decree, for leave to file in the District Court, a bill in the nature of a bill of review, setting up a judgment rendered in another circuit as res judicata, is addressed to the sound discretion of the appellate court, and should be decided upon considerations addressed to the materiality of the new matter and the diligence in its presentation.

3. Equity 🔑456—Petition by losing party to Circuit Court of Appeals, after affirmance, held to be treated as petition for leave to file bill of review.

Where, after affirmance of a decree for plaintiff in a patent infringement suit, defendant filed a petition alleging that the patent had been adjudged invalid in another circuit, and asking the court to determine the effect of such judgment, and hold it to be a final adjudication, entitling defendant to a decree dismissing the suit, and to issue such orders as might be necessary, the Circuit Court of Appeals should have regarded the petition as an application for leave to file in the District Court a petition in the nature of a bill of review.

4. Appeal and error 🔑1114 — Reversal without passing on merits warranted, when merits not passed on by Circuit Court of Appeals.

Where the Circuit Court of Appeals denied a petition, which in effect was a petition for leave to file a bill of review, on the ground that its former decree of affirmance was final, the Supreme Court is authorized to reverse the judgment, without passing upon the merits of the petition.

5. Courts 🔑383(1) — Decree in proceeding ancillary to suit involving validity of patent reviewable by certiorari.

A petition filed in the Circuit Court of Appeals, after affirmance of a decree in a patent infringement suit, for leave to file a bill in the nature of a bill of review, was ancillary to the original jurisdiction invoked, and was still a suit involving the validity of a patent, the decree in which was final, and subject to review by certiorari.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by Neils A. Christensen and another against the National Brake & Electric Company. A decree in favor of plaintiffs was affirmed by the Circuit Court of Appeals for the Seventh Circuit, and defendant thereaft-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

er filed a petition asking such court to direct the District Court to dismiss the bill. The application was denied (258 Fed. 880, 169 C. C. A. 600), and the applicant brings certiorari. Reversed and remanded.

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*Messrs. John S. Miller, of Chicago, Ill., Thomas B. Kerr, of New York City, and Charles A. Brown and Edward Osgood Brown, both of Chicago, Ill., for petitioner.

Messrs. Joseph B. Cotton, of New York City, Willet M. Spooner and Louis Quarles, both of Milwaukee, Wis., and William R. Rummler, of Chicago, Ill., for respondents.

Mr. Justice DAY delivered the opinion of the Court.

Suit was brought by Christensen and the Allis-Chalmers Company in the District Court *427 of the United States for *the Eastern District of Wisconsin against the National Brake & Electric Company for infringement of patent to Christensen No. 635,280 for improvement in a combined pump and motor. After answer, the petition was amended so as to set up that Christensen before the issue of the patent No. 635,280 had obtained a patent for the same invention under No. 621,324, and that because of defects the same had been returned to the Commissioner of patents, and the new letters issued for the same invention, and that the Commissioner of Patents canceled letters patent No. 621,324 and issued letters patent No. 635,280 for the full term of 17 years from October 17, 1899.

In the amended bill it was prayed that the patent monopoly to Christensen be adjudged to be valid for 17 years from March 21, 1899, the date of the first patent, and the second letters patent be held by the court to be evidence of the grant for the term of 17 years from that date. Answer was filed, testimony taken, and a decree was rendered in favor of Christensen, the District Court holding that whether the patent monopoly were evidenced by one or the other or both of the two letters patent, was immaterial. Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where the decree of the District Court was affirmed (229 Fed. 564, 144 C. C. A. 24), and mandate was duly issued to the District Court. After a petition for rehearing was denied, an application was made to this court for a writ of certiorari, which was denied February 21, 1916. 241 U. S. 659, 36 Sup. Ct. 447, 60 L. Ed. 1225. On the remand to the District Court a master was appointed and an accounting begun.

On March 11, 1916, Christensen and the Allis-Chalmers Company filed a bill of complaint against the Westinghouse Traction Brake Company in the District Court of the United States for the Western District of Pennsylvania. Issues were made up, and evidence was taken.

We do not deem it necessary for present *428 purposes to *recite the history of the litigation in the proceedings in Pennsylvania. Thereafter, the Brake & Electric Company made application in the District Court in Wisconsin, asking to have the benefit of the decree in Pennsylvania dismissing the bill by setting up that decree as res judicata. The District Court denied the petition. Afterwards, on August 19, 1918, the Brake & Electric Company presented and filed a motion and petition upon which the Circuit Court of Appeals, Seventh Circuit, rendered the decree which is now the subject of review.

The petition alleges that the decree in the Pennsylvania suit was one presenting the same issues as were presented and considered in the Wisconsin suit; that the plaintiffs were the same, and the defendants were in privity; that in the Pennsylvania suit it was adjudged, in accordance with the mandate issued by direction of the Circuit Court of Appeals of the Third Circuit that patent No. 635,280 was issued without warrant, and that the bill of complaint as to that patent should accordingly be dismissed; that upon further proceedings had in the Court of Appeals in the Third Circuit and the District Court in Pennsylvania as to patent No. 621,234 the bill upon that patent was dismissed for want of prosecution. A transcript of the proceedings in the District Court of the United States for the Western District of Pennsylvania was presented, and petitioner stated that it was advised that the District Court for the Eastern District of Wisconsin had no power or authority without the assent of the Circuit Court of Appeals for the Seventh Circuit to entertain the motion or application to set aside or modify the former decree of such District Court affirmed by the Circuit Court of Appeals, but that the Circuit Court of Appeals had such jurisdiction and power, and that because of the final adjudication in the District Court for the Western District of Pennsylvania the suit in the District Court of the Eastern District of Wisconsin should *429 be dismissed on the *motion of the petitioner. The petition recited the proceedings in the District Court of Wisconsin, and the fact that that court was proceeding to take an accounting under the former decree. The prayer of the petition was that the Circuit Court of Appeals take jurisdiction of the petition, and inquire into and determine the status of the case, and the force and effect of the final judgment of the District Court of the Western District of Pennsylvania, and hold the same to be a final adjudication, and that the petitioner was entitled to a final decree in the suit in Wisconsin dismissing the same for want of equity; that the District Court be directed to proceed and act accordingly, and the court was asked to issue such orders in the premises, and such writ or writs of certiorari or otherwise as might be necessary or proper, and such further and different orders, directions, writs, or relief as should seem proper or necessary.

The Circuit Court of Appeals for the Seventh Circuit refused to grant any relief upon the petition, holding that the decree of the Wisconsin court was final in its character, notwithstanding it was interlocutory in form, and that the decree in the Third Circuit could not be set up as res judicata between the parties. 258 Fed. 880, 169 C. C. A. 880. From that decree the writ of certiorari brings the case to this court.

It thus appears that in a suit upon a patent, and one subsequently issued alleged to be for the same invention, Christensen had obtained a decree in the Wisconsin District Court sustaining the right to a patent monopoly and an accounting. From this decree appeal had been taken to the Circuit Court of Appeals for the Seventh Circuit, where the decree was affirmed, and the cause remanded to the District Court, where the accounting was in progress. Subsequently Christensen brought the suit in Pennsylvania upon the patent rights in controversy which result-

ed in a decree which, it is contended, *is binding upon Christensen, and res judicata as to the invalidity of the patent.

[1, 2] In such case the Brake & Electric Company, if it wished to avail itself of the Pennsylvania decree, had the right to apply by petition in the Appellate Court of the Seventh Circuit for leave to file a bill in the court of original jurisdiction in the nature of a bill of review, setting up the new matter as a bar to further proceedings. Such applications are addressed to the sound discretion of the appellate tribunal, and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation. Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. Ed. 828; In re Gamewell Co., 73 Fed. 908, 20 C. C. A. 111; Keith v. Alger, 124 Fed. 32, 59 C. C. A. 552; Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263.

The matter was considered in Re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994, where this court reversed a decree of the Circuit Court dismissing a bill upon a patent, holding that the patent was valid and had been infringed by the defendant, and remanding the cause to the Circuit Court for further proceedings. It was held that the Circuit Court had no authority to grant or entertain a petition filed without leave of this court for a rehearing for newly discovered evidence, and that mandamus was the proper remedy to set aside the order of the Circuit Court failing to execute the mandate of this court. The authorities were reviewed by Mr. Justice Gray, speaking for the court. Among other things he said:

> "In this respect, a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in Southard v. Russell, above cited, said: 'Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission
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> be given on an application to *that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.' 16 How. 570, 571. So, in United States v. Knight, 1 Black, 488, 489, Chief Justice Taney said that, in a case brought before this court exercising general jurisdiction in chancery, 'the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered.'"

In Re Potts it was held that, unless application was made to this court within 20 days for leave to file a petition for a rehearing in the Circuit Court, the writ of mandamus would issue as prayed.

In Potts & Co. v. Creager, 97 Fed. 78, 79, 38 C. C. A. 47, it appears from the statement of subsequent proceedings in the case that this court upon application granted leave to file a petition for rehearing in the Circuit Court.

That leave to file a supplemental petition in the nature of a bill of review may be granted after the judgment of the appellate court, and after the going down of the mandate at the close of the term at which judgment was rendered, was held in Re Gamewell Co., 73 Fed. 908, 20 C. C. A. 111, in a carefully considered opinion rendered by the Circuit Court of Appeals for the First Circuit, reciting the previous consideration of the question in cases in this court. We think these cases settle the proper practice in applications of this nature.

This case is unlike the one before us in Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 37 Sup. Ct. 506, 61 L. Ed. 1148, in which it was held that a decree in a patent infringement suit affirmed by the Circuit Court of Appeals for the Sixth Circuit, while a like decree was pending but not yet heard before the Circuit Court of Appeals for the

Seventh Circuit, upon a *motion seasonably made in the latter Court of Appeals, should have been held to be res judicata because of the legal identity of the subject matter and privity of the parties.

In the instant case the Circuit Court of Appeals for the Seventh Circuit, treating the application as an original petition to have the decree made in the Third Circuit pronounced res judicata, held that the former decree in the Seventh Circuit was final, and denied the prayer of the petition.

[3, 4] In our view the proper practice in matters of this sort required the Circuit

Court of Appeals to regard the petition, taking all its allegations together, and with its prayer for general relief, as an application for leave to file in the District Court a petition in the nature of a bill of review invoking a consideration of the effect of the judgment in the Third Circuit. Such consideration the Circuit Court of Appeals may well be directed to undertake in the exercise of its proper function in determining the rights of the parties, and for that purpose its judgment should be reversed, without passing in this court upon the merits of the petition. This procedure is sanctioned by former decisions of this court. Lutcher & Moore Co. v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757; Cramp v. Curtiss Co., 228 U. S. 646, 33 Sup. Ct. 722, 57 L. Ed. 1003; Brown v. Fletcher, 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128.

[5] A motion was made to dismiss the writ of certiorari upon the ground that this case is one in which an appeal might have been had. But we are of opinion that in view of the nature of the application, and the status of the case brought for infringement of the patents in question, the proceeding was not of that character in which an appeal would lie to this court. We held in McFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801, that the line of division between cases appealable from the Circuit Court of Appeals and those made final in
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that court was determined by the *source of original jurisdiction of the trial court, and not by the nature of the questions of law raised or decided.

In our view the petition filed in the Circuit Court of Appeals was ancillary to the original jurisdiction invoked, and was still in its essence and nature a suit involving the validity of a patent, which is expressly made final in the Circuit Court of Appeals, subject to the right of this court to review by writ of certiorari.

It follows that the decree of the Circuit Court of Appeals should be reversed, and the case remanded to that court for further proceedings upon the petition filed by the National Brake & Electric Company in conformity with the opinion of this court.

Reversed.

(254 U. S. 494)

MANGAN v. UNITED STATES.

(Argued Dec. 10, 1920. Decided Jan. 3, 1921.)

No. 112.

1. Courts 🔑464(1)—One claiming compensation for cotton seized as abandoned property must show ownership.

Under Judicial Code, § 162 (Comp. St. § 1153), giving the Court of Claims jurisdiction of claims for property taken under Act March 12, 1863, providing for the collection of abandoned property, a claimant cannot recover for cotton seized as abandoned property without proving ownership of the cotton.

2. United States 🔑103—Sale of cotton held rescinded, so as to prevent buyer recovering from United States for its seizure as abandoned property.

H., who had sold cotton to the Confederate Government, and rescinded the sale, and sold it to his father, later sold it to claimant's intestate as administrator or agent of his father's estate, but, after seizure of the cotton by the United States government as abandoned property, H., on demand for a refund of the purchase price, gave his note to claimant's intestate and filed claim for the property. Claimant's intestate subsequently sued on the note. *Held*, that the inference from these facts was that the sale was rescinded by mutual agreement, and that claimant's intestate had no title entitling her to maintain a claim therefor.

3. Sales 🔑92—Parties to sale of cotton seized by government could rescind.

Parties to a sale of cotton, which had been seized by the United States government subsequent to the sale as abandoned property, were competent to rescind the contract, where no rights of third persons were involved.

Appeal from the Court of Claims.

Suit by Michael F. Mangan, administrator of Mary E. Pillow, deceased, against the United States. From a judgment dismissing the claim (54 Ct. Cl. 207), the claimant appeals. Affirmed.

Mr. Charles F. Consaul, Mr. John S. Blair, and Ida M. Moyers, all of Washington, D. C., for appellant.

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*Mr. Frank Davis, Jr., Asst. Atty. Gen., for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

Essential findings of fact by the Court of Claims in this case are as follows:

On January 23, 1863, John H. Hamiter, of Arkansas, sold 175 bales of cotton to the government of the Confederate States and executed and delivered a bill of sale, containing this paragraph:

> "The undersigned having sold to the Confederate States of America, and received the value of same in bonds, the receipt whereof is hereby acknowledged, 175 bales of cotton, marked, numbered, and classed as in the margin, which is now deposited at my plantation, hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same as [at] his own expense at Conway, on Red river, in the state of Arkansas, to the order of the Secretary of the Treasury, or his agents or their assigns."

The payment in bonds not being made, "five or six months later" Hamiter notified the agent of the government that if they were not delivered, he would treat the sale as rescinded, and, the bonds not being forthcoming, he sold the cotton to his father, who died not long thereafter.

About two years later, in September, 1865, Hamiter, "as administrator or other agent of his father's estate," sold 70 bales of the cotton to plaintiff's decedent, then Mrs. Trigg (afterwards Mrs. Pillow), and received pay for it. Mrs. Pillow sent it to the Red river for shipment to market, where it was seized by the United States Treasury agents, under authority of "An act to provide for the collection of abandoned property," etc., approved March 12, 1863, 12 Stat. 820, c. 120. It was

sold, and *for the proceeds paid into the United States Treasury Mrs. Pillow, since deceased, instituted this action.

The Court of Claims dismissed the petition without an opinion, probably because it deemed the showing of title to the cotton by the claimant's decedent so obviously insufficient as not to require discussion.

[1] The only warrant for such a suit at this late day is found in section 162 of the Judicial Code (Comp. St. § 1153), and to entitle the claimant to recover he must prove that his decedent was the owner of the cotton at the time it was seized. Thompson v. United States, 246 U. S. 547, 549, 38 Sup. Ct. 349, 62 L. Ed. 876.

[2, 3] There is no finding by the Court of Claims that Mrs. Pillow was the owner of the cotton when it was seized, but it is argued that facts are found which require that conclusion. These are: that Hamiter owned the cotton, that he sold it to Mrs. Pillow who paid for it, and that after she took possession of it the government seized it. It is argued that these facts show title in her, which was not divested by anything afterwards done by her, and therefore the claim of her representative for the proceeds of the cotton should be allowed.

Other facts found, however, on which we must proceed to judgment are: That Hamiter sold the cotton to the Confederate States government, and when it was not paid for declared the sale void and then sold it to his father; that afterwards, "as administrator or other agent of his father's estate," he sold it to Mrs. Pillow; and that after she had failed to secure its release by the United States government, she demanded that Hamiter should refund to her the purchase price. This demand at first Hamiter refused, but "upon fear of threatened arrest and punishment for his transactions in connection with the cotton," he consented, gave his note to Mrs. Pillow for the amount of the purchase price and filed a claim for the cotton in his own name which was disallowed. Thus Hamiter obviously thought the contract in form a sale

had been *rescinded by mutual consent, and that Mrs. Pillow was of the same conviction is shown by the fact that when Hamiter's note at six months was not paid she sued him upon it, but "it does not satisfactorily appear what was the result of the suit."

The natural and impressive inference from these facts is, not that Mrs. Pillow obtained from Hamiter a good title to the cotton and a right to the proceeds of it, but that these two persons, parties to the sale, who were 50 years nearer to it than courts can now be placed and who knew more about it than it is possible now to learn, agreed that it should be rescinded because of the prior "transactions of Hamiter in connection with the cotton," which must mean that the title which he was able to confer upon Mrs. Pillow was not deemed by her satisfactory. and therefore, by mutual agreement she released all interest in the cotton and necessarily in the proceeds of it. No rights of third persons being involved, the parties were as competent to rescind the contract of sale as they were to make it, and the finding of fact is that they did so for what Mrs. Pillow obviously thought a sufficient consideration.

We are not concerned with whether R. S. § 3477 (Comp. St. § 6383), prevented the transfer to Hamiter of any rights against the government which Mrs. Pillow may have had. The claimant did not undertake to prove that Hamiter, or any one else, had a valid claim, but that Mrs. Pillow owned the cotton at the time it was seized, and this, we think, he failed to do, and therefore the judgment of the Court of Claims must be

Affirmed.

(254 U. S. 433)

SULLIVAN et al. v. KIDD.

(Argued and Submitted April 27, 1920. Restored to Docket for Reargument May 17, 1920. Reargued Dec. 10, 1920. Decided Jan. 3, 1921.)

No. 65.

1. Aliens ⚷9—British subject, who is citizen and resident of Canada, cannot inherit land contrary to law of the state.

Under article 4 of the Treaty of March 2, 1899, with Great Britain, providing that the stipulations of such treaty shall not apply to any of the British colonies, unless notice to that effect shall have been given on behalf of such colony by the British government, where such notice was never given on behalf of Canada, a British subject, who is a resident and citizen of Canada, is not entitled to the benefits of articles 1 and 2, relative to inheritance, and cannot inherit land in Kansas, contrary to the laws of that state.

2. Treaties ⚷7—To be interpreted according to rules for interpretation of written contracts.

Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals.

3. Treaties 🔑13—To be executed so as to make purpose effective.

Treaties are to be executed in the utmost good faith, with a view to make effective the purposes of the high contracting parties.

4. Treaties 🔑7—All parts to receive reasonable interpretation, to give fair operation to whole.

All parts of a treaty are to receive a reasonable construction, with a view to giving a fair operation to the whole.

5. Aliens 🔑9—Canadian citizen not entitled to inherit, because laws of Canada permit aliens to inherit.

Where the British government never gave the required notice to extend the treaty of March 2, 1899, to the Dominion of Canada, the fact that such Dominion, in the exercise of its legislative authority, has given aliens the right to inherit, cannot give a British subject, who is a citizen and resident of Canada, the rights of inheritance given by the treaty, contrary to the law of the state.

6. Aliens 🔑9—Canadian citizen not entitled to inherit under most favored nation clause of British treaty.

Article 5 of the Treaty of March 2, 1899, with Great Britain, giving the citizens or subjects of each country in the dominions of the other the rights accorded to citizens or subjects of the most favored nation, does not authorize British subjects, who are Canadian citizens, to inherit land in Kansas, where the required notice was never given to extend the provisions of such treaty to the Dominion of Canada.

7. Treaties 🔑7—Construction by executive department given much weight.

While the construction of treaties is a judicial question, the construction placed upon a treaty and consistently adhered to by the executive department charged with the supervision of foreign relations, should be given much weight.

Appeal from the District Court of the United States for the District of Kansas.

Suit between Bartholomew Sullivan and others and Jane Kidd. Decree in favor of Kidd, and the other parties appeal. Reversed.

See, also, 40 Sup. Ct. 484.

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*Messrs. George F. Beatty and B. I. Litowich, both of Salina, Kan., for appellants.

Messrs. H. M. Langworthy, O. H. Dean, and Roy B. Thomson, all of Kansas City, Mo., and J. H. Ralston, of Washington, D. C., for appellee.

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*Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States (by special leave of court).

Mr. Justice DAY delivered the opinion of the Court.

This is an appeal from a decree of the United States District for the District of Kansas. It involves the construction of the Treaty between Great Britain and the United States of March 2, 1899, relating to the tenure and disposition of real and personal property. Compilation of Treaties in Force 1904, 375 (Malloy); 31 Stats. U. S. 1939.

The case arises from the following facts: Peter Martin died at Osawatomie, Kan., January 29, 1915, owing real estate situated in the county of Saline, Kan. He left surviving him certain relatives, among others a sister Margaret Ingoldsby, a resident of the township of Sheffield, county of Lennox-Addington, Province of Ontario, Canada. After the death of Peter Martin, and on July 28, 1916, Margaret Ingoldsby died at her home in Canada, and by her last will and testament, duly probated, she named the appellee, Jane Kidd, her sole devisee and legatee. The real estate in Kansas has been sold in partition sale, and the question to be decided is whether Jane Kidd, thus holding by devise the interest of Margaret Ingoldsby, is entitled to succeed to the undivided one-seventh of the estate of Peter Martin.

Primarily the devolution of the estate, it being situated in the state of Kansas, would be determined by the laws of that state. Blythe v. Hinckley, 180 U. S. 333, and previous cases in this court cited and quoted on page 341 et seq., 21 Sup. Ct. 390, on page 394 et seq. (45 L. Ed. 557). Under the Constitution and laws of Kansas, Margaret Ingoldsby, an alien, was incapable of inheriting, and the estate would pass to the brothers and sisters and their representatives who were native citizens. Johnson v. Olson, 92 Kan. 819, 142 Pac. 256, L. R. A. 1915E, 327.

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*The right of Jane Kidd to succeed to the interest of Margaret Ingoldsby is said to arise from the fact that the latter was, although a citizen and resident of Canada, a British subject, and entitled to the succession because of the Treaty of March 2, 1899. The District Court sustained this contention. Pertinent provisions of the treaty are:

"ARTICLE I.

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.

"ARTICLE II.

"The citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, whether resident or nonresident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

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*"ARTICLE IV.

"The stipulations of the present convention shall not be applicable to any of the colonies or foreign possessions of Her Britannic Majesty unless notice to that effect shall have been given, on behalf of any such colony or foreign possession by Her Britannic Majesty's representative at Washington to the United States Secretary of State, within one year from the date of the exchange of the ratifications of the present convention.

"It is understood that under the provisions of this article, Her Majesty can in the same manner give notice of adhesion on behalf of any British protectorate or sphere of influence, or on behalf of the island of Cyprus, in virtue of the convention of the 4th of June, 1878, between Great Britain and Turkey.

"The provisions of this convention shall extend and apply to any territory or territories pertaining to or occupied and governed by the United States beyond the seas, only upon notice to that effect being given by the representative of the United States at London, by direction of the treaty making power of the United States.

"ARTICLE V.

"In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.

"ARTICLE VI.

"The present convention shall come into effect ten days after the day upon which the ratifications are exchanged, and shall remain in force for ten years after such exchange. In case neither of the high contracting parties shall have given notice to the other, twelve
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months before *the expiration of the said period of ten years, of the intention to terminate the present convention, it shall remain in force until the expiration of one year from the day on which either of the high contracting parties shall have given such notice.

"The United States or Her Britannic Majesty shall also have the right separately to terminate the present convention at any time on giving twelve months' notice to that effect in regard to any British colony, foreign possession, or dependency, as specified in article IV, which may have acceded thereto."

The case was argued and submitted at the last term of this court. It was ordered reinstated with notice to the Attorneys General of the United States and of the state of Kansas. The case has been reargued. The Solicitor General presented the views of the State Department of the United States, and submitted a brief in behalf of the government.

[1] There are opposing views of the treaty, one taken by the British, and the other by the American, government. The view of the former being that British subjects, resident of Canada, or elsewhere, are entitled to inherit property in any state of the United States, and citizens of the United States are entitled to inherit in Great Britain and its possessions and colonies, provided as to the latter, that notice has been given under article 4 of the treaty of adhesion to the terms of the convention as to such colonies and possessions. The American contention is stated by the Solicitor General, and appears by a communication from the Secretary of State of October 2, 1920, sent in response to the invitation of the Solicitor General, and now on the files of the Department of Justice. The Secretary of State sets forth that it is the view of this government that British subjects, citizens and residents of Canada, do not inherit in the United States by virtue of the stipulations of the treaty, be-
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cause as to the Domin*ion of Canada no notice of adhesion to the same has been given as is required by the stipulations of article 4. It hence appears that the one contention is that the notice required by article 4 has a territorial effect only, and when given brings such territory into the operative force of the treaty as to the property situated therein; the other, that as to subjects and citizens, the notice is required to bring residents and property within the operative effect of the treaty.

Applied to the concrete case, the American contention is that Margaret Ingoldsby was not entitled to inherit in Kansas by the terms of this treaty because notice of adherence for the Dominion of Canada was not given. The communication of the State Department to the Solicitor General shows that the American government is ready, and has expressed its willingness to take up the matter of extending the treaty provisions to the Dominion of Canada, notwithstanding the fact that the stipulated time for notice has expired.

[2-4] Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties;

that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, p. 249. At the time of the negotiation of the treaty Great Britain had numerous colonies and possessions, and the United States had recently acquired certain islands beyond the seas. Concerning these the contracting parties made the stipulations contained in article 4, adding the right to give like notice in behalf of any British protectorate, or sphere of influence, or on behalf of the island of Cyprus by virtue of the convention of June 4, 1878, between Great Britain and Turkey. *440 As to the islands beyond *the seas occupied or governed by the United States, they were to come within the terms of the treaty only upon notice to that effect by direction of the treaty-making power of the United States.

If the contention of the appellee be correct, it necessarily follows that as to British possessions, the inhabitants thereof being British subjects, had nothing to gain by giving notice which article 4 specifically required, for as to them their rights had been secured by articles 1 and 2 of the treaty. Applying this construction to the instant case, Canadians, while residents of the Dominion and citizens of a self-regulating and self-governing community, acquired by virtue of this treaty as British subjects the right to inherit in every state of the American Union regardless of local laws; this while citizens of the United States acquired no corresponding right to inherit in the Dominion of Canada until notice be given; a matter entirely beyond the control of American authority. American right to inherit in Canada became a matter of grace on the part of the other contracting nation when it saw fit to grant it by signifying its adhesion to the treaty. Such construction is inconsistent with the general purpose and object of such conventions to secure equality in exchange of privileges and reciprocity in rights granted and secured. Geofroy v. Riggs, 133 U. S. 258, 271, 10 Sup. Ct. 295, 33 L. Ed. 642.

[5] The fact that Canada as a self-governing dependency, in the exercise of the legislative power which is hers, has seen fit to give aliens the right to inherit, adds nothing to the argument in favor of the appellee. The Dominion of Canada has not the treaty-making power. Whatever the Dominion may see fit to do in the exercise of its own legislative authority cannot affect the right of a state of the American Union to determine for herself whether aliens shall inherit property within her borders. The construction insisted upon by the United States makes for the exchange of reciprocal rights under *441 the provisions *of the treaty, and when the required notice is given, British subjects resident of Canada would have property rights in the United States similar to those accorded citizens of the United States in Canada. That notice was deemed essential to the security of rights of British subjects, resident of the colonies, is shown by the practice which has followed the making of the supplementary convention of 1902 (Treaties in Force 1904, 379; 32 U. S. Stats. p. 1864) extending for 12 months from July 28, 1901, the time fixed in article 4 of the Treaty of March 2, 1899, for the notification of accession to that convention by British colonies or foreign possessions. In a note to this treaty, published in Treaties in Force 1904, supra, it appears that most of the British colonies and possessions have given notice of adhesion to the treaty of 1899.

The significance of article 6 is important. In this article provision is made for the right of the United States or the British government to terminate separately the convention by twelve months' notice to that effect in regard to any British colony, foreign possession or dependency, as specified in article 4, which may have acceded to the convention. This article lends strong support to the argument that only colonies or possessions which accede to the convention are to have the benefit thereof; such rights, recognized as acquired by accession, being subject to termination by the withdrawal provision of article 6.

[6] Nor are we impressed with the argument that Canadian citizens, being also British subjects, are entitled to inherit in Kansas by virtue of the most favored nation clause. That clause has been held in the practice of this country to be one not extending rights acquired by treaties containing it because of reciprocal benefits expressly conferred in conventions with other nations in exchange for rights or privileges given to this government. This clause cannot overcome the specific provisions of arti- *442 cle *4 making adhesion to the treaty necessary in order to bring citizens and property of colonies and possessions within the benefits of the treaty.

We are unable to see that the construction of this treaty is aided by the argument of counsel in the supplemental brief of the appellee that Lord Salisbury for the British government insisted upon the construction which they contend for in relation to a similar convention with Japan. We find nothing in the archives of the Department of State to show that this insistence was brought forward in the course of negotiations or in any manner came to the attention of the American representative, Mr. Hay, who negotiated this treaty with Sir Julian Pauncefote, the British representative.

The American government upon a message

from the President for the purpose of securing the consent of the Senate, as we learn from public documents on file in the State Department, has with the consent of the Senate extended the provisions of the convention of 1899 to Porto Rico and has so notified the British government. We are advised by the letter of the Secretary of State of October 2, 1920 (on file in the Department of Justice), that this government is ready to take up with the British government the matter of extension of the treaty provisions to Hawaii and the Dominion of Canada.

[7] While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight. Charlton v. Kelly, 229 U. S. 447, 468, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397. See, also, Castro v. De Uriarte (D. C.) 16 Fed. 93, 98 (opinion by Judge Addison Brown).

Taking the view which we have here expressed *443 of the *real purpose of the treaty as evidenced by its terms, which is strengthened by the practices of both governments in pursuance of it, we reach the conclusion that for lack of notice of the adhesion of Canada to the terms of the treaty, the law of Kansas was not superseded in favor of British subjects resident in Canada, and it determined the rights of aliens to inherit lands in that state.

Reversed.

(254 U. S. 415)

SOUTHERN PAC. CO. v. BERKSHIRE.

(Submitted Nov. 19, 1920. Decided Jan. 3, 1921.)

No. 106.

1. **Master and servant ⇒217(5) — Engineer presumed to have known of mail crane.**

A railroad engineer who had passed over a route many times must be presumed to have known of a mail crane near the track, which was visible from the engineer's seat for half a mile.

2. **Master and servant ⇒113(1) — Maintenance of mail crane near track held not negligence.**

As a matter of law, the maintenance of a mail crane at the same distance from a railroad track as all others along the road, and with the end of the crane when elevated no nearer to trains than 14 inches, was not, in the absence of any special circumstances at the particular point, a violation of the company's duty to its employés, and the jury should not have been permitted to find negligence from its maintenance.

3. **Master and servant ⇒217(22) — Engineer knowing of mail crane assumed risk of injury from contact.**

A railroad engineer, who must have known of a mail crane near the track and could have seen it from his seat had he looked, assumed the risk of injury in leaning out of the engine window a sufficient distance to come in contact with the crane, though he may not have known the precise distance to which the end of the crane would reach.

Mr. Justice Clarke, Mr. Justice Day, and Mr. Justice Pitney, dissenting.

On Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas.

Action by W. S. Berkshire, temporary administrator of William A. Linder, deceased, against the Southern Pacific Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas (207 S. W. 323) and writ of error denied by the Supreme Court of Texas, and defendant brings certiorari. Reversed.

Messrs. William I. Gilbert, of Los Angeles, Cal., and W. F. Herrin, of San Francisco, Cal., for petitioner.

Messrs. C. B. Hudspeth and George E. Wallace, both of El Paso, Tex., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought in a state court against the petitioner for causing the death *416 of Linder, the plaintiff's *intestate. At the trial the petitioner requested instructions that Linder assumed the risk of injury from the cause complained of and that a verdict should be rendered for the defendant. These were refused, the defendant saving its rights upon the record, and the plaintiff got a verdict and judgment. The Court of Civil Appeals affirmed the judgment; the Supreme Court denied a writ of error, and thereupon a writ of certiorari was allowed by this court upon the ground that an immunity set up under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665) was involved.

The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat, unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane, or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers. In order to have uniformity the Post Office Department fixes the distance of the cranes from the equipment, and the length of the hooks, so that, in the language of a witness for the plaintiff:

> "The same hook that will take a sack off a crane in Arizona or New Mexico will take it as it goes through western Kansas."

The evidence was all to the effect that this crane stood at the same distance as all the others along the road. The end of the crane when elevated was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event.

[1] Linder had been upon this route for

some years, had *passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead through a front window. About a mile before reaching Carney Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side.

[2] In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the travelling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. The first element in it is the standard of conduct to be laid down for the road. The standard concerns a permanent condition not only at this place, but at many places along the road and presumably at innumerable others on all the large railroads of the United States. There are no special circumstances to qualify this part of the question—which is whether or not it is consistent with the duty of a railroad to its employees to erect railroad cranes of which the end of the arm when in use is fourteen inches from the side of the train. The railroad is required and presumed to know its duty in the matter and it would seem that the Court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case. See Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed 485.

It is impracticable to require railroads to

have no *structures so near to their tracks as to endanger people who lean from the windows of the cars. Most passengers are familiar with cautions against putting out heads or arms. However it may be in other cases where there is more or less choice as to position, this is true as to the postal cranes. The farthest point at which a bag could be picked up is twenty-nine inches, and it requires a less distance than that to be sure of getting the bag. In short it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment. It equally is impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department. When a railroad is built it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

[3] But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning

well out from *the train. As we have said, the only possible inference on the uncontradicted evidence of the plaintiff's witnesses was that he leaned out considerably more than fourteen inches as shown by the position of his body and the place of the cut on his head. The probability is that the distance of the crane was somewhat greater than the minimum that we have assumed, but that we lay on one side. Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law. Butler v. Frazee, 211 U. S. 459, 465–467, 29 Sup. Ct. 136, 53 L. Ed. 281. Kenney v. Meddaugh, 118 Fed. 209, 55 C. C. A. 115.

Judgment reversed.

Mr. Justice CLARKE, dissenting. Engineer Linder, when leaning out of his cab, in the discharge of his duty to see the condition of a "hot driving pin," was struck on the head and killed by the end of a horizontally extended arm of a mail crane. There is no question of contributory negligence in the case—the judgment could not be reversed for that, under the Federal Employers' Liability Act. The negligence of the railroad company is palpable but, nevertheless, the finding of a properly instructed jury and of two state courts, is here reversed because this Court concludes, as a matter of fact, that the mail crane arm was such an obvious and conspicuous source of danger to Linder that he must be held, as a matter of law, to have assumed the danger from it, by continuing in the service of the company.

The record shows: That Linder was a freight engineer, and as such had nothing to do with mail cranes and had neither occasion nor opportunity, except very rarely, to see what, if any, danger the crane arms could be to him when in the discharge of his du-

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ties, for, during the two *years next before his death, he had made but twelve trips on passenger trains, only three of which were on trains which "picked up" mail from cranes; that when mail cranes are not in use the arms hang vertically beside the supporting post, which is three feet eight inches from the side of an engine, and obviously in such position they are not a source of danger to train men; that, on the line involved, the arms of cranes were extended horizontally toward the track, so as to be a source of danger to engineers, only two or three times a day, at widely separated intervals, when they were used to support a mail bag for ten minutes before the arrival of each mail train,—a fraction of an hour in twenty-four; and that Linder, when leaning out of his cab to see the condition of a hot driving pin, was struck an inch above his ear, so that if the arm had been three or four inches farther from the track he would not have been injured.

The record does not show: That Government requirements for mail cranes require them to be as close to the track as this one was. On the contrary, the only evidence to the point is that of an employé in the Government mail service, who testified, that the hooks on mail cars are adjusted to catch mail bags if within twenty-nine inches of their sides, that allowing for the swaying of the cars, they will catch them if twenty-six inches away, and that the sides of the cars are "flush" with the sides of engine cabs. The point of the crane arm which killed Linder "was about fourteen inches from the side of the cab," but on this evidence it could have been placed twenty-six inches away, where it would not have been a source of danger to him.

Although the civil engineer, who had charge of the cranes on the division, was a witness for the company, he was not asked the distance of the crane causing the injury, or of any other crane, from the track—a suspicious circumstance—and that other

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cranes were at the same dis*tance as the one which caused the injury can only be inferred from inadequate statements of witnesses who had never made any measurements and who gave the merest impressions with respect to them. Where, as here, three or four inches is a matter of life and death, random estimates are valueless and should not be accepted, especially when the company certainly had perfectly definite information, which was suppressed. A hard and fast assumption of law should not be based on findings of fact by this court derived from such evidence.

There is no description whatever in the record of the length, dimensions or appearance of the arms of the crane which caused the death of Linder. How, on such evidence, can it be justly stated, that such crane arm was so permanent and conspicuous a source of danger that, as a matter of law, Linder, a freight engineer, usually running past it at high speed when its arms were down, should be charged with knowing and appreciating and assuming the risk!

It has been a criminal offense in Ohio for twenty years to maintain mail cranes nearer than eighteen inches to the nearest point of contact with the widest locomotive on the road erecting such cranes, 97 O. L. 274, and there are similar statutes in other States. If the point of the crane arm here involved had been eighteen inches, four inches farther than it was, from the engine, Linder would not have been injured.

There is no evidence whatever that Linder actually knew that the crane arm extended close enough to the track to cause him injury, and the latest formulation by this Court of the rule applicable to the case is:

> "In order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence [as this defect was] it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety;
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> or else *such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." Gila Valley, etc., Ry. Co. v. Hall, 232 U. S. 94, 102, 34 Sup. Ct. 229, 231 (58 L. Ed. 521).

Earlier expressions of the rule are that the danger must be "plainly observable" (Texas & P. R. Co. v. Archibald, 170 U. S.

665, 672, 18 Sup. Ct. 777, 780 [42 L. Ed. 1188]; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96), or "so patent as to be readily observable" (Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 25 Sup. Ct. 164, 168 [49 L. Ed. 382]).

It is "a strong thing" to hold, on the indefinite evidence in this record, which I have attempted accurately to detail, that a mail crane arm is such a permanent and conspicuous source of danger to a freight engineer as to bring this case within the scope of the decisions cited, and it is a yet stronger thing to reverse the finding of a jury properly instructed, and the judgments, on a question of fact, of two state courts, which the record shows acted with full appreciation of, and with a desire to follow, the decisions of this Court with respect to assumption of risk.

In practice certainly, and I think in theory, the decision of the Court in this case will introduce a new and unfortunate standard into the law of assumption of risk, which will confuse the doctrine as it has been worked out in the cases cited, will render railway companies careless in placing obstructions near to their tracks, and will result in the injury and death of many innocent and careful men, if the effect of it is not promptly corrected by State and National statutes, and therefore I cannot consent to join in it.

Mr. Justice DAY and Mr. Justice PITNEY join in this dissent.

(254 U. S. 491)

UNITED STATES v. STRANG et al.

(Argued Dec. 9, 1920. Decided Jan. 3, 1921.)

No. 206.

1. **United States ⊂⊃61—Agent of Emergency Fleet Corporation not "agent of United States," within penal statute.**

The Emergency Fleet Corporation, organized by the Shipping Board, as authorized by Act Sept. 7, 1916, and authorized by the President to exercise a portion of the power and authority granted to him by Act June 15, 1917, is a separate entity, though all of its stock is owned by the government, and an inspector of such corporation is not an "agent of the United States," within Criminal Code, § 41 (Comp. St. § 10205), prohibiting any member of a firm from acting as officer or agent of the United States for the transaction of business with such firm.

2. **Corporations ⊂⊃304 — Agents of corporation are not agents of stockholders.**

Generally agents of a corporation are not agents of the stockholders and cannot contract for them.

Mr. Justice Clarke dissenting.

In Error to the District Court of the United States for the Southern District of Florida.

Criminal proceeding by the United States against James H. Strang and others. A demurrer to the indictment was sustained, and the United States brings error. Affirmed.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States.

Mr. John W. Dodge, of Jacksonville, Fla., for defendants in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The ultimate question for determination is whether the employment of defendant Strang as an inspector by the United States Shipping Board Emergency Fleet Corporation, without more, made him an agent of the government within the meaning of section 41, Criminal Code.

"Sec. 41. No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years." Comp. St. § 10205.

Holding that this employment did not suffice to create the relation alleged, the trial court sustained a demurrer to the indictment. It contains four counts, three of which charge that Strang unlawfully acted as agent of the United States in transacting business with the Duval Ship Outfitting Company, a copartnership of which he was a member, in that while an employee of the Fleet Corporation as an inspector he signed and executed (February, 1919) three separate orders to the Outfitting Company for repairs and alterations on the steamship Lone Star. The other defendants are charged with aiding and abetting him. The trial court and counsel here have treated the fourth count as charging all the defendants with conspiracy to commit the offenses set forth in the three preceding counts. United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443.

Counsel for the government maintain that

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the Fleet *Corporation is an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested by Congress in the President and by him delegated to it; that the acts of the corporation within its delegated authority are the acts of the United

States; that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector Strang necessarily acted as agent of the United States.

The demurrer was properly sustained.

[1] As authorized by the Act of September 7, 1916 (39 Stat. 728), the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with $50,000,000 capital stock, all owned by the United States, and it became an operating agency of that board. Later, the President directed that the corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917 (40 Stat. 182), and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See The Lake Monroe, 250 U. S. 246, 252, 39 Sup. Ct. 460, 63 L. Ed. 962. The corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of section 41.

[2] Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. Bank of the *494 United *States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 908, 6 L. Ed. 244; Bank of Kentucky v. Wister et al., 2 Pet. 318, 7 L. Ed. 437; Briscoe et al. v. Bank of Kentucky, 11 Pet. 257, 9 L. Ed. 709; Salas v. United States, 234 Fed. 842, 148 C. C. A. 440. The view of Congress is further indicated by the provision in section 7, Appropriation Act of October 6, 1917 (40 Stats. 345, 384 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 251b]):

> "Provided, that the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment for the purposes of this section."

Also, by the Act of October 23, 1918 (chapter 194, 40 Stats. 1015 [Comp. St. Ann. Supp 1919, § 10199]) which amends section 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock.

Affirmed.

Mr. Justice CLARKE dissents.

(254 U. S. 387)

COCHRAN et al. v. UNITED STATES.

(Argued Dec. 15 and 16, 1920. Decided Jan. 3, 1921.)

No. 116.

1. Internal revenue 🔑2—Taxes on legacies held sufficiently certain to be saved by repealing act as taxes previously "imposed."

Under War Revenue Act June 13, 1898, § 29, providing for a tax on legacies at the rate of 75 cents on the $100, the amount of taxes on legacies of less than $1,000,000 paid prior to July 1, 1902, from an estate having a net value of nearly $8,000,000 was not rendered uncertain by the fact that the amount of claims against the estate had not been ascertained, and the taxes were therefore "imposed" within the meaning of the repealing act of April 12, 1902, effective July 1, 1902, providing that taxes imposed by section 29 prior to the taking effect of the repealing act should continue in force, especially where the executors made a return of the legacies, and no liabilities requiring repayment of the legacies had developed after 14 years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Impose.]

2. Internal revenue 🔑38—Right to recover taxes should be shown by averment and proof.

The right to recover taxes voluntarily paid should be shown not only by averment, but by proof, and not by assertion and speculation.

Appeal from the Court of Claims.

Suit by Alexander Smith Cochran and another, as surviving executors of William F. Cochran, deceased, against the United States. From a judgment dismissing the claim (54 C. C. 219), the claimants appeal. Affirmed.

Mr. H. T. Newcomb, of New York City, for appellants.

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Mr. W. L. Frierson, Sol. Gen., of Chattanooga, Tenn., for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from a judgment of the Court of Claims denying recovery of taxes paid under the War Revenue Act of June 13, 1898 (30 Stat. 448), and amendments, upon certain legacies made under the will of William F. Cochran.

The facts so far as we deem them material are as follows:

Cochran died in New York, December 27, 1901, leaving a will and a personal estate of the value of $7,918,027.18 of which appellees and Era S. Cochran were made executors. The latter has since died. The will was probated January 9, 1901, and letters testamentary issued the same date and administration was immediately undertaken and proceeded with without extraordinary or unnecessary delay.

Six months' notice to creditors was given as required by the law of New York and the time for the presentation of claims expired August 4, 1902. Prior to September 30, 1902, debts and claims against the estate were presented and for the most part paid to the aggregate amount of $98,589.04, of which amount $66,776.25 were paid prior to July 1, 1902. Expenses of administration during that period had been ascertained to be $125,000, of which sum $13,047.16 were paid prior to July 1, 1902. Otherwise claims and expenses of administration had not been ascertained.

Certain sums were bequeathed to the executors in trust for the children of Cochran and there was also a legacy to a niece and one to a stranger to his blood. Trusts were set up in accordance with the will and the legatees were paid prior to July 1, 1902, the sums provided to be paid. The aggregate payment so made amounted to the sum of $3,140,979.10.

*In 1892 and 1893 litigation was instituted against the decedent which might involve the estate, it was estimated, in the payment of several hundred thousand dollars or more. The litigation according to the findings of the Court of Claims is still in progress and on account of it money has been retained by the executors that might otherwise have been distributed. The probable outcome of the litigation is not shown.

Under the laws of New York funds in the hands of executors after the expiration of notice to creditors are liable to after-discovered debts, and legatees who have received money prior to the expiration of such notice are liable up to the amount paid them for claims subsequently presented. The executors were not secured for the payments to legatees prior to July 1, 1902, and prior to that date the value of the residuary estate had not been ascertained.

In compliance with section 30 of the Act of June 13, 1898, the executors on February 17, 1903, made a return and filed it with the collector of internal revenue giving a schedule of the legacies arising from the personal property of the estate and the amount of tax due thereon. The collector accepted the schedule as correct. The amount paid to him by the executors was the amount they estimated as the amount of the taxes due. The schedule showed the taxes on each legacy and that the total was $158,321.78, which sum was by the collector paid to the United States.

July 16, 1904, a demand was made upon the Commissioner of Internal Revenue for the repayment to the executors of the sum paid. After one rejection (October 22, 1910), the Commissioner (March 15, 1915) recommended the claim for allowance in the sum of $107,292.24, and for the rejection of $51,029.54. The recommendation was approved by the Secretary of the Treasury. The former sum was paid; the latter was not, and remains unrefunded.

*This sum was computed in respect to the interest of eight different legatees, of which six were residuary legatees, and the computations were made according to certain general rules, tables, and instructions for the use of internal revenue officers, administrators, and trustees in determining the amount of taxes to be paid to the United States upon legacies or distributive shares arising from personal property under the Act of June 13, 1898. There was no special investigation by the Commissioner of Internal Revenue as to the expectancy of life of the several beneficiaries or as to the earning power of the bonds placed in trust for them respectively, and for their benefit.

[1] The contentions of the parties are quite accurately opposed. The appellees contend that an assessment was a necessary condition to the collection of the taxes, and that there was no assessment until after July 1, 1902, and that on that date the law which established the taxes was repealed.

In opposition it is urged by the United States that if an assessment was necessary the right to make it was reserved by the repealing act, and that the appellees, as executors, having made a report of the legacies and the taxes thereon, the report and its acceptance by the collector of internal revenue was to all intents and purposes an assessment. It is further urged that, if an assessment was necessary for the purpose of collecting the taxes, it is now immaterial.

These contentions constitute the issue in the case and depend upon the relation of the law (mostly statutory) to the facts and what it determines. As an element in the determination, the use of the rules of the department and the mortuary tables counsel dismisses from controversy, in concession to Henry v. United States, 251 U. S. 393, 40 Sup. Ct. 185, 64 L. Ed. 322, and Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. 367, 64 L. Ed. 709. The remaining element, that is, the necessity of an assessment prior to July 1, 1902, to the validity of the taxes in ques*tion, counsel for appellant says, revolves "upon the meaning and application of the word 'imposed,' the fifth word in the special saving clause of the repeal act of April 12, 1902." And counsel defines the word to include all of the steps necessary to the collection of a tax, making it tantamount to "accrued." In other words, the contention is that a tax is not "imposed" by the simple declaration of a law that property shall be subject to it, but "imposed" only when the tax becomes due and payable, and that the taxes in the present case had not reached that essential condition before July 1, 1902, because they had not been assessed. In support of the contention counsel cites Mason v. Sargent, 104 U. S. 689, 26 L. Ed. 894, and Hertz v. Woodman, 218 U. S.

205, 30 Sup. Ct. 621, 54 L. Ed. 1001. There is much in the latter case which, it may be urged, is adverse to the contention, but upon this we are not called upon to pass, for counsel concedes that if a statute imposes a tax in such way as that the amount is readily reduced to a certainty, no assessment is necessary. And this is true of the taxes in question.

By Section 29 of the Act of June 13, 1898 (30 Stat. 448), legacies or distributive shares such as this case is concerned with[1] are made subject to a duty at the rate of 75 cents for each and every $100 of the clear value thereof, and the tax is made a lien and charge for 20 years and its payment required before payment and distribution to the legatees. The section also requires the trustee to make and render to the collector a schedule, list, or statement of the legacies together with the amount of duty that has accrued or shall accrue thereon. Section 30 was amended March 2, 1901 (31 Stat. 938), but no change in anything important to the present controversy. Section 29 and the amendments of March 2, 1901, were repealed by Act of April 12, 1902 (32 Stat. 97 *392 et *seq. [Comp. St. § 6369]), but it was provided that "all taxes or duties imposed by section 29 * * * and amendments thereof, prior to the taking effect" of the repealing act should "be subject, as to lien, charge, collection and otherwise, to the provisions of section thirty * * * and amendments thereof," which are hereby "continued in force." Except as so continued in force, the repealing statute took effect July 1, 1902.

The schedule under section 29 was rendered, as we have seen, accepted by the collector, and taxes were paid in accordance therewith in the sum of $158,321.78.

The schedule included legacies that had been paid after July 1, 1902, but as by Act of June 27, 1902 (32 Stat. 406), such legacies were not subject to a tax, the taxes on them were refunded, upon demand of the executors, but the government refused to refund the taxes on legacies paid prior to that date. This suit was brought for their amount, that is, the sum of $51,029.54.

To support recovery, it is contended that there was no obligation of payment, because, as has already been said, the amount to be paid was not made certain by assessment, or, to quote counsel, was not "so certain (or capable of such ascertainment) that reasonable minds could not disagree, and that the exercise of judgment and the consideration and weighing of evidence could not affect the result." For this Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, and other cases are cited and reviewed.

But we cannot agree that there was uncertainty. We have seen the amount of taxes imposed by the statute was definite and the appellants had no trouble in estimating and returning the value of the legacies upon which it was imposed. The basis of the claim of uncertainty is that the estate was and is not settled and that there is a possibility that the legatees may be called upon to pay debts. The contention is as strained and baseless as that rejected in Simpson v. United States, supra.

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[2] *It is to be remembered, besides, that the case does not present a case of resistance to the payment of a tax, but of the recovery of taxes voluntarily paid, and that therefore the illegality of them should be shown not only by averment, but by proof, not, as it is attempted to be, by assertion and speculation. It is true that it is averred that prior to July 1, 1902, the amount of claims against the estate had not been ascertained, and that there was responsibility upon the trustees and legatees to make a return of the whole or ratable portions of the legacies to the extent that the sums remaining in the estate should be insufficient to satisfy all valid claims. It is conceded, however, the contingency of this might have terminated August 1, 1902, and while it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refutation that an estate of the net personal value of nearly $8,000,000 was or is in danger of embarrassment by the payment of legacies of less than $1,000,000. And we have seen that the executors, who had knowledge of the condition of the estate, and all that it might be made subject to, did not hesitate to make a return of the legacies to the collector of internal revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims June 23, 1916, 14 years after the commencement of the administration of the estate and nearly as long after the time of presentation of claims against it, and the record shows that the total of the claims and expenses of administration, including funeral expenses, amount to the sum of $235,700. In the face of this exhibition we are asked to speculate upon possibility of the existence of liabilities that 14 years have not developed.

Judgment affirmed.

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[1] We disregard a distinction in the legacies as not important to the argument.

(254 U. S. 394)

ERIE R. CO. v. BOARD OF PUBLIC UTILITY COM'RS et al.

Nos. 33 and 34.

PASSAIC WATER CO. v. SAME.

No. 35.

WESTERN UNION TELEGRAPH CO. v. SAME.

No. 36.

D. FULLERTON & CO. v. SAME.

No. 37.

MORRIS & CO. v. SAME.

No. 38.

MEYER et al. v. SAME.

No. 39.

PUBLIC SERVICE RY. CO. v. SAME.

No. 40.

(Argued Nov. 16 and 17, 1920. Decided Jan. 3, 1921.)

1. **Railroads 🔑96—May be required to maintain bridges or viaducts over or under highways newly laid out.**

Railroad companies may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways.

2. **Commerce 🔑58 — Railroads 🔑99(1) — State may require abolition of grade crossings when reasonably required.**

The state, from which railroads derive their right to occupy land within the state, has a constitutional right to insist that highway crossings shall not be made dangerous to the public, whatever may be the cost to the railroad companies; and, if it reasonably can be said that safety requires the abolition of grade crossings, neither prospective bankruptcy of the company nor its engagement in interstate commerce can take away this fundamental right of the state as sovereign of the soil.

3. **Railroads 🔑99(1)—Contracts subject to state's right to require abolition of grade crossing.**

Contracts by a railroad are subject to the possible exercise of the state's sovereign right to require the abolition of dangerous grade crossings.

4. **Railroads 🔑214—May cease operation, if unduly burdened by state.**

If the burdens imposed on a railroad by the state are so great that the road cannot be run at a profit, it can stop, whatever misfortune the stopping may produce.

5. **Railroads 🔑99(2)—Apportionment of cost of abolishing grade crossing not ground for complaint.**

As a railroad company might have been charged with the whole expense of abolishing dangerous grade crossings, it could not complain that only 10 per cent. of the cost was thrown upon a street railway company by the State Board of Public Utility Commissioners.

6. **Railroads 🔑99(11)—Discretion of board ordering abolition of grade crossing subject to review.**

If Act N. J. March 12, 1913, c. 57, leaves the Board of Public Utilities Commissioners a discretion as to ordering the elimination of a dangerous grade crossing, the discretion is subject to review by the courts.

7. **Courts 🔑394(3)—Federal Supreme Court not concerned with delegation of legislative powers to state boards.**

The federal Supreme Court has no concern with the question of delegation of legislative or quasi legislative powers to a state commission or board.

8. **Railroads 🔑99(2)—Portion of cost of eliminating grade crossing may be ordered paid by street railroad.**

A street railway crossing the tracks of a steam road at grade in a public street increases the danger of the crossing, and may be required to bear a part of the expense of removing it as a condition of its continued right to use the streets.

9. **Waters and water courses 🔑192—Water company bound to adjust itself to change of grade of highway carried over or under railroad.**

A water company, the location of whose pipes will be affected by a lawful change of grade of a street to carry it over or under a railroad, must adjust itself to the changed conditions.

10. **Constitutional law 🔑235—Water company, required to change pipes on change of grade of street, not denied equal protection of laws.**

A water company, required to bear the expense of moving its pipes in connection with the change of grade of the street to pass over or under a railroad, is not denied the equal protection of the laws, because a street railroad company, instead of being charged with the expense of moving its tracks, is charged a percentage of the total expense at the crossing, which presumably is greater than the mere adjustment of its tracks to a new surface.

11. **Railroads 🔑99(1)—Side track rights subordinate to changes in main track lawfully ordered for elimination of crossing.**

The rights of owners of side tracks, which will be dislocated by the elimination of a grade crossing, are subordinate to changes in the main tracks, otherwise lawful.

The Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

In Error to the Court of Errors and Appeals of the State of New Jersey.

Certiorari proceedings by the Erie Railroad Company, by the Passaic Water Company, by the Western Union Telegraph Company, by D. Fullerton & Co., by Morris & Co., by Jacob Meyer and another, partners doing business as Meyer & De Vogel, and by the

Public Service Railway Company against the Board of Public Utility Commissioners of New Jersey and others. Judgments of the Supreme Court of New Jersey (89 N. J. Law, 24, 98 Atl. 28; 89 N. J. Law, 57, 98 Atl. 13), affirming the orders of the board, were affirmed by the Court of Errors and Appeals (90 N. J. Law, 672, 673, 103 Atl. 1052; 90 N. J. Law, 694, 714, 103 Atl. 1053; 90 N. J. Law, 715, 103 Atl. 1054; 90 N. J. Law, 729, 103 Atl. 1055), and the prosecutors bring error. Affirmed.

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*Messrs. Geo. S. Hobart, of Newark, N. J., Gilbert Collins, of Jersey City, N. J., and Charles E. Hughes, of New York City, for plaintiffs in error in Nos. 33–39.

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*Mr. Frank Bergen, of Newark, N. J., for plaintiff in error in No. 40.

Messrs. L. Edward Hermann, of Jersey City, N. J., Frank H. Sommer, of Newark, N. J., and William I. Lewis, of Paterson, N. J., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

These are writs of error brought by parties interested in an order of the Board of Public Utility Commissioners of New Jersey, dated April 20, 1915, directing a change in fifteen places in the City of Paterson, where the Erie Railroad now crosses that number of streets at grade. The order was reviewed on writs of certiorari and affirmed by the Supreme Court, and on appeal by the Court of Errors and Appeals. 89 N. J. Law, 57, 24, 98 Atl. 13, 28; 90 N. J. Law, 672, 673, 714, 729, 677, 694, 103 Atl. 1052, 1053, 1055, 1051. The Erie Railroad Company made two applications to the Supreme Court, the second being based upon a refusal by the Board to grant a rehearing of its order. Accordingly it has two *408 writs of error here. *But the second adds nothing to the first as we could not say that the Board unreasonably refused further delay. Those of the other parties are to the judgments affirming the original order of the Board. The Erie Railroad was ordered to make the change by carrying fourteen of the crossings under, and one, at Madison Avenue, over the railroad. It will also have to bear the cost, subject to a charge to the Public Service Railway Company of ten per centum of the cost of changing three crossings used by its road. The most important questions arise in the Erie Railroad Company's case and we take that up first.

The order was made under an Act of March 12, 1913, c. 57, P. L. 1913, p. 91, which is construed by the State courts to authorize it, subject to the constitutional questions to be dealt with here. The Erie Railroad's line in Paterson is over tracks originally belonging to the President and Directors of the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company, but now held by the Erie Railroad, by assignment of perpetual leases upon the terms that if in any unforeseen way the leases terminate the value of erections and improvements must be repaid by the lessors. They however are small corporations having no assets except their roads and the rentals received from the Erie Company. The leases were ratified by an Act of March 14, 1853 (P. L. 480), providing that they should not be held to confer any privilege or right not granted to the lessors by their charters. It is admitted that the statute must be taken to impose the duty of making the changes upon the company operating the road, the plaintiff in error, which is an interstate road. It put in evidence that it did not have assets sufficient to make the changes, at least without interfering with the proper development or its interstate commerce, and also contended that the whole evidence did not justify the finding of the Board that the crossings were dangerous to public safety but at most show- *409 ed that *the change would be a public convenience. It is said that the order must be reasonable to be upheld and that it is not reasonable to require an expenditure for such a purpose of over two million dollars from a company that has not more than $100,000 available, and that the order and the statute when construed to justify it not only interfere unwarrantably with interstate commerce and impair the obligation of contracts but take the Erie Company's property without due process of law.

[1] Most of the streets concerned were laid out later than the railroads and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the State to throw the burden of this improvement upon the railroad. That is the fundamental question in the case. It might seem to be answered by the summary of the decisions given in Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis, 232 U. S. 430, 438, 34 Sup. Ct. 400, 401 (58 L. Ed. 671). "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157; Northern Pacific Ry. Co. v. Puget Sound & Willapa Harbor Ry. Co., 250 U. S. 332, 39 Sup. Ct. 474, 63 L. Ed. 1013. For although the statement is said to be explained as a matter of state law by the previous decisions in Minnesota, it is made without reference to those decisions or to any local rule, and moreover the intimation of the judgment in the present case is that whatever may have been the earlier rulings the law of New Jersey now adopts the same view.

But it is argued that the order is unreasonable in the circumstances to which we have adverted, the principle applied to the regulation of public service corporations being invoked. Mississippi R. R. Commission v. Mobile & Ohio R. R. Co., 244 U. S. 388, 391, *410 37 Sup. Ct. 602, 61 L. Ed. 1216; Chicago, *Burlington & Quincy R. R. Co. v. Railroad Commissioners of Wisconsin, 237 U. S. 220, 35 Sup. Ct. 560, 59 L. Ed. 926. But the extent of the States' power varies in different cases from absolute to qualified, somewhat as the privilege in respect of inflicting pecuniary damage varies. The power of the State over grade crossings derives little light from cases on the power to regulate trains.

[2-4] Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and *411 neither prospective bankruptcy *nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & Rio Grande R. R. Co. v. Denver, 250 U. S. 241, 246, 39 Sup. Ct. 450, 63 L. Ed. 958. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. Denver & Rio Grande R. R. Co. v. Denver, 250 U. S. 241, 244, 39 Sup. Ct. 450, 63 L. Ed. 958; Union Dry Goods Co. v. Georgia Public Service Co., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; Manigault v. Springs, 199 U. S. 473, 480, 26 Sup. Ct. 127, 50 L. Ed. 274. If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. v. R. R. Commissioners, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the Courts below the evidence justified the conclusion of the Board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need of further mention by what we have said thus far.

[5] The plaintiff in error discusses with considerable detail the effect of the changes upon private sidings. But its rights in respect of these are at least no greater than those in respect of the main line and are covered by the preceding discussion. So are the objections that if the leases ever are terminated it has no chance of being repaid the value of its improvements because of the smallness of the lessor corporations. They would have this property in that event and it would be subject to their obligation—but the answer to the complaint of the plaintiff in error in all its forms is that which we have made. Whatever the cost, it may be re- *412 quired by New Jersey not to im*peril the highways if it does business there. We agree with the decisions below that as the railroad company might have been charged with the whole expense the fact that no more than ten per centum of the cost of three crossings is thrown upon a street railway company is a matter of which it cannot complain.

If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous. The Board must be supposed to have known the locality and to have had an advantage similar to that of a Judge who sees and hears the witnesses. The Courts of the State have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand. We cannot say that they were not. At some crossings the danger was less than at others, but it was necessary or at least prudent to proceed on a general plan. Upon the whole matter while it is difficult to avoid the apprehension that the state officials hardly gave due weight to the situation of the company as a whole in their anxiety for the well being of the State, we are of opinion that they did not exceed their constitutional powers. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil. Probably the conclusion that we have reached could be supported upon the narrower ground that a continuing obligation was imposed by the charters of the plaintiff in error's lessors, and was assumed by the plaintiff in error, but that which we have stated seems to us free from doubt.

[6, 7] Some argument is based upon a discretion supposed *to be left to the Board by the statute, which reads that when it appears to the Board that the crossing is dangerous it may order, &c. The state courts seem to regard the words as imposing a positive duty, but upon either construction we perceive no infraction of the company's constitutional rights. If the words are imperative the reasons that we have given apply. If they leave a discretion it is subject to review by the Courts, and this Court has no concern with the question how far legislative or quasi-legislative powers may be delegated to a Commission or Board. Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 225, 29 Sup. Ct. 67, 53 L. Ed. 150. We deem it unnecessary to give our reasons in greater detail for deciding that the judgment against the Erie Railroad Company must be affirmed.

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[8] While the Railroad Company contends that the Public Service Railway Company should be charged more, the latter company comes here upon the proposition that it should be charged nothing. We agree with the Courts below that a street railway crossing the tracks of a steam road at grade in a public street increases the danger and may be required to bear a part of the expense of removing it. The amount charged does not appear to be excessive and upon the principles that we have laid down the payment of it may be made a condition of the continued right to use the streets. Detroit, Fort Wayne & Belle Isle Ry. v. Osborn, 189 U. S. 383, 390, 23 Sup. Ct. 540, 47 L. Ed. 860; Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121, 129, 35 Sup. Ct. 82, 59 L. Ed. 157.

[9, 10] The Passaic Water Company contends that the expense of moving its pipes cannot be thrown wholly upon it—mainly on the ground that the change of grade was unlawful. This ground fails and the company must adjust itself to the lawfully changed conditions. It also contends that it does not receive the equal protection of the laws because the street railway instead of being charged *the expense of moving its tracks is charged ten per centum of the total expense at its crossings. Presumably this charge is greater than the mere adjustment of tracks to a new surface. It is based upon the share of the street railroad in creating the danger. As the street railroad cannot complain, certainly the Water Company cannot.

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[11] The Western Union Telegraph Company makes similar objections and also says that its interstate commerce is interfered with and presents from its own point of view arguments dealt with so far as they seem to us to need mention in disposing of the principal case. The other plaintiffs in error own side tracks which will be dislocated by the change and they will be put to further expense if the plan is carried out according to what the New Jersey Court decides to be suggestions not commands. The rights in the side tracks are subordinate to changes in the main track otherwise lawful. As against these as against the others the judgment of the Court of Errors and Appeals is affirmed.

Judgments affirmed.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS dissent.

(254 U. S. 443)

DUPLEX PRINTING PRESS CO. v. DEERING et al.

(Argued Jan. 22, 1920. Decided. Jan. 3, 1921.)

No. 45.

1. Monopolies 🔑24(1)—Clayton Act applies to pending suits for injunction, so far as it affects remedies.

In so far as the Clayton Act of October 15, 1914, provides for relief by injunction to private suitors, imposes conditions upon granting such relief under particular circumstances and otherwise modifies the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), it is applicable to pending suits for injunction, as the right to injunction must be determined as of the time of the hearing.

2. Injunction 🔑101(1)—Combination to obstruct complainant's interstate trade may be enjoined, if a violation of federal statutes.

A combination to hinder and obstruct complainant's interstate trade in printing presses, by coercing its customers and other persons handling its goods, as a result of which it has sustained substantial damages to its interstate trade, and is threatened with further and irreparable loss, and damage may be enjoined if the threatened loss is due to a violation of the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), as amended by the Clayton Act.

3. Conspiracy 🔑1—Definition of "conspiracy."

A "conspiracy" is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

4. Injunction 🔑101(1)—"Secondary boycott" defined.

A "secondary boycott" is a combination not merely to refrain from dealing with a person, or to advise or by peaceful means persuade his customers to refrain, but to exercise coercive pressure on such customers, actual or prospective, in order to cause them to withhold or withdraw their patronage, through fear of loss or damage to themselves.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Secondary Boycott.]

5. Injunction 🔑101(1)—Federal statutes determine right to injunction against restraint of interstate commerce.

In determining the right to injunction against restraints of interstate commerce, the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830) and the Clayton Act are of paramount authority, and their prohibitions must be given full effect, irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

6. Monopolies 🔑12(1)—Restraint of interstate commerce by peaceable persuasion for benefit of parties to combination is prohibited.

A restraint of interstate commerce produced by peaceable persuasion is within the prohibition of the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), though the participants in the combination or the conspiracy have some object beneficial to themselves or their associates, which they might have been at liberty to pursue in the absence of the statute.

7. Monopolies 🔑12(1)—Clayton Act does not authorize labor organizations to depart from legitimate objects and engage in restraint of trade.

Clayton Act, § 6 (Comp. St. § 8835f), providing that the anti-trust laws shall not be construed to forbid the existence and operation of labor organizations, or to restrain individual members from lawfully carrying out their legitimate objects, nor shall such organizations or their members be construed to be illegal combinations or conspiracies, does not exempt such an organization or its members from liability, where they depart from its normal or legitimate object and engage in an actual combination or conspiracy in restraint of trade.

8. Injunction 🔑101(2)—Provision of Clayton Act forbidding injunction, except to prevent irreparable damage, is declaratory of prior law.

Clayton Act, § 20, par. 1 (Comp. St. § 1243d), prohibiting injunctions in any case between employer and employees, etc., unless necessary to prevent an irreparable injury to property or a property right for which there is no adequate remedy at law, etc., is declaratory of the law as it stood before.

9. Injunction 🔑101(2)—Provision of Clayton Act restricting injunction is confined to persons standing in proximate relation to described controversy.

Clayton Act, § 20, par. 2 (Comp. St. § 1243d), providing that "no such restraining order or injunction" shall prohibit certain acts, nor shall any of such acts be considered violations of any law of the United States, refers to injunctions in cases between employer and employees, etc., involving or growing out of a dispute concerning terms or conditions of employment, referred to in paragraph 1, and confines the restriction on the granting of injunctions and the relaxation of the provisions of the anti-trust and other laws to persons proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective.

10. Injunction 🔑101(2)—Provisions of Clayton Act restricting issuance must not be enlarged by loose construction.

Clayton Act, § 20 (Comp. St. § 1243d), prohibiting injunctions against certain acts in cases between employers and employees, etc., imposes an exceptional and extraordinary restriction on the equity powers of the United States courts and on the general operation of the anti-trust laws, and cannot be enlarged by loose construction.

11. Injunction 🔑101(2)—Provisions of Clayton Act restricting issuance does not make all members of labor organization parties to dispute.

Clayton Act, § 20 (Comp. St. § 1243d), providing that in cases between employers and employees involving disputes concerning employment, no injunction shall prohibit certain acts, nor shall such acts be considered violations of law, does not extend the exemptions to all members of a labor organization, a few of whose members are on strike, because of terms or conditions of employment.

12. Injunction 🔑101(2)—Threats or persuasion to bring about sympathetic strike of customers' employees and others not authorized by Clayton Act; "peaceable or lawful persuasion."

Clayton Act, § 20 (Comp. St. § 1243d), prohibiting injunctions in cases between employers and employees, forbidding any person ceasing to patronize or employ any party to the dispute or recommending, advising or persuading others by peaceable and lawful means, so to do, did not authorize a labor organization, to which complainant's striking employees belong, or its members, to use threats or persuasion to bring about strikes or a cessation of work by employees of complainant's customers or prospective customers, or a trucking company employed by the customers, to compel the customers to refrain from commercial relations with complainant, as to instigate a sympathetic strike in aid of a secondary boycott is not peaceable or lawful persuasion.

13. Statutes 🔑216—Debates in Congress may not be resorted to in construing statutes.

The debates in Congress, expressive of the views and motives of individual members, may not be resorted to in ascertaining the meaning and purpose of Congress in adopting a statute.

14. Statutes 🔑217—Committee reports and explanatory statements by committee member may be regarded as exposition of legislative intent.

Reports of committees of the Senate and House of Representatives, and explanatory statements in the nature of a supplemental report by the committee member in charge of a bill in course of passage, may be regarded as an exposition of the legislative intent, where the meaning of a statute is obscure.

15. Monopolies 🔑12(1)—Secondary boycotts not legalized by Clayton Act.

Clayton Act, § 20 (Comp. St. § 1243d), does not legalize secondary boycotts.

Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Clarke, dissenting.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by the Duplex Printing Press Company against Emil J. Deering and another, individually and as business agents of District No. 15 of the International Association of Machinists, and others. A decree dismissing the bill (247 Fed. 192) was affirmed by the Circuit Court of Appeals for the Second Circuit (252 Fed. 722, 164 C. C. A. 562), and complainant appeals. Reversed and remanded.

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*Messrs. Daniel Davenport, of Bridgeport, Conn., and Walker Gordon Merritt, of New York City, for appellant.

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*Messrs. Frank X. Sullivan, of New York City, and Frank L. Mulholland, of Toledo, Ohio, for appellees.

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*Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity brought by appellant in the District Court for the Southern District of New York for an injunction to restrain a course of conduct carried on by defendants in that district and vicinity in maintaining a boycott against the products of complainant's factory, in furtherance of a conspiracy to injure and destroy its good will, trade, and business—especially to obstruct and destroy its interstate trade. There was also a prayer for damages, but this has not been pressed and calls for no further mention. Complainant is a Michigan corporation, and manufactures printing presses at a factory in Battle Creek, in that state, employing about 200 machinists in the factory, in addition to 50 office employees, traveling salesmen, and expert machinists or road men, who supervise the erection of the presses for complainant's customers at their various places of business. The defendants who were brought into court and answered the bill are Emil J. Deering and William Bramley, sued individually and as business agents and representatives of District No. 15 of the International Association of Machinists, and Michael T. Neyland, sued individually and as business agent and representative of Local Lodge No. 328 of the same association. The *461 Dis*trict Council and the Lodge are unincorporated associations having headquarters in New York City, with numerous members resident in that city and vicinity. There were averments and proof to show that it was impracticable to bring all the members before the court and that the named defendants properly represented them; and those named were called upon to defend for all, pursuant to equity rule 38 (226 U. S. 659, 33 Sup. Ct. xxix). Other jurisdictional averments need no particular mention. The District Court, on final hearing, dismissed the bill (247 Fed. 192), the Circuit Court of Appeals affirmed its decree (252 Fed. 722, 164 C. C. A. 562), and the present appeal was taken.

The jurisdiction of the federal court was invoked both by reason of diverse citizenship and on the ground that defendants were engaged in a conspiracy to restrain complainant's interstate trade and commerce in printing presses, contrary to the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. (Comp. St. §§ 8820–8823, 8827–8830). The suit was begun before but brought to hearing after the passage of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730. Both parties invoked the provisions of the latter act, and both courts treated them as applicable. Complainant relied also upon the common law; but we shall deal first with the effect of the acts of Congress.

The facts of the case and the nature of the relief prayed are sufficiently set forth in the report of the decision of the Circuit Court of Appeals. 252 Fed. 722, 164 C. C. A. 562. The case was heard before Circuit Judges Rogers and Hough and District Judge Learned Hand. Judge Rogers, although in the minority, stated the case and the pleadings for the court (252 Fed. 723–727, 164 C. C. A. 562), and delivered an opinion for reversal in which he correctly outlined (252 Fed. 734–737 164 C. C. A. 562) the facts as shown by the undisputed evidence—defendants having introduced none. Judges Hough and Hand followed with separate opinions for affirmance, not, however, disagreeing with *462 Judge Rogers as to the facts. These may *be summarized as follows:

Complainant conducts its business on the "open shop" policy, without discrimination against either union or non-union men. The individual defendants and the local organizations of which they are the representatives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000, and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. Complainant's principal manufacture is newspaper presses of large size and complicated mechanism, varying in weight from 10,000 to 100,000 pounds, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul, and erect them at the point of delivery. These presses are sold throughout the United States and in foreign countries; and, as they are especially designed for the production of daily papers, there is a large market for them in and about the city of New York. They are delivered there in the ordinary course of interstate commerce; the handling, hauling, and installation work at destination being done by employees of the purchaser under the supervision of a specially skilled machinist supplied by complainant. The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. In August, 1913 (eight months before the filing of the bill), the International Association called a strike at

complain*ant's factory in Battle Creek, as a result of which union machinists to the member of about 11 in the factory and 3 who supervised the erection of presses in the field left complainant's employ. But the defection of so small a number did not materially interfere with the operation of the factory, and sales and shipments in interstate commerce continued.

The acts complained of made up the details of an elaborate programme adopted and carried out by defendants and their organizations in and about the city of New York as part of a country-wide programme adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: Warning customers that it would be better for them not to purchase, or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company, usually employed by customers to haul the presses, not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men, by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective cus-

tomers, and persons concerned *in hauling, handling, or installing the presses. In some cases the threats were undisguised; in other cases polite in form, but none the less sinister in purpose and effect.

All the judges of the Circuit Court of Appeals concurred in the view that defendants' conduct consisted essentially of efforts to render it impossible for complainant to carry on any commerce in printing presses between Michigan and New York and that defendants had agreed to do and were endeavoring to accomplish the very thing pronounced unlawful by this court in Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, and Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341. The judges also agreed that the interference with interstate commerce was such as ought to be enjoined, unless the Clayton Act of October 15, 1914, forbade such injunction.

[1] That act was passed after the beginning of the suit, but more than two years before it was brought to hearing. We are clear that the courts below were right in giving effect to it; the real question being whether they gave it the proper effect. In so far as the act (a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the Sherman Act, it was effective from the time of its passage, and applicable to pending suits for injunction. Obviously, this form of relief operates only in futuro, and the right to it must be determined as of the time of the hearing. State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 431, 432, 15 L. Ed. 435. See, also, United States v. Schooner Peggy, 1 Cranch, 103, 110, 2 L. Ed. 49; Sampeyreac v. United States, 7 Pet. 222, 239, 240, 8 L. Ed. 665; Mills v. Green, 159 U. S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed. 293; Dinsmore v. Southern Express Co., 183 U. S. 115, 120, 22 Sup. Ct. 45, 46 L. Ed. 111; Berry v. Davis, 242 U. S. 468, 470, 37 Sup. Ct. 208, 61 L. Ed. 441.

The Clayton Act, in section 1 (Comp. St. § 8835a), includes the Sherman Act in a definition of "anti-trust laws," and in section 16

(38 Stat. 737 [section 8835*o*]) gives to private parties a right to relief by injunction in any court of the United States against threatened *465 loss or *damage by a violation of the antitrust laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman Act, under which some of the federal courts had held, as this court afterwards held in Paine Lumber Co. v. Neal, 244 U. S. 459, 471, 37 Sup. Ct. 718, 61 L. Ed. 1256, that a private party could not maintain a suit for injunction.

[2] That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future—is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

[3] Looking first to the former act, the thing declared illegal by its first section (26 Stat. 209 [Comp. St. § 8820]) is:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."

The accepted definition of a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. Pettibone v. United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419. If the purpose be unlawful, it may not be carried out, even by means that otherwise would be legal; and, *466 although *the purpose be lawful, it may not be carried out by criminal or unlawful means.

[4] The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott"; that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

[5] As we shall see, the recognized distinction between a primary and a secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act. But, in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular states. Those acts, passed in the exercise of the power of Congress to regulate commerce among the states, are of paramount authority, and their prohibitions must be given full effect, irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes.

In Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, where there was an effort to compel plaintiffs to unionize their factory by preventing them from manufacturing articles intended for transportation beyond the state, and also by preventing vendees from reselling articles purchased from plaintiffs and negotiating with plaintiffs for further purchases, by means of a boycott of plaintiffs' products and of dealers who handled them, this court held that there was a conspiracy in restraint of *467 trade actionable under section 7 of the *Sherman Act (section 8829), and in that connection said (208 U. S. 293, 28 Sup. Ct. 303, 52 L. Ed. 488, 13 Ann. Cas. 815):

> "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."

And when the case came before the court a second time, 235 U. S. 522, 534, 35 Sup. Ct. 170, 59 L. Ed. 341, it was held that the use of the primary and secondary boycott and the circulation of a list of "unfair dealers," intended to influence customers of plaintiffs and thus subdue the latter to the demands of the defendants, and having the effect of interfering with plaintiffs' interstate trade, was actionable.

In Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, wholesale dealers were subjected to coercion merely through the circulation among retailers, who were members of the association, of information in the form of a kind of "black list," intended to influence the retailers to refrain from dealing with the listed wholesalers, and it was held that this constituted a violation of the Sherman Act. Referring to this decision, the court said, in Lawlor v. Loewe, 235 U. S. 522, 534, 35 Sup. Ct. 170, 172 (59 L. Ed. 341):

> "That case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the states."

[6] It is settled by these decisions that such a restraint produced by peaceable persuasion *468 is as much within the *prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

[7] Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the Circuit Court of Appeals was divided; the majority holding that under section 20, "perhaps in conjunction with section 6," there could be no injunction. These sections are set forth in the margin.[1] Defendants seek to derive from them some *469 *authority for their conduct. As to section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

The principal reliance is upon section 20. This regulates the granting of restraining orders and injunctions by the courts of the United States in a designated class of cases, with respect to (a) the terms and conditions of the relief and the practice to be pursued, *470 and (b) the character of *acts that are to be exempted from the restraint, and in the concluding words it declares (c) that none of the acts specified shall be held to be violations of any law of the United States. All its provisions are subject to a general qualification respecting the nature of the controversy and the parties affected. It is to be a "case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment."

[8, 9] The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that

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[1] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." Section 8835f.

"Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." Section 1243d.

"no such restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, * * * involving, or growing out of, a dispute concerning terms or condition of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, *471 and also the relaxation *of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in section 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong," and that, as there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of the Machinists' Union in calling a strike at the factory—section 20 operated to permit members of the Machinists' Union elsewhere, some 60,000 in number, although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce, and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

[10] We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by *472 resorting to a loose construction of *the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

[11] Nor can section 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment," which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of section 20, which contain no mention of labor organizations, so as to produce an inconsistency with section 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not fav- *473 ored, and in effect, as *was noted in Loewe v. Lawlor, 208 U. S. 274, 303, 304, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, would confer upon voluntary associations of individuals formed within the states a control over commerce among the states that is denied to the governments of the states themselves.

[12] The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a

violation of the laws of the United States, that is to say:

> (a) "Terminating any relation of employment, * * * or persuading others by peaceful means so to do;" (b) "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working;" (c) "ceasing to patronize or to employ any party to such dispute, or * * * recommending, advising, or persuading others by peaceful and lawful means so to do;" (d) "paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits; * * *" (e) "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and *lawful*" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes *474 or a cessation of work *on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.

The majority of the Circuit Court of Appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of section 20 to legalize the secondary boycott "at least in so far as it rests on or consists of refusing to work for any one who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.

[13, 14] By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. Aldridge v. Williams, 3 How. 9, 24, 11 L. Ed. 469; United States v. Union Pacific R. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224; United States v. Freight Association, 166 U. S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, *475 *194 U. S. 486, 495, 24 Sup. Ct. 816, 48 L. Ed. 1087. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 198–199, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; United States v. Coca Cola Co., 241 U. S. 265, 281, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487; United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310, 318, 38 Sup. Ct. 525, 62 L. Ed. 1130.

[15] In the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now section 20. See House Rept. No. 627, 63d Cong., 2d Sess., pp. 33–36; Senate Rept. No. 698, 63 Cong., 2d Sess., pp. 29–31; the latter being a reproduction of the former. But they contain extracts from judicial opinions and a then recent text-book sustaining the "primary boycott," and expressing an adverse view as to the secondary or coercive boycott, and, on the whole, are far from manifesting a purpose to relax the prohibition against restraints of trade in favor of the secondary boycott.

Moreover, the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb) who had the bill in charge when it was under consideration by the House. The question whether the bill legalized the secondary boycott having been raised, it was emphatically and unequivocally answered by him in the negative.[2] The

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[2] Extracts from Congressional Record, vol. 51, part 10, 63d Cong., 2d Sess.:

(Page 9652.)

Mr. Volstead. Would not this also legalize the secondary boycott? * * *

Mr. Webb. Mr. Chairman, I do not think it legalizes a secondary boycott.

Mr. Volstead. Let me read the lines, if the gentleman will permit. And no such restraining order or injunction shall prohibit any one—

"from ceasing to patronize those who [or to] employ any party to such dispute, or from recommending, *476 subject—he declared in substance or *effect—was under consideration when the bill was framed, and the section as reported was carefully prepared with the settled purpose of excluding the secondary boycott and confining boycotting to the parties to the dispute, allowing parties to cease to patronize *477 and to ask others to cease *to patronize a party to the dispute; it was the opinion of the committee that it did not legalize the secondary boycott; it was not their purpose to authorize such a boycott, not a member of the committee would vote to do so; clarifying amendment was unnecessary; the section as reported expressed the real purpose so well that it could not be tortured into a meaning authorizing the secondary boycott. This was the final word of the House committee on the subject, and was uttered under such circumstances and with such impressive emphasis that it is not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported. In substantially that form it became law; and since, in our opinion, its proper construction is entirely in accord with its purpose as thus declared, little need be added.

The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people *478 constituting, indeed, the general public *upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the antitrust laws, of which the section under consideration forms after all a part.

Reaching the conclusion, as we do, that complainant has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statutes; there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts, and also and especially from using any force, threats, command, direction, or even persuasion with the

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advising, or persuading others by peaceful means so to do."

Now, does not the word "others" in that instance refer to others than parties to the dispute?

Mr. Webb. No; because it says in line 15:

"From ceasing to patronize or employ any parties to such dispute."

Mr. Volstead. * * * Can there be any doubt this is intended or does, in fact, legalize the secondary boycott?

Mr. Webb. I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so. It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned in section 18 [now section 20], but we did not intend, I will say frankly, to legalize the secondary boycott.

(Page 9653.)

Mr. Webb. I will say this section was drawn two years or more ago and was drawn carefully, and those who drew this section drew it with the idea of excluding the secondary boycott. It passed the House, I think, by about 243 to 16, and the question of the secondary boycott was not raised then, because we understood so clearly it did not refer to or authorize the secondary boycott.

(Page 9658.)

Mr. Webb. Mr. Chairman, I should vote for the amendment offered by the gentleman from Minnesota [Mr. Volstead] if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you cannot possibly make it mean a secondary boycott. Therefore this section does not authorize the secondary boycott.

I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it. It is not the purpose of the committee to authorize it, and I do not think any person in this House wants to do it. We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute.

object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, *479 *or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott should be included in the injunction according to the proofs.

Complainant is entitled to its costs in this court and in both courts below.

Decree reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice BRANDEIS, dissenting, with whom Mr. Justice HOLMES and Mr. Justice CLARKE, concur.

The Duplex Company, a manufacturer of newspaper printing presses, seeks to enjoin officials of the machinists' and affiliated unions from interfering with its business by inducing their members not to work for plaintiff or its customers in connection with the setting up of presses made by it. Unlike Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, there is here no charge that defendants are inducing employees to break their contracts. Nor is it now urged that defendants threaten acts of violence. But plaintiff insists that the acts complained of violate both the common law of New York and the Sherman Act, and that, accordingly, it is entitled to relief by injunction under the state law and under section sixteen of the Clayton Act, October 15, 1914, c. 323, 38 Stat. 730, 737.

The defendants admit interference with plaintiff's business but justify on the following ground: There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced *480 three of *them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale, and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated, for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers, who had assented to union conditions, notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer. Because the Duplex Company refused to enter into such an agreement, and in order to induce it to do so, the machinists' union declared a strike at its factory, and in aid of that strike instructed its members and the members of affiliated unions not to work on the installation of presses which plaintiff had delivered in New York. Defendants insisted that by the common law of New York, where the acts complained of were done, and where this suit was brought, and also by section 20 of the Clayton Act, 38 Stat. 730, 738, the facts constitute a justification for this interference with plaintiff's business.

First. As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. They contend that the Duplex Company's refusal to deal with the machinists' union and to observe its standards threatened the interest, not only of such union members as were its factory employees, but even more of all members of the several affiliated unions *481 employed by plaintiff's competitors and *by others whose more advanced standards the plaintiff was, in reality, attacking; and that none of the defendants and no person whom they are endeavoring to induce to refrain from working in connection with the setting up of presses made by plaintiff is an outsider, an interloper. In other words, that the contest between the company and the machinists' union involves vitally the interest of every person whose co-operation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common law principles the answer should, in my opinion, be: Yes, if as a matter of fact those who so co-operate have a common interest.

The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life. It is conceded that, although the strike of the workmen in plaintiff's factory injured its business, the strike was not an actionable wrong; because the obvious self-interest of the strikers constituted a justification. See Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638. Formerly courts held that self-interests could not be so served. Commons, History of Labor in the United States, vol. 2, c. 5. But even after strikes to raise wages or reduce hours were held to be legal because of the self-interest, some courts held that there was not sufficient causal relationship between a strike to unionize a shop and the self-interest of the strikers to justify injuries inflicted. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Lucke v. Clothing Cutters' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. *482 A. 534, 99 Am. St. Rep. 783. *But other courts, repeating the same legal formula, found that there was justification, because they viewed the facts differently. National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347; Roddy v. United Mine Workers, 41 Okl. 621, 139 Pac. 126, L. R. A. 1915D, 789.

When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials whereever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingmen did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. Burnham v. Dowd, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778; Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Booth v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226. But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself. Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661; Cohn & Roth Electric Co. v. Bricklayers, 92 Conn. 161, 101 Atl. 659, 6 A. L. R. 887; Gill Engraving Co. v. Doerr (D. C.) 214 Fed. 111; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495; Grant Construction Co. v. St. Paul Building Trades, 136 Minn. 167, 161 N. W. 520, 1055; Pierce v. Stablemen's Union, 156 Cal. 70, 76, 103 Pac. 324.

So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom *483 they *sought co-operation have a common interest which the plaintiff threatened. This view is in harmony with the views of the Court of Appeals of New York. For in New York, although boycotts like that in Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, are illegal because they are conducted, not against a product, but against those who deal in it, and are carried out by a combination of persons, not united by common interest, but only by sympathy (Auburn Draying Co. v. Wardwell, 227 N. Y. 1, 124 N. E. 97, 6 A. L. R. 901), it is lawful for all members of a union by whomever employed to refuse to handle materials whose production weakens the union (Bossert v. Dhuy, supra; P. Reardon, Inc., v. Caton, 189 App. Div. 501, 178 N. Y. Supp. 713). Compare Paine Lumber Co. v. Neal, 244 U. S. 459, 471, 37 Sup. Ct. 718, 61 L. Ed. 1256.

> "The voluntary adoption of a rule not to work on nonunion made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer." Bossert v. Dhuy, supra, 221 N. Y. 355, 117 N. E. 584, Ann. Cas. 1918D, 661.

In my opinion, therefore, plaintiff had no cause of action by the common law of New York.

Second. As to the anti-trust laws of the United States: Section 20, of the Clayton Act, declares;

> "Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The acts which are thus referred to are, whether performed singly or in concert:

> "Terminating any relation of employment, or * * * ceasing to perform any work or labor, or * * * recommending, advising or persuading others by peaceful means so to do, or * * * attending at any place where such person or persons may lawfully be, for the purpose of obtaining or communicating information, or *484 * * * peacefully per*suading any person to work or to abstain from working, or * * * ceasing to patronize or employ any party to such dispute, * * * or * * * recommending, advising, or persuading others by peaceful and lawful means so to do, or * * * paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value, or peacefully assembling in a lawful manner and for lawful purposes, or * * * doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

This statute was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants. Aside from the use of the injunction, the chief source of dissatisfaction with the existing law lay in the doctrine of malicious combination,[3] and, in many parts of the country, in the judicial declarations of the illegality at common law of picketing and persuading others to leave work. The grounds for objection to the latter are obvious. The objection to the doctrine of malicious combinations requires *485 some explan*ation. By virtue of that doctrine, damage resulting from conduct such as striking or withholding patronage or persuading others to do either, which without more might be damnum absque injuria because the result of trade competition, became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.[4] It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful;[5] and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

By 1914 the ideas of the advocates of legislation had fairly crystalized upon the manner in which the inequality and uncertainty *486 of the law should be removed. It was to *be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of injuria from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was damnum absque injuria, because an incident of trade competition, or a legal injury, because in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act.[6] The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course.[7] Both the *487 *majority and the minority report of the House committee indicate that such was its purpose.[8] If, therefore, the act applies to the case at bar, the acts here complained of cannot "be considered or held to be violations of any law of the United States," and hence do not violate the Sherman Act.

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[3] See "Malice and Unlawful Interference," Ernest Freund, 11 Harv. L. Rev. 449, 461; "Rights of Traders and Laborers," Edw. F. McClennen, 16 Harv. L. Rev. 237, 244; "Crucial Issues in Labor Litigation," Jeremiah Smith, 20 Harv. L. Rev. 429, 451; Principles of Labor Legislation, Commons and Andrews, pp. 95-116; Hoxie, Trade Unionism in the United States, p. 231; Groat, Attitude of American Courts towards Labor Cases, pp. 76-77; 221; 246; J. W. Bryan, The Development of the English Law of Conspiracy, p. 147 et seq.

Report of the Industrial Commission, 1901, vol. XVII, p. cxiv, p. 515, 556; Report of Royal Commission on Trade Disputes and Trade Combinations, 1906, p. 12; Report of Commission on Industrial Relations, 1915, pp. 135, 377.

For attempts to reach this doctrine by legislation see also 52d Congress, H. R. 6640, § 1; 56th Congress, H. R. 11667, § 7; 57th Congress, S. 649, § 7.

[4] See James Wallace Bryan, The Development of the English Law of Conspiracy:

"We find little difficulty in attributing the illegality of combinations to strike or otherwise to advance the interests of labor, not to the material loss inflicted upon the employer concerned, but to the harm supposed to result from their activities to the public at large." And since the judge or jury believe the conduct socially bad and since it is admittedly done intentionally, not inadvertently, they declare that the actors are animated by malice which negatives the justification of "fair competition," e. g. Lord Bowen in Mogul S. S. Co. v. MacGregor [1892] A. C. 25, "intentionally to do that which is calculated * * * to damage * * * and does damage another in his property or trade is actionable if done without just cause or excuse, and * * * is what the law calls a malicious injury."

[5] See A. V. Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century," 17 Harv. L. Rev. 511, 532: "The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion."

[6] It was said that this doctrine "completely unsettle(d) the law * * * and set up the chancellor in the midst of the labor organization at the inception of a strike as an arbiter of their conduct as well as a controller of their fates." 62d Congress, 2d Sess. Hearings Before a Subcommittee of the Senate Committee on the Judiciary on H. R. 23635, p. 429.

Again, it was pointed out that the incorporation of this idea in the Sherman Law had "done violence to the right to strike—to cease work collectively * * * and to the right to withhold patronage and to agree to withhold patronage." Brief by Samuel Gompers, Hearings before the House Committee on the Judiciary on Trust Legislation, 63d Congress, 2d Sess., vol. 2, p. 1808.

[7] Compare the following: "There are apparently only two lines of action possible: First to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade unions, and second, to remove all restriction which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property and the public peace. The first method has been tried and failed absolutely. * * * The only method therefore seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strikebreakers, and peaceful picketing." Report of the Committee on Industrial Relations, 1915, p. 136.

The Duplex Company contends that section 20 of the Clayton Act does not apply to the case at bar, because it is restricted to cases "between an employer and employees, or between employers and employees, or between employees or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment"; whereas the case at bar arises between an employer in Michigan and workingmen in New York not in its employ, and does not involve their conditions of employment. But Congress did not restrict the provision to em*488ployers and workingmen in their em*ploy. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship. Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 52–53, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315. Louisville etc. Ry. Co. v. Wilson, 138 U. S. 501, 505, 11 Sup. Ct. 405, 34 L. Ed. 1023; Cf. Rex. v. Neilson, 44 N. S. 488, 491. The further contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is, in my opinion, founded upon a misconception of the facts.

Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.

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[8] The majority declared that the section sets out specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trade dispute," which it has been necessary to affirm because of "the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." The minority insisted that the section prescribes "a set rule forbidding under any circumstances the enjoining of certain acts which may or may not be actuated by a malicious motive or for the purpose of working an unlawful injury, etc." 63d Congress, 2d Session, House Report 627, p. 30; Id., part 2, Appendix A, p. 20.

(254 U. S. 522)

In re MUIR.

THE GLENEDEN.

(Argued Jan. 7, 1919. Decided Jan. 17, 1921.)

No. 18.

1. **Admiralty ⚷25—Parties questioning court's jurisdiction bound to show that vessel is under control of foreign government.**

Prima facie the District Court had jurisdiction of a suit in rem against a steamship owned by a private corporation, and parties questioning such jurisdiction had the burden of showing by evidence that the steamship was in the public service and under the control of a foreign government as an admiralty transport; such facts not being especially within the knowledge of the libelant and he having no superior means of showing the real facts.

2. **Evidence ⚷26—Judicial notice not taken that vessel is under control of foreign government.**

Judicial notice cannot be taken in a suit in rem against a steamship owned by a private corporation that the steamship is in the public service and under the control of a foreign government as an admiralty transport.

3. **International law ⚷10—Foreign government entitled to appear and claim vessel and challenge court's jurisdiction.**

A foreign government, or, with its sanction, its accredited and recognized representative, is entitled to appear in a suit in admiralty against a vessel, claim the vessel, and raise the question of the court's lack of jurisdiction because of its control of the vessel.

4. **International law ⚷10—Claim of foreign government to vessel should be presented through Executive Department, and not by private counsel as amici curiæ.**

Where a libel in rem is brought against a vessel claimed to be under the control of a foreign government as an admiralty transport, if such government objects to appearing as a suitor in a foreign court, it should make the asserted public status and immunity of the vessel the subject of diplomatic representations, to the end that, if the claim is recognized by the Executive Department of the government, it may be set forth and supported in an appropriate suggestion to the court by the Attorney General or some law officer acting under his direction; and a mere suggestion filed on behalf of the British Embassy, by private counsel appearing as amici curiæ, that the vessel is under the control of such government, does not, when unsupported by proof, require the court to release the vessel.

5. **Mandamus ⚷10—Prohibition ⚷5(3)—Not granted when jurisdiction of lower court is doubtful.**

Where a suit in rem against a vessel claimed to be under the control of a foreign government is still in the interlocutory stage, and the status of the vessel is doubtful and uncertain, and the jurisdiction of the District Court correspondingly in doubt, a writ of mandamus or prohibition will not be issued to prevent the District Court from proceeding with the case.

6. **Courts ⚷379—Supreme Court has jurisdiction to issue prohibition to District Court sitting in admiralty.**

Under Judicial Code, § 234 (Comp. St. § 1211), the Supreme Court has undoubted jurisdiction to issue writs of prohibition to the District Courts sitting in admiralty to prevent an unlawful assumption or exercise of jurisdiction.

Petition for Writ of Prohibition and Writ of Mandamus.

Original petition by James Thomson Muir, master of the steamship Gleneden, for a writ of prohibition and a writ of mandamus. Rule to show cause discharged, and petition dismissed.

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*Messrs. John M. Woolsey and J. Parker Kirlin, both of New York City, for petitioner.

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*Mr. Homer L. Loomis, of New York City, for respondent.

Messrs. F. R. Coudert and Howard Thayer Kingsbury, both of New York City, in behalf of the British Embassy, by leave.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

On July 28, 1917, the Gleneden, a British steamship privately owned, and the Giuseppe Verdi, an Italian steamship similarly owned, came into collision in the Gulf of Lyons, both being seriously damaged. November 7, 1918, the British owner of the Gleneden commenced a suit in rem in admiralty against the Giuseppe Verdi in the District Court for the District of New Jersey to recover damages occasioned by the collision, and a few days later the Italian owner of the Giuseppe Verdi commenced a like suit against the Gleneden in the District Court for the Eastern District of New York. The libel in each suit attributed the collision entirely to negligence of servants and agents of the owner of the vessel libeled, it being alleged that she was in their charge at the time. When the suits were begun the vessels were within the waters of the United States and each was within the particular district where libeled.

The proceedings in the suit against the Gleneden are of immediate concern. After process issued and the vessel was arrested, private counsel for the British Embassy in Washington, appearing as amici curiæ, presented to the court a suggestion in writing to the effect that the process under which the vessel was arrested should be quashed and jurisdiction over her declined, because, as was alleged, "the said vessel is an admiralty transport in the service of the British government by virtue of a requisition from the

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Lords Commissioners of the *Admiralty, and is engaged in the business of the British government, and under its exclusive direction and control and is under orders from the British Admiralty to sail from the port of New York on or about November 25, 1918, to carry a cargo of wheat belonging and consigned to the British government"; because the court "should not exercise jurisdiction over a vessel in the service of a cobelligerent foreign government"; and because "the British courts have refused to exercise jurisdiction over vessels in government service, whether of the British government or of allied governments, in the present war, and that by comity the courts of the United States should in like manner decline to exercise jurisdiction over vessels in the service of the British government." An affidavit of the master of the vessel affirming the truth of much that was alleged accompanied the suggestion. The libelant, being cited to show cause why the suggestion should not be acceded to, responded by objecting that it was not presented through official channels of the United States and by denying that the facts were as alleged.

A hearing on the suggestion was had in which the libelant and counsel for the British Embassy participated—the latter only as amici curiæ—and at which the owner of the Gleneden was represented informally, without an appearance. In the course of the hearing counsel for the libelant called on the others to submit proof in support of the allegations in the suggestion, particularly to produce the ship's articles and other instruments bearing on the suggested public status of the vessel, and to present the master for examination; but both the counsel for the British Embassy and the representative of the owner refused to do any of these things and insisted that the court was bound on the mere assertion of the claim of immunity to quash the process and release the vessel. The libelant produced the libel in the suit against the Giuseppe Verdi, depositions given

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in that suit by the *master and other officers of the Gleneden, a certificate from the customs officers in New York showing the report and entry of the Gleneden on her arrival, and other evidence, all tending measurably to show that the vessel was operated by her owner under a charter party whereby the owner was to keep her properly manned, furnished and equipped, was to assume any liability arising from negligent navigation, and was to bear all loss, injury or damages arising from dangers of the sea including collision. "On all the facts" thus put before it, the court found that "the Gleneden was owned by and was still in the beneficial possession of the Gleneden Steamship Company, Limited, a private British corporation, who through its servants, was in the actual control of the steamer and of her navigation, but engaged in performing certain more or less public services for the British crown under a contractual arrangement amounting to the usual or government form of time charter party." The court "decided accordingly that the Gleneden was not a public ship in the sense that she was either a government agency or entitled to immunity," and the suggestion was overruled and an order was entered to the effect that the vessel would be released only on the giving of a bond by the owner securing the claim in litigation or a bond to the marshal conditioned for the return of the vessel when that could be done consistently with the asserted needs of the British government.

Afterwards, on November 29, 1918, the master, appearing specially for the interest of the owner and for the purpose of objecting to the arrest and detention of the vessel, interposed a special claim to the effect that the Gleneden Steamship Company, Limited, was the true and sole owner of the vessel and he as master was her true and lawful bailee; and also interposed therewith a peremptory exception to the jurisdiction of the court on the grounds taken in the suggestion on behalf of the British Embassy.

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This claim and exception concluded *with a prayer that the process be quashed and the vessel released. The exception was not set down for hearing and remains undisposed of. There was no appearance by either the owner or the master save as just stated; nor was there any appearance by the British government or by any representative of that government other than through the suggestion which counsel for the Embassy in Washington presented as amici curiæ.

After filing the special claim and exception, the master applied to the Circuit Court of Appeals for the Second Circuit for writs of prohibition and mandamus preventing the District Court from exercising further jurisdiction and commanding it to undo what had been done; but the application was denied for reasons which need not be noticed now, 255 Fed. 24, 166 C. C. A. 352.

A few days later an arrangement was effected whereby an acceptable surety company undertook to enter into and file a stipulation for value in the usual form and in a sum to be named by the libelant, not exceeding $450,000, unless on an intended application to this court for a writ of prohibition the vessel should be held immune from the process under which she was arrested and detained. Following that arrangement, on December 10, 1918, the District Court entered the following order:

> "On the annexed agreement for security, and consent of the proctors for the libelant herein, and the record herein it is
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> "Ordered that in order to prevent further delay and expense, the steamship Gleneden be and she hereby is allowed to proceed on her voyage and leave the physical custody of the marshal of the Eastern district of New York, provided,

however, that this order does not and shall not be deemed to constitute any withdrawal or quashing of the writ of arrest; and it is

"Further ordered that all proceedings herein be stayed and special claimant's or libelant's *531 time to file any other *or further papers herein be extended to and including the 23d day of December, 1918, and in case application is made for a writ of prohibition to the Supreme Court on or before December 23, 1918, all proceedings herein be stayed and the time of the special claimant or of the libelant to file any other or further papers herein be extended until ten (10) days after the entry and service of an order or decree on the final decision of the United States Supreme Court on the said writ of prohibition."

The master thereupon asked leave of this court to file a petition for a writ of prohibition preventing the District Court from proceeding with the suit and from interfering with the Gleneden in any manner, and for a writ of mandamus directing that court to vacate the order made when the suggestion on behalf of the British Embassy was overruled and to enter an order releasing the vessel without requiring security; the grounds advanced in the petition being essentially a repetition of those embodied in the suggestion of counsel for the British Embassy. The requested leave was given, a rule to show cause was issued, a return was made by the District Judge, and counsel have been heard. Whether on the case thus made either of the writs should be granted is the matter to be decided.

The principal question sought to be presented—whether the Gleneden is such a public vessel of the British government as to be exempt from arrest in a civil suit in rem in admiralty in a court of the United States—is one of obvious delicacy and importance. No decision by this court up to this time can be said to answer it. The nearest approach is in the case of The Exchange, 7 Cranch, 116, 3 L. Ed. 287, where an armed ship of war, owned, manned and controlled by a foreign government at peace with the United States, was held to be so exempt. To apply the principle or doctrine of that decision to the *532 Gleneden would be *taking a long step, and the present posture of this litigation is such that we find no occasion to consider whether there is proper warrant for taking it.

It is conceded that the Gleneden is not an armed ship of war, and that she is not owned by a foreign government, but by a private corporation. In a sense she may be temporarily in the service and under the control of the British government, but the nature and extent of that service and control are left in uncertainty by the proofs, although the facts evidently are susceptible of being definitely shown.

[1, 2] Prima facie the District Court had jurisdiction of the suit and the vessel (The Belgenland, 114 U. S. 355, 368-369, 5 Sup. Ct. 860, 29 L. Ed. 152), and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge.

[3, 4] As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. The Sapphire, 11 Wall. 164, 167, 20 L. Ed. 127; The Santissima Trinidad, 7 Wheat, 283, 353, 5 L. Ed. 454; Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. The Anne, 3 Wheat. 435, 445, 446, 4 L. Ed. 428. And, if there was objection to appearing as a suitor in a foreign court, it was open to that gov- *533 ernment to make the as*serted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. The Cassius, 2 Dall. 365, Fed. Cas. No. 7,743; The Exchange, 7 Cranch, 116, 3 L. Ed. 287; Id., 16 Fed. Cas. 85, No. 8786; The Pizarro, 19 Fed. Cas. 786, No. 11,-199; The Constitution, L. R. 4 P. D. 39; The Parlement Belge, L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as amici curiæ, and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See United States v. Lee, 106 U. S. 196, 209, 1 Sup. Ct. 240, 27 L. Ed. 171. Of course, the suggestion as made could not be given the consideration and weight claimed for it.

[5] From all that has been said it is apparent that the status of the Gleneden, judged in the light of what was done and shown in the District Court, is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel. The suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question

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*may be re-examined in regular course on an appeal from the final decree.

[6] The power of this court, under section 234 of the Judicial Code (Comp. St. § 1211) to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, to prevent an unlawful assumption or exercise of jurisdiction, is not debatable. But this power, like others, is to be exerted in accordance with principles which are well settled. In some instances, as where the absence of jurisdiction is plain, the writ goes as a matter of right. Ex parte Phenix Insurance Co., 118 U. S. 610, 626, 7 Sup. Ct. 25, 30 L. Ed 274; Ex parte Indiana Transportation Co., 244 U. S. 456, 37 Sup. Ct. 717, 61 L. Ed. 1253. In others, as where the existence or absence of jurisdiction is in doubt, the granting or refusal of the writ is discretionary. In re Cooper, 143 U. S. 472, 485, 12 Sup. Ct. 453, 36 L. Ed. 232; In re New York & Porto Rico Steamship Co., 155 U. S. 523, 531, 15 Sup. Ct. 183, 39 L. Ed. 246; In re Alix, 166 U. S. 136, 17 Sup. Ct. 522, 41 L. Ed. 948. And see Ex parte Gordon, 104 U. S. 515, 518, 519, 26 L. Ed. 814; The Charkieh, L. R. 8 Q. B. 197.

Here the most that can be said against the District Court's jurisdiction is that it is in doubt; and in other respects the situation is such that we deem it a proper exercise of discretion to refuse the writ. Nothing need be added to show that the request for a writ of mandamus is on no better footing. In re Morrison, 147 U. S. 14, 26, 13 Sup. Ct. 246, 37 L. Ed. 60; Ex parte Oklahoma, 220 U. S. 191, 209, 31 Sup. Ct. 426, 55 L. Ed. 431; Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217.

Rule discharged and petition dismissed.

(254 U. S. 548)

EUGENE SOL LOUIE v. UNITED STATES.

(Argued Dec. 8, 1920. Decided Jan. 17, 1921.)

No. 337.

Courts 🔑385(4)—Contention of Indian that place of homicide was not within reservation does not support direct writ of error.

Under Judicial Code, § 78 (Comp. St. § 1063), under which the state of Idaho constitutes the district of Idaho, section 24 (section 991), giving District Courts jurisdiction of all crimes cognizable under the authority of the United States, and Penal Code, § 328 (Comp. St. § 10502), relative to the murder of an Indian by another Indian within the boundaries of the state and within the limits of an Indian reservation, defendant's objection to the court's jurisdiction on the ground that he had been declared competent and the land on which the crime was alleged to have been committed had been deeded to him in fee simple would not support a direct writ of error from the Supreme Court, and the case was properly taken to the Circuit Court of Appeals, as the objection was not to the court's jurisdiction, but was in effect that the killing was not within the reservation and did not violate any law of the United States.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Eugene Sol Louie was convicted of murder, and a writ of error was dismissed by the Circuit Court of Appeals for the Ninth Circuit (264 Fed. 295), and he brings error. Reversed and remanded to the Circuit Court of Appeals.

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*Mr. Wm. B. McFarland, of Cœur d'Alene, Idaho, for petitioner.

The Attorney General and Mr. William C. Herron, of Washington, D. C., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Louie, an Indian, was indicted under section 273 of the Penal Code (Comp. St. § 10446) in the District Court of the United States for the District of Idaho, Northern Division, for the murder of another Indian within the limits of the Cœur d'Alene reservation. A motion to dismiss for want of jurisdiction was overruled and the defendant was tried and convicted. By motion in arrest of judgment, he objected in terms to the jurisdiction of the court over the person of defendant and over the crime charged on the ground that before the time of the alleged crime he had been declared competent and the land on which the crime was alleged to have been committed had been allotted and deeded to him in fee simple. Compare United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195. This motion also was overruled, the defendant was sentenced, and the case was taken on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. That court, one judge dissenting, dismissed the writ of error for want of jurisdiction on the ground that, since the sole question presented was whether the District Court had jurisdiction, its decision could be reviewed only by direct writ of error from this court to the District Court. See United States v. Jahn, 155 U. S. 109, 114, 115, 15

Sup. Ct. 39, 39 L. Ed. 87. Compare Raton Waterworks Co. v. City of Raton, 249 U. S. 552, 39 Sup. Ct. 384, 63 L. Ed. 768. The dissenting judge was of opinion that the Circuit Court of Appeals had jurisdiction of the writ of error, because an additional error relating to the merits had been assigned there, although *550 not raised below. 264 Fed. 295. *A writ of certiorari was granted by this court. 253 U. S. 482, 40 Sup. Ct. 587.

We have no occasion to consider the question on which the Circuit Court of Appeals divided. The motions made by defendant in the District Court raised a question, not of the jurisdiction of that court, but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set forth in the motions, the defendant was in respect to the acts complained of subject to the laws of the state of Idaho and not to the laws of the United States; in other words, that he did not violate the laws of the United States. Compare United States v. Kiya (D. C.) 126 Fed. 879, 880. Section 328 of the Penal Code (Comp. St. § 10502) provides that an Indian committing murder on another Indian "within the boundaries of any state, and within the limits of any Indian reservation, shall be subject * * * to the same penalties as are all other persons committing" the same crime "within the exclusive jurisdiction of the United States." United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; Donnelly v. United States, 228 U. S. 243, 269, 270, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710. The defendant, in effect, denied that the killing was, in the statutory sense, within the reservation. If this was true, an essential element of the crime against the United States was lacking; as much so as if it had been established in United States v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200, or in United States v. Soldana, 246 U. S. 530, 38 Sup. Ct. 357, 62 L. Ed. 870, that the region into which liquor was introduced was not Indian country. That the District Court for Idaho had jurisdiction to determine whether the locus in quo was a part of the reservation was not questioned. By Section 78 of the Judicial Code (Comp. St. § 1063) the whole state of Idaho is comprised within the District of Idaho; by paragraph second of section 24 (section 991) District Courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States; and the defendant was arrested within the district of Idaho.

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*Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court. Pronovost v. United States, 232 U. S. 487, 34 Sup. Ct. 391, 58 L. Ed. 696; Lamar v. United States, 240 U. S. 60, 65, 36 Sup. Ct. 255, 60 L. Ed. 526. He properly sought review in the Circuit Court of Appeals. In United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, and United States v. Pelican, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676, where the defense was similar to that presented here, and in United States v. Sutton, supra, and United States v. Soldana, supra, the cases came to this court by direct writ of error to the District Court under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704). Hallowell v. United States, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750, where a similar question was involved, came here on certificate. In Clairmont v. United States, 225 U. S. 551, 554, 32 Sup. Ct. 787, 56 L. Ed. 1201, it was inadvertently assumed without discussion that the question involved was one of the jurisdiction of the District Court.

The judgment of the Circuit Court of Appeals is reversed and the case remanded to that court for further proceedings in conformity with this opinion.

Reversed.

The CHIEF JUSTICE took no part in the decision of this case.

(254 U. S. 505)

J. W. GOLDSMITH, JR.–GRANT CO. v. UNITED STATES.

(Argued Dec. 8, 1920. Decided Jan. 17, 1921.)

No. 214.

1. **Constitutional law 🔑303—Internal revenue 🔑2—Automobile used to transport liquor to evade tax is subject to forfeiture, though party reserving title is not guilty, and statute is constitutional.**

Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of any conveyance, etc., used in the removal, etc., of any goods or commodities with intent to defraud the United States of the tax thereon, applies to an automobile used in the unlawful removal of distilled spirits, though a seller of the automobile, who retained title for the unpaid purchase money, was without guilt, and the statute so applied does not violate Const. Amend. 5, relative to due process of law, as the thing forfeited is primarily considered the offender.

2. **Internal revenue 🔑2—Statute providing for forfeiture of conveyances, etc., used to evade tax not modified by other statutes.**

Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of conveyances used in the removal, etc., of goods or commodities with intent to defraud the United States of the tax thereon, is not modified or limited by sections 3460 and 3461 (Comp. St. §§ 6362, 6363), relative to proceedings on the seizure of goods subject to forfeiture under the internal revenue laws.

Mr. Justice McReynolds dissenting.

In Error to the District Court of the United States for the Northern District of Georgia.

Libel by the United States against a Hudson automobile, in which the Grant Company intervened. Judgment of condemnation and forfeiture was entered, and the intervener and its surety, J. W. Goldsmith, Jr., bring error. Affirmed.

Messrs. L. C. Hopkins and C. T. Hopkins, both of Atlanta, Ga., for plaintiffs in error.

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*Assistant Attorney General Adams, for the United States.

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*Mr. Justice McKENNA delivered the opinion of the Court.

By an act of Congress passed July 13, 1866 (now section 3450, Revised Statutes [Comp. St. § 6352], and we shall so refer to it), it was enacted that:

> "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods or commodities, * * * shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

In pursuance of this enactment a libel was filed against a Hudson automobile of the appraised value of $800, and it charged that the automobile before its seizure was used by three persons who were named, in the removal and for the deposit and concealment of 58 gallons of distilled spirits upon which a tax was imposed by the United States, and had not been paid.

Plaintiff in error, herein referred to as the Grant Company, was, on its petition, permitted to intervene and to give bond and replevy the automobile.

The company subsequently answered, alleging the facts hereinafter mentioned, and in addition, pleaded against a condemnation and forfeiture of the car, the Constitution of the United States, especially article 5 of Amendments, which prohibits the deprivation of life, liberty or property without due process of law.

The case was to a jury upon an agreed statement of facts, which recited that:

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The Grant Company was a *seller of automobiles and was the owner in fee simple of the automobile used in this case, and sold it, retaining the title for unpaid purchase money, to J. G. Thompson (he was named in the libel), who was a taxicab operator, and W. M. Lamb, who was in the newspaper business; that the car was used by Thompson in violation of section 3450, R. S., but that such use was without the knowledge of the company or of any of its officers, nor did it or they have any notice or reason to suspect that it would be illegally used.

The court charged the jury to render a verdict finding the car guilty overruling a motion of the Grant Company to direct a verdict for it on the grounds: (1) That section 3450, U. S. R. S., was in violation of article 5 of Amendments of the Constitution of the United States, in that it deprived the Grant Company of its property without due process of law. (2) That the section was not to be construed to forfeit the title of a third party entirely innocent of wrongdoing, and that the proper construction of the section was that it contemplated forfeiting only the interest or title of the wrongdoer. (3) That the title reserved by the company for the balance of the purchase money had never been divested, and therefore, could not be condemned, and that only the interest of Thompson and Lamb could be condemned.

The jury found the car guilty and in pursuance of the verdict a judgment of condemnation and forfeiture was entered, but as a bond with security had been given for the car, it was adjudged that the United States recover from the Grant Company as principal and J. W. Goldsmith, Jr., as security, the principal sum of $800 and costs. Execution was awarded accordingly.

Motion for a new trial was denied, and this writ of error was then prosecuted.

[1] This statement indicates the questions in the case and, as we have seen, involves the *510 construction of section 3450 and *its unconstitutionality if it be not construed as contended by the Grant Company.

If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress; that Congress necessarily had in mind the facts and practices of the world and that in the conveniences of business and of life, property is often and sometimes necessarily put into the possession of another than its owner. And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.

Regarded in this abstraction the argument is formidable, but there are other and militating considerations. Congress must have taken into account the necessities of the government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion and the ways and means of violation or evasion. In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable

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creature was forfeited. *To the superstitious reason to which the rule was ascribed, Blackstone adds:

> "That such misfortunes are in part owing to the negligence of the owner, and therefore, he is properly punishable by such forfeiture."

And he observed:

> "A like punishment is in like cases inflicted by the Mosaical law: 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten.' And, among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic."

See, also, The Blackheath, 195 U. S. 361, 366, 367, 25 Sup. Ct. 46, 49 L. Ed. 236; Liverpool, etc., Nav. Co. v. Brooklyn Terminal, 251 U. S. 48, 53, 40 Sup. Ct. 66, 64 L. Ed. 130.

But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. Dobbins Distillery v. United States, 96 U. S. 395, 24 L. Ed. 637, is an example of the rulings we have before made. It cites and reviews prior cases, applying their doctrine and sustaining the constitutionality of such laws. It militates, therefore, against the view that section 3450 is not applicable to a property whose owner is without guilt. In other words, it is the ruling of that case, based on prior cases, that the thing is primarily considered the offender. And the principle and practice have examples in admiralty. The Palmyra, 12 Wheat. 1, 6 L. Ed. 531.

The same principle was declared in United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555. The following cases at circuit may also be referred to: United States v. Mincey, 254 Fed. 287, 165 C. C. A. 554 (1918); Logan v. United States, 260 Fed. 746, 171 C. C. A. 484 (1919); United States v. One Saxon Automobile, 257 Fed. 251, 168 C. C. A. 335; United States v. 246½ Pounds of Tobacco (D. C.) 103 Fed. 791; United States v. 220 Patented Machines (D. C.) 99 Fed. 559.

Counsel resists the reasoning and precedent of these cases in an argument of considerable length erected on the contention of the in-

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justice of making an innocent man *suffer for the acts of a guilty one, and the anxious solicitude a court must feel and exercise, and which, it is said, it has often expressed, and by which it has been impelled to declare laws unconstitutional that offend against reason and justice.

The changes are rung on the contention, and illustrations are given of what is possible under the law if the contention be rejected. It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made it will be time enough to pronounce upon it. And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent.

[2] Counsel further urge that section 3450 should be read in connection with sections 3460 and 3461 (Comp. St. §§ 6362, 6363), and other sections of the Revised Statutes, and should be construed to provide for the forfeiture of no interest for which those sections offer protection. We are, however, unable to concur with counsel that they modify the requirement or effect of section 3450. They have no relation to the latter section, nor is their remedy applicable to cases under that section.

There is an intimation that in the prior cases there was something in the relation of the parties to the property or its uses from which it was possible to infer its destination to an illegal purpose; at any rate, the risk of such purpose and that such relation had influence in the decision of the cases.

We are unable to accept the intimation. There may, indeed, be greater risk to the own-

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er of property in one *form or purpose of its bailment than in another, but wrong cannot be imputed to him by reason of the form or purpose. It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental. If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.

Judgment affirmed.

Mr. Justice McREYNOLDS dissents.

(254 U. S. 535)

ST. LOUIS & S. F. RY. CO. v. PUBLIC SERVICE COMMISSION OF STATE OF MISSOURI.

(Submitted Dec. 9, 1920. Decided Jan. 17, 1921.)

No. 117.

Commerce 🔑58—Order requiring detour of through trains to pass through particular city held undue burden on interstate commerce.

An order of a state Public Service Commission, requiring a railroad company to detour through trains between points in different states in order to pass through a particular city of 4,000 inhabitants, constituted an undue burden on interstate commerce, where such city had seven local trains each way, which met its reasonable requirements, and compliance with the order would add 10 miles to the route of the through trains and require the maintenance of 16 additional miles of track at the high standard essential for through trains.

Mr. Justice Pitney and Mr. Justice Clarke, dissenting.

In Error to the Supreme Court of the State of Missouri.

Certiorari by the receivers of the St. Louis & San Francisco Railway Company against the Public Service Commission of the State of Missouri. A judgment affirming an order of the Commission was affirmed by the Supreme Court of Missouri (Lusk v. Public Service Commission, 277 Mo. 264, 210 S. W. 72), and the Railroad Company brings error. Reversed and remanded.

Messrs. Wm. F. Evans and Edward T. Miller, both of St. Louis, Mo., for plaintiff in error.

Mr. James D. Lindsay, of Jefferson City, Mo., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error's main line extends from St. Louis to Memphis—305 miles. As originally constructed it turned sharply southeastward at Hayti, Mo.—220 miles from St. Louis—ran thence 7 miles to Caruthersville, a city of 4,000 people, thence southwestward 9 miles to Grassy Bayou, and thence south. A "cut-off" between Hayti and Grassy Bayou —6 miles—became part of the main line in 1904, and thereafter through freight and night passenger trains passed that way. The through day passenger trains—Nos. 801 and *536 802—continued to *move along the old line until August, 1913, when they were routed over the "cut-off." At the same time two new daily passenger trains were put on and operated between Blytheville, Ark., and Cape Girardeau, Mo., by way of Caruthersville.

The Missouri Public Service Commission directed the railway company to restore trains 801 and 802 to the route followed prior to 1913 and the state Supreme Court approved this action. We are asked to declare the order invalid because it unduly burdens interstate commerce. The point is well taken.

Fourteen local daily passenger trains move in and out of Caruthersville—seven each way. Some of these make close connections with all through trains at Hayti. These locals do not carry equipment of the highest class, but apparently they afford fair facilities for reaching and leaving Caruthersville without serious delay or great inconvenience. If deficient in schedule or equipment, there is an easy remedy by means other than detours of the through trains.

The applicable general doctrine has been often considered and in Chicago, Burlington & Quincy Ry. Co. v. Wisconsin R. R. Commission, 237 U. S. 220, 226, 35 Sup. Ct. 560, 562 (59 L. Ed. 926), this court said:

> "In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the Legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may *537 determine, such fact being necessarily in*volved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. Gladson v. Minnesota, 166 U. S. 427; Lake Shore R. R. v. Ohio, 173 U. S. 285; Atlantic Coast Line v. Nor. Car. Corp. Comm., 206 U. S. 1; Mo. Pac. Ry. v. Kansas, 216 U. S. 262; Cleveland, etc., Ry. v. Illinois, 177 U. S. 514; Mississippi R. R. Comm. v. Ill. Cent. R. R., 203 U. S. 335; Atlantic Coast Line v. Wharton, 207 U. S. 328."

Considering the facts disclosed we think it plain that the fourteen local passenger trains meet the reasonable requirements of Caruthersville and that the commission's order unduly burdens interstate commerce. Compliance with it would require the railway to maintain 16 more miles of track at the high standard essential for the through trains, and to move the latter 10 miles further with consequent delay and inconveniences all along the line. The burden certainly would not be less serious than those which were condemned in some if not all of the causes above referred to.

The judgment of the court below must be

reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent.

(254 U. S. 513)

BULLOCK, Circuit Judge, et al. v. STATE OF FLORIDA ex rel. RAILROAD COMMISSION OF STATE OF FLORIDA et al.

(Argued Dec. 6 & 7, 1920. Decided Jan. 17, 1921.)

No. 262.

1. Courts 🔑397½, New, vol. 9A Key-No. Series—Certiorari proper remedy to review grant by state court of writ of prohibition, claimed to deny due process.

Certiorari is the only remedy for review of a judgment of a state Supreme Court granting a writ of prohibition, forbidding a lower court to confirm a sale on foreclosure of a railroad mortgage, which judgment is claimed to deprive the mortgagee of his property without due process of law, contrary to the Fourteenth Amendment.

2. Courts 🔑394(1)—Where state court's decision depends upon party's rights, stating it in terms of jurisdiction does not prevent review.

Where it was not questioned that a state court had jurisdiction of a railroad foreclosure suit, or suggested that any statute forbade a decree for a sale with the privilege to the purchaser of dismantling the road, and the decision of the state Supreme Court in granting a writ of prohibition depended entirely on a determination of what the rights of the company were, the fact that such decision was stated in terms of jurisdiction of the lower court did not prevent a review by the United States Supreme Court.

3. Railroads 🔑214—Operation at loss not required.

Apart from statute or express contract, people putting their money into a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future, and no implied contract to do so can be elicited from the acceptance of a charter or a grant of the power of eminent domain.

4. Railroads 🔑214—Cannot maintain proceeding against state for leave to cease operation.

A railroad company whose road is a failure cannot make the state a party to a proceeding for leave to stop; its only remedy being to stop without such leave.

5. Railroads 🔑194(7)—Purchasers at foreclosure sale may stop operation at a loss.

Purchasers of a railroad on a foreclosure sale have the same right as the railroad company to cease operation when it can only be operated at a loss.

6. Constitutional law 🔑315—Railroads 🔑194(7)—Prohibition against sale on foreclosure with privilege of dismantling does not take property without due process; "proceeding in rem."

A suit to foreclose a railroad mortgage is not a "proceeding in rem," and can confer no rights except those existing in the mortgagor, and the right of the purchaser as against the state to turn the property to other uses cannot be settled, and hence a provision in the decree, authorizing the purchaser to dismantle the road, does not enlarge the purchaser's rights, and a writ of prohibition, forbidding confirmation of the sale under such decree, does not cut down the future purchaser's rights, or take property without due process of law, in violation of Const. Amend. 14.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Rem.]

7. Courts 🔑394(1)—Whether state is bound by decree is a matter of local law.

Whether the state should be bound by the decree in a suit to foreclose a railroad mortgage to which it voluntarily made itself a party before the decree went into effect, and whether the decree was wrong in attempting to bind it, is a local question, not reviewable by the United States Supreme Court on writ of certiorari to the state Supreme Court.

In Error to the Supreme Court of the State of Florida.

Prohibition proceeding by the State of Florida, on relation of the Railroad Commission of the State of Florida and others, against W. S. Bullock, Judge of the Circuit Court of the Fifth Judicial Circuit of the State of Florida, and another. Prohibition was granted (State v. Bullock, 82 South. 866, 8 A. L. R. 232; Id., 83 South. 701), and defendants bring error, and apply for a writ of certiorari. Writ of error dismissed, writ of certiorari granted, and judgment affirmed.

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*Mr. George C. Bedell, of Jacksonville, Fla., for plaintiffs in error.

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*Mr Dozier A. De Vane, of Tallahassee, Fla., for defendants in error.

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*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a proceeding by the relators seeking a prohibition forbidding a State judge of a lower court to confirm a sale of a railroad "for the purpose of and with the privilege on the part of the purchaser of dismantling the same" as authorized by a foreclosure decree. The trustee of the mortgage under foreclosure was made a party to the proceeding and demurred upon the ground that the prohibition would deprive him of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Florida granted the prohibition, State v. Bullock, 82 South. 866, 8 A. L. R. 232; Id., 83 South. 701, and

thereupon this defendant sued out a writ of error and filed a petition for a writ of certiorari from this Court. Action upon the latter was postponed to the hearing on the writ of error. Certiorari being the only remedy the petition is granted, as the case is deemed a proper one to be reviewed.

The road concerned is that of the Ocklawaha Valley Railroad Company. It succeed-

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ed by foreclosure of a *previous mortgage to a logging road, and gave the present mortgage to Hood, one of the plaintiffs in error, in trust for the bondholders. The bonds are held by the Assets Realization Company. Before the present bill for foreclosure was filed the Railroad Company had applied to the Railroad Commission for leave to cease operations, had been refused, and the State, by the Railroad Commission, had obtained an injunction forbidding the dismantling of the road and requiring it to go on. It ceased operations however on December 7, 1917. On December 10, 1917, the bill to foreclose was filed. On the same day the State filed a bill in the same Court, ancillary to its other bill, asking for a receiver to operate the road until further order, and a few days later sought to have its bill consolidated with the foreclosure suit. This was denied and the State's bill was dismissed. The decree of foreclosure complained of was entered on December 24, 1917, but on January 22, 1918, in deference to the State's contention that the road could be run at a profit, although the State had not been admitted formally as a party, H. S. Cummings was appointed a receiver, he being the most available man and being able by his connections to give the road a good deal of business in the way of carrying lumber. After nearly a year's trial the Court was satisfied that the road could not go on and thereupon ordered a sale which was made on February 3, 1919. On March 27, 1919, the Court admitted the State as a party and informed counsel that if it turned out as the Receiver and State insisted, "that the road was operating so as to pay expenses of operation and the taxes and had some reasonable show for business the sale would not be confirmed." On May 5, 1919, the Court entered an order finding that the road was hopelessly insolvent and could not be operated so as to have any net income whatever but postponing confirmation of the sale until May 12, before which time the proceedings for prohibition were begun.

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*The foreclosure decree of December 24, 1917, provided for a first offer of the road to be used as a common carrier, but if less than $200,000 was bid, there was to be a second offer with the privilege of dismantling. If, however, the bid on the second offer did not exceed by $100,000 the bid under the first offer, if there was one, the bid under the first offer was to be accepted. The trustee for bondholders was authorized to use the indebtedness of the company in bidding and to apply his bid, if accepted, to the same. There was no bid on the first offer and the Assets Realization Company bought the property under the second. The prohibition is against confirming the sale and against so much of the foreclosure decree as authorized the second offer or dismantling the road. The ground of decision was that in the absence of statute a railroad company has no right to divert its property to other uses without the consent of the State and that the lower Court had no jurisdiction to make the prohibited portion of the decree in a proceeding to which the State was not a party until after the decree had been made.

[2] It is not questioned that the lower Court had jurisdiction of the foreclosure and it is not suggested that any statute forbids the decree that was made. The decision of the Court proceeds upon a doctrine as to the duty of the railroad company, again a duty not based upon statute, and although stated in terms of jurisdiction, depends entirely upon a determination of what the rights of the company are. If the company had the right to stop its operations and dismantle its road we do not understand that it is doubted that the decree might embody that right in its order of sale. If we are correct, the word "jurisdiction" must not prevent a further consideration of the case. Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U. S. 411, 414, 415, 40 Sup. Ct. 371, 64 L. Ed. 638.

[3-5] Apart from statute or express contract people who have put their money into a

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railroad are not bound to go on *with it at a loss if there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed. Purchasers of the road by foreclosure would have the same right.

[6] But the foreclosure was not a proceeding in rem and could confer no rights except those existing in the mortgagor. A purchaser at the sale would acquire all such rights as the mortgagor had to stop operations, whatever words were used in the decree, and, whatever the words, would get no more. The prohibition excluding from the decree the words purporting to authorize dismantling the road did not cut down the future purchaser's rights, any more than did the presence of those words enlarge them. Therefore

the action of the Supreme Court is not open to objection under the Constitution of the United States, although it may be that it hardly would have been taken if the authority to dismantle had not sounded more absolute than it could be in fact, considering the nature of the proceeding. Without previous statute or contract to compel the company to keep on at a loss would be an unconstitutional taking of its property. But the prohibition does not compel the company to keep on, it simply excludes a form of authority from the decree that gives the illusion of a power to turn the property to other uses that cannot be settled in that case.

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[7] *As the state voluntarily made itself a party to the foreclosure suit before the decree went into effect, as indeed the decree never has, it might seem that the State ought to be bound in a way that otherwise it would not be. But if in a revisory proceeding the higher State Court says that the State should not be bound and that the decree was wrong in this particular, that is a local question with which we have nothing to do. The result is that although the State Court may have acted on questionable or erroneous postulates there is nothing in its action that calls for a reversal of its judgment.

Writ of Error dismissed.
Writ of Certiorari granted.
Judgment affirmed.

(254 U. S. 538)

PERE MARQUETTE RY. CO. v. J. F. FRENCH & CO.

(Argued Nov. 19, 1920. Decided Jan. 17, 1921.)

No. 105.

1. Carriers 🔑174—Delivery at original destination to another carrier for transportation to another destination, as requested by holder of bill of lading, is a "delivery."

Under Bills of Lading Act, § 9 (Comp. St. § 8604e), providing that delivery is justified to a person in possession of an order bill by the terms of which the goods are deliverable to his order, or which has been indorsed to him, the act of the terminal carrier, after a shipment reached its destination, in striking out the original destination and substituting another, and delivering the shipment to another railroad for transportation to such new destination, on request of the party holding the bill of lading, constituted in legal contemplation a "delivery."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

2. Carriers 🔑82—Delivery to holder of order bill of lading is justified, regardless of capacity or validity of holding.

Under Bills of Lading Act, § 9 (Comp. St. § 8604e), delivery to the person holding an order bill of lading properly indorsed is justified, regardless of the capacity in which he holds possession of the bill, or whether he holds it lawfully or unlawfully, so long as the carrier has no notice of any infirmity of title.

3. Carriers 🔑82—Delivery to agent holding bill of lading sufficient delivery, though possession regarded as that of principal.

Assuming that an agent's possession of an order bill of lading was that of his principal, the forwarding of the goods to him by another carrier nevertheless constituted a delivery, when his request for such forwarding was ratified by his principal, since, if his possession of the bill was the principal's possession, the delivery to him was a delivery to the principal.

4. Carriers 🔑83—Exonerated by delivery without requiring surrender of bill of lading, unless loss results from such failure.

Delivery of a shipment to the holder of an order bill of lading does not, under the Bills of Lading Act (Comp. St. §§ 8604aaa–8604w), exonerate the carrier where it fails to require surrender of the bill of lading as provided therein, if loss results to the shipper or subsequent purchaser from such failure; but where the loss suffered is not the result of the failure to take up the bill, the mere failure to take it up does not defeat the exoneration.

5. Carriers 🔑59—Not liable to shippers as bona fide purchasers of bill of lading for delivering without requiring surrender.

Under Bills of Lading Act, § 11 (Comp. St. § 8604f), making a carrier delivering goods without taking up and canceling the order bill of lading liable to purchasers of the bill of lading in good faith, where a bank, to which a draft was sent for collection accompanied by an order bill of lading, delivered the bill without payment of the draft, and the buyers obtained delivery from the carrier without surrendering the bill, refused the goods, and returned the bill of lading, the shippers who took back the draft and bill of lading from the bank to which they had sold them, with knowledge of the facts, were not bona fide purchasers.

6. Carriers 🔑83—Delivery to one not having bill of lading, as he states, without requiring surrender, is conversion.

If a carrier delivers goods covered by an order bill of lading, without requiring its surrender from the person to whom delivery is made on his statement that he has the bill, and such person is not the holder of the bill of lading as he states, the carrier is liable to the shipper as for a conversion.

7. Carriers 🔑83—Delivery without surrender of bill of lading is conversion, if loss results therefrom, but not otherwise.

Where a carrier's failure to require the presentation and surrender of an order bill of lading on delivery of the shipment is the cause of the shipper losing the goods, the delivery constitutes a conversion; but where delivery is made to a person who has the bill, or who has authority from the holder of the bill, and the cause of the shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree, or his improper subsequent conduct, the mere failure to require presentation and surrender of the bill will not make the delivery a conversion.

8. Carriers 🔑83—Delivery without requiring surrender of bill of lading held not a conversion, not having caused shipper's loss.

Where sellers of potatoes attached the bill of lading to a draft and sold it to a bank, which sent it to another bank for collection of the draft, and such bank delivered the bill of lading without payment of the draft, and the buyers obtained possession without surrendering the bill, and afterwards rejected the potatoes and caused the bill of lading to be returned, the delivery by the carrier without requiring surrender of the bill of lading was not the cause of the shipper's loss, and did not constitute a conversion.

9. Carriers 🔑83—Drawers of draft not under duty to take it back from bank, whose agent delivered bill of lading without payment of draft.

Where sellers of potatoes shipped them under an order bill of lading, which they attached to a draft for the purchase price, and sold it to a bank, which sent the draft to another bank for collection, and such bank delivered the bill of lading without payment of the draft, the sellers were under no duty to take back the draft and bill of lading from the bank to which they sold them, as it was the tortious act of such bank's agent that occasioned the damage, and, having assumed the loss in so doing, the sellers could not hold the carrier for technical failure to take up the bill of lading.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

Action by J. F. French & Co. against the Pere Marquette Railway Company. A judgment for plaintiffs was affirmed by the Supreme Court of Michigan (204 Mich. 578, 171 N. W. 491), and defendant brings certiorari. Reversed.

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*Messrs. Oscar E. Waer, of Grand Rapids, Mich., and John C. Shields, of Detroit, Mich., for petitioner.

Mr. Clare J. Hall, of Grand Rapids, Mich., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The federal Uniform Bills of Lading Act of August 29, 1916, c. 415, 39 Stat. 538 (Comp. St. §§ 8604aaa-8604w), provides by section 9 that a carrier is, subject to the provisions of sections 10, 11 and 12,

"justified in delivering goods to one who is"

(c) "A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

The main questions presented for our decision in this case are whether, upon the facts hereinafter stated, there was a delivery to one in possession of the bill, and, if so, whether the delivery exonerated the carrier, it having been made without requiring surrender of the bill of lading.

In 1917 J. F. French & Co. shipped a carload of potatoes from Bailey, Mich., to Louisville, Ky., by the Pere Marquette Railroad as initial carrier and the Big Four Railroad as connecting and terminal carrier. The shipment was made on a "consignor's order" *540 bill of *lading in the standard form by which the car was consigned to the shippers' order at Louisville; and there was a notation:

"Notify Marshall & Kelsey, % Capt. Bernard, Commissary, Camp Taylor."

The shipper attached the bill of lading to a draft on Marshall & Kelsey for the purchase price of the potatoes and sold and delivered both, duly indorsed in blank, to a bank at Grand Rapids. This bank transmitted for collection the draft, with bill of lading attached, to an Indianapolis bank. The latter, without obtaining payment of the draft, detached the bill of lading from it and wrongfully delivered the bill of lading to Marshall & Kelsey. The car having reached Louisville, its destination named in the bill of lading, it was physically delivered by the Big Four, upon request of one Bindner, to the Southern Railroad, to be forwarded to Dumesnil, under the circumstances hereinafter set forth, without requiring surrender of the bill of lading. Later, upon the refusal of Marshall & Kelsey to accept the potatoes and honor the draft, possession of the car and bill of lading was returned to the shippers, who accepted them under protest and, without waiving any rights which they might have, proceeded to dispose of the potatoes elsewhere, in order to make the damage as light as possible for all concerned. The shippers then brought this suit in a state court of Michigan against the Pere Marquette to recover compensation, contending that the carrier had by delivering the car upon request, without requiring surrender of the bill of lading, become liable for conversion of the potatoes. The court directed a verdict for plaintiff, and the judgment entered thereon was affirmed by the Supreme Court of Michigan. 204 Mich. 578, 171 N. W. 491. The case comes here on writ of certiorari. 250 U. S. 637, 39 Sup. Ct. 494, 63 L. Ed. 1183.

The following additional facts are material: Camp Zachary Taylor was located about six miles from Louisville on the Southern *541 Railroad, near Dumesnil station. *Marshall & Kelsey had contracted with the government to supply a large quantity of potatoes at this camp; and had made a contract of purchase with J. F. French & Co. The car in question was shipped to Louisville to be applied on these contracts. The indorsed bill of lading for this, as for other cars shipped under like circumstances, had been left by Marshall & Kelsey at Dumesnil with one Bindner, an employee of the Southern Railroad, for safe-keeping. He, having the bill of lading in his possession at Dumesnil, telephoned from there, at Marshall & Kelsey's request, to the Big Four Railroad to ascertain whether the car had arrived at Louisville. Finding that it had, Bindner, knowing the government's need of potatoes, told the Big Four trackage clerk that "he had the bill of lading and to let the car go out to the camp." Bindner had no specific instructions from Marshall & Kelsey to do this; but his action was later ratified by them. Upon receiving Bindner's further assurance that a small demurrage charge which had accrued would be paid, the trackage clerk, without requiring surrender of the bill of lading, released the car, changed the waybill so as to provide for delivery of the car at Dumesnil, and turned it over to the Southern. A charge of 6 cents per hundred pounds thereby became payable to the Southern Railroad for the local carriage from Louisville to Dumesnil; and it was left by the waybill payable by the consignee with the other freight charges upon receipt of the car at Dumesnil. The Big Four had no information that the draft covering the car had not been paid or of the circumstances under which Bindner obtained possession of the bill of lading. The car arrived at Dumesnil, but the government did not accept it. Thereupon Bindner returned the bill of lading to Marshall & Kelsey upon their request; they returned it to the Indianapolis bank; this bank returned it and the draft to the Grand Rapids bank, which in turn surrendered both to J. F. French &

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Co., upon being *repaid the sum originally credited to their account. The shippers then took possession of the car, disposed of the potatoes elsewhere, but at a lower price, and brought this suit to recover the amount of their loss. The evidence is in conflict concerning the reason for the failure of the government to accept the potatoes, their condition, and the cause of deterioration in them, if any; and no finding of fact was made by the Supreme Court of Michigan on this issue. But, in an action for conversion the matter could affect only the question of damages and not that of liability; and it is not material in the view which we take of the case.

There is no controversy over the amount of the loss. Nor is it denied that suit was properly brought against the Pere Marquette as initial carrier. The shipment was interstate. The shippers sue the inital carrier under section 20 of the Act to Regulate Commerce as amended (Comp. St. § 8604aa), contending that there was a conversion of the goods by a misdelivery of them at Dumesnil instead of a delivery at Louisville; or, if it be held that there was a delivery at Louisville, that it was an unjustifiable delivery in violation of the contract of carriage, since a clause in the bill of lading declared:

> "The surrender of this original bill of lading properly indorsed shall be required before delivery of the property."

The carrier defends on the ground that there was a delivery at Louisville which exonerated it under section 9 of the federal Uniform Bills of Lading Act. Is the carrier liable for misdelivery, because the car was sent from Louisville to Dumesnil upon Bindner's request without requiring surrender of the bill of lading?

[1] First. The Supreme Court of Michigan held that the Big Four, in sending the car over the Southern to Dumesnil at the request of Bindner, made not a delivery but an irregular reconsignment. Whatever name be used in referring to the act of forwarding the car, the Big Four, when it surrendered possession of the car to the Southern at

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Bind*ner's request, terminated its relation as carrier; just as it would have done if, at his request, it had shunted the car onto a private industrial track or had given the control of it to a truckman on the team tracks. Having brought the goods to the destination named in the bill of lading the carrier's only duty under its contract was to make a delivery at that place; and it could make that delivery by turning the goods over to another carrier for further carriage. Compare Bracht v. San Antonio Ry. Co., 254 U. S. 489, 41 Sup. Ct. 150, 65 L. Ed. —, decided by this court January 3, 1921; Seaboard Air-Line Railway v. Dixon, 140 Ga. 804, 79 S. E. 1118; Melbourne & Troy v. Louisville & Nashville Railroad Co., 88 Ala. 443, 6 South. 762. The fact that in forwarding the car the Big Four used the original waybill, striking out the word "Louisville" under the "destination" and substituting "Dumesnil, Ky. So. R. R.," is of no significance. The shipment from Louisville to Dumesnil was a wholly new transaction. In turning over the car for this new shipment the railway made a disposal of it in assumed termination and discharge of its obligations, which was, in legal contemplation, a delivery. Whether it was a justifiable delivery and did indeed discharge its obligations we must next consider.

Second. Was the delivery at Bindner's order one which the carrier was justified in making under the provisions of section 9 of the federal Uniform Bills of Lading Act? Prior to the enactment of the federal Uniform Bills of Lading Act, or of other appli-

cable legislation, a carrier was not ordinarily relieved from liability to the consignor or owner for delivery of goods to a person not legally entitled to receive them, although such person was in possession of an order bill of lading duly indorsed in blank, and surrendered it to the carrier at the time of delivery. Delivery was held not to be a justification because the bill of lading, despite insertion therein of words of negotiability, did not become a negotiable instrument. Independently of statute (and, indeed, also
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under earlier state statutes) the *insertion of words of negotiability had merely the effect of enabling title to the goods to be transferred by transfer of the document. See Berkley v. Watling, 7 A. & E. 29. But one who did not have a valid title to the goods could not by transfer of the bill of lading give a good title to a bona fide holder. Shaw v. Railroad Company, 101 U. S. 557, 25 L. Ed. 892. When in the interests of commerce the federal Uniform Bills of Lading Act extended to bills of lading certain characteristics of negotiable paper in order to protect a bona fide purchaser of such bills, it was deemed proper to afford also certain protection to the carrier. This was done, in part, by providing in section 9 that the carrier would be justified in making delivery to any person in possession of an order bill of lading duly indorsed, with certain exceptions to be noted below.

[2, 3] The shippers contend that Bindner was not "a person in possession" of the bill, because he held it as agent for Marshall & Kelsey and not on his own account. So far as the carrier is concerned that fact is entirely immaterial. Under section 9 it is physical possession of the bill which is made a justification for delivery of the goods by the carrier. Under that section it is immaterial in what capacity the person holds possession of the bill, and also whether he holds it lawfully, or unlawfully, so long as the carrier has no notice of any infirmity of title. But the shippers' contention would not be advanced if it were held that the legal, not the physical, possession is determinative. For Bindner's request of the trackage clerk to have the car forwarded to Dumesnil was later ratified by Marshall & Kelsey. If his physical possession of the bill were deemed legally their possession of it, the physical delivery to him of the car would likewise be deemed legally a delivery of it to them and, hence, satisfy in this respect the requirements of section 9.

The only exception to the rule justifying the carrier in making delivery to one in pos-
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session of an order bill of *lading indorsed in blank, which is urged as applicable here, is where the carrier has information that the person in possession of the bill is not lawfully entitled to the goods. The shippers contend that the Big Four, when it made delivery of the car, had such information regarding Bindner. For this contention there is not the slightest basis in the evidence. The Big Four had no such information. Nor was there in the circumstances anything which should even have led it to doubt that Bindner was lawfully entitled to request that the car be shipped to Dumesnil.

[4] Concluding, therefore, that there was a delivery, that it was made to a person in possession of the bill of lading properly indorsed and that it was made in good faith, the important question remains: Does such a delivery exonerate the carrier upon suit by the shipper when it failed to require surrender of the bill of lading as provided in that instrument? In our opinion there is no exoneration where loss to shipper or subsequent purchaser of the bill results from such a failure; but where the loss suffered is not the result of the failure to take up the bill, mere failure to take it up does not defeat the exoneration.

[5] The plaintiffs seek to establish the carrier's liability for its failure to take up the bill on two theories—first, that they are bona fide purchasers of the bill left outstanding; and, second, that as shippers and owners their goods were converted by a delivery in violation of the terms of the bill of lading. But the shippers cannot claim the protection of section 11 of the act as bona fide purchasers of the bill, as those words are understood in the law, even if in taking back the draft and the bill of lading from the bank they can be deemed purchasers within the meaning of the act. They took back the bill of lading after the events here in question, with full knowledge of them, and because of them. The purchaser whom the act protects is he who is entitled
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to assume that the carrier has *not delivered the goods and will not thereafter deliver them except to a person who holds the bill of lading. The purpose of sections 10, 11 and 12 is to give bills of lading attributes of commercial paper. Here the plaintiffs were not buying commercial paper but a lawsuit.

[6] There is nothing in the act which imposes upon the carrier a specific duty to the shipper to take up the bill of lading. Under section 8 the carrier is not obliged to make delivery except upon production and surrender of the bill of lading; but it is not prohibited from doing so. If instead of insisting upon the production and surrender of the bill it chooses to deliver in reliance upon the assurance that the deliveree has it, so far as the duty to the shipper is concerned, the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case the carrier is liable for conversion and must, of course, indemnify the shipper for any loss which results. Such liability arises, not from the

statute, but from the obligation which the carrier assumes under the bill of lading.

[7-9] Does a delivery without compliance with the surrender clause of the bill of lading render the carrier liable for conversion under the facts shown here? Although there is a conflict of language in the cases in which a shipper sues a carrier for delivery of goods without requiring a surrender of the bill of lading, there appears to be no conflict of principle or indecision. Where the failure to require the presentation and surrender of the bill is the cause of the shipper losing his goods, a delivery without requiring it constitutes a conversion. Babbitt v. Grand Trunk Western Railway, 285 Ill. 267, 120 N. E. 803; Turnbull v. Michigan Central Railway Co., 183 Mich. 213, 150 N. W. 132; Judson v. Minneapolis & St. Louis Railway Co., 131 Minn. 5, 154 N. W. 506; see First National Bank v. Oregon-Washington Railway & Navigation Co., 25 Idaho, 58, 136 Pac. 798. Compare Georgia, Florida, & Alabama Ry. Co. v. Blish Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 *547 L. Ed. 948. But *where delivery is made to a person who has the bill or who has authority from the holder of it, and the cause of the shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct, the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion. Chicago Packing & Provision Co. v. Savannah, Florida & Western Ry. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367; Famous Mfg. Co. v. Chicago & Northwestern Railway Co., 166 Iowa, 361, 147 N. W. 754; Nelson Grain Co. v. Railroad Co., 174 Mich. 80, 140 N. W. 486; St. Louis Southwestern Ry. of Texas v. Gilbreath (Tex. Civ. App.) 144 S. W. 1051. In the Chicago Packing Co. case, supra, the court said:

> "The loss in the present case was not occasioned by the failure of the railway to require the production and surrender of the bills of lading, but by the faithlessness of Hobbs & Tucker to their principal."

Similarly, in the case before us, the failure of the carrier to require production and surrender of the bill of lading did not cause the loss. The same loss would have resulted if the bill had been presented and surrendered. The real cause of the loss was the wrongful surrender of the bill of lading by the Indianapolis bank to Marshall & Kelsey by means of which the car was taken to Camp Taylor and the shipper deprived of the Louisville market. Nor did the failure to take up the bill enable the buyer to throw back the loss upon the shippers. The shippers deliberately assumed the loss by their voluntary act in taking back the draft and the bill of lading which they had sold to the Grand Rapids bank. Doubtless J. W. French & Co.'s relations with Marshall & Kelsey and with the Grand Rapids bank and the relations of the latter with the Indianapolis bank made this course advisable. But it is clear that they were under no duty to do so, since the tortious act of the bank's agent for collection had occasioned the damage. Having *548 as*sumed the loss of their own volition they should not be permitted to pass it on to the carrier merely because of its technical failure to take up the bill of lading. The delivery was made to one in possession of the bill of lading who could, and doubtless would, have surrendered it, had he not been prevented by distance from doing so. To hold a carrier liable under such circumstances would seriously interfere with the convenience and the practice of business.

Reversed.

Mr. Justice HOLMES did not take part in the consideration and decision of this case.

(254 U. S. 552)

PANAMA R. CO. v. PIGOTT.

(Submitted Jan. 13, 1921. Decided Jan. 24, 1921.)

No. 133.

1. **Appeal and error 🔑1062(4)—Submitting to jury question of foreign law held not prejudicial to defendant.**

In an action for personal injuries received at a railroad crossing, the defendant did not get less than it was entitled to when the trial court left to the jury the question whether the law of Panama, where the accident occurred, authorized recovery for negligence of employés selected with due care and allowed recovery for pain and suffering.

2. **Railroads 🔑350(5)—Negligence as to children using crossing without safeguards held jury question.**

Where there was evidence that a railroad crossing in a city was much used, and that, especially in the afternoon, at which time the accident occurred, there were usually many children about, the court was warranted in leaving to the jury the question whether proper care required the company to have a flagman or gate at the crossing or to maintain other safeguards.

3. **Negligence 🔑136(29)—Contributory negligence of seven year old boy jury question.**

In an action for injuries to a seven year old boy, it might not be error for the court to permit the jury to attribute the accident to defendant's negligence alone, though that could not be done under the evidence in the case of an older person.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Noel Pigott, a minor, by his guardian ad litem, George Morrell, against the Panama Railroad Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (256 Fed. 837, 168 C. C. A. 183), and defendant brings error. Affirmed.

Mr. Frank Feuille, of Ancon, Canal Zone, for plaintiff in error.

Mr. Theodore C. Hinckley, of Panama, Republic of Panama, for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought in the District Court of the Canal Zone for the Division of Cristobal to recover from the Panama Railroad Company for personal injuries suffered by the minor, Pigott, in the City of Colon, *353 Republic *of Panama. Pigott recovered a judgment which was affirmed by the Circuit Court of Appeals. 256 Fed. 837, 168 C. C. A. 183. The case is brought to this Court under the Panama Canal Act, August 24, 1912, c. 390, § 9; 37 Stat. 560, 566 (Comp. St. § 10045). The facts may be stated in a few words. The minor, a boy of seven, was run over when attempting to cross the railroad track on a street in Colon. There was evidence that the crossing was much used and that, especially in the afternoon, the time of the accident, there usually were many children about; there were however, neither gates nor a watchman at the place. A hedge higher than the child somewhat obstructed the view. The engine was backing a box car and did not have the lookout required by the company's rules. There was evidence also that it gave no warning by bell or whistle. In short by the criteria of the common law the plaintiff had a right to go to the jury with his case.

[1-3] The fundamental argument for the plaintiff in error is that the law of Panama was not applied in determining the principles of liability or in fixing the rule of damages. It is contended that if, as there was evidence to prove, due care had been used in the selection of servants by the railroad, the company was not answerable for their negligence, and that in any event there could be no recovery for pain. Both of these contentions are simply attempts to reargue what was decided in Panama Railroad Co. v. Toppin, 252 U. S. 308, 40 Sup. Ct. 319, 64 L. Ed. 582. The plaintiff in error certainly did not get less than it was entitled to when, in view of contradictory testimony from lawyers on the two sides, the Court left the law of Panama to the jury. The Court was warranted in also leaving to the jury the question whether proper care required the company to have a flagman or gate at the crossing and the other safeguards that we have mentioned. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. In view of the extreme youth of the plaintiff we cannot say *554 that the Court erred in allowing the jury *to attribute his misfortune to the defendant's conduct alone, whatever difficulties there might be in the case of an older person; and we perceive no other ground for not allowing the verdict and the decision of the two Courts below to stand.

Judgment affirmed.

(254 U. S. 586)

JACKSON v. SMITH et al.

(Argued Dec. 17, 1920. Decided Jan. 24, 1921.)

No. 130.

1. Receivers 🔑103—Liable for profits shared with purchaser at sale of estate's assets.

A receiver owes the affirmative duty to secure the largest returns for the estate at a sale of property under a trust deed given to secure a note to the estate, and where he placed himself in a position in which his personal interests might be antagonistic to those of his trust by an agreement to share profits with the purchasers at the trustee's sale, he is accountable to the estate for all the profits obtained by him and those who associated with him in the matter, though the estate was not injured thereby.

2. Receivers 🔑143—Confederates in transaction in breach of receiver's trust liable for profits.

Those who knowingly joined a receiver in an agreement to share the profits from the purchase by one of them of the property at a sale under trust deed to secure a note to the estate are jointly and severally liable with the receiver for all the profits resulting from that transaction.

3. Receivers 🔑103—Trustee's duty at sale does not permit receiver to act adversely to estate's interests.

The duty of the trustee under a deed to secure a note to an estate in hands of a receiver to secure the largest amount possible at the sale, which relieves the receiver of any obligation to the maker of the note, does not relieve him of his obligation to the estate, or permit him to retain a profit made by him through an agreement with the purchaser at the trustee's sale.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Proceeding by E. Hilton Jackson, as receiver of the First Co-operative Association of Georgetown, D. C., against John Lewis Smith and another. Decree for plaintiff was reversed by the Court of Appeals of the District of Columbia (48 App. D. C. 565), and plaintiff brings certiorari. Decree of the Court of Appeals of the District of Columbia reversed, and that of the Supreme Court of the District affirmed.

Mr. W. W. Millan, of Washington, D. C., for petitioner.

Mr. Louis A. Dent, of Washington, D. C., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Smith and Wilson were sued in the Supreme Court of the District of Columbia by the receiver of the First Co-operative Building Association of Georgetown, D. C., for the amount of profits made by them and a former receiver of the association in the purchase at a foreclosure sale and subsequent resale of land mortgaged to secure a note owned by the association. The Supreme Court held them liable for the full amount of the profits, $743.68, with interest and costs. The Court of Appeals of the District reversed the decree and ordered that the bill be dismissed with costs. 48 App. D. C. 565. A writ of certiorari was granted by this court. 250 U. S. 655, 40 Sup. Ct. 10, 63 L. Ed. 1192.

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The question before *us is whether the respondents are liable upon the following facts, and, if so, in what amount.

In 1908 the Supreme Court of the District appointed William E. Ambrose, a member of its bar, receiver of the First Co-operative Building Association of Georgetown, D. C. Among the assets of the association so intrusted to the receiver was a note of Schwab for $2,700, secured by a mortgage deed of trust of land. The note being in default, Ambrose as receiver requested the trustee under the deed of trust to advertise the land for sale at public auction. The auction sale was held and a bid of $350 was made by Edwin L. Wilson, a member of the bar; but the trustee withdrew the property from sale because the bid was inadequate. Thereafter it was arranged between Wilson, Ambrose, and another lawyer, John Lewis Smith, who was counsel of the receiver, that the trustee should again advertise the property for sale; that Wilson should at the second sale use his own judgment whether to bid, and, if so, what amount; and that, if he should happen to become the purchaser, the three should be jointly liable for the purchase price and any expenses incident to the purchase and should be jointly interested in the property purchased. The second sale was duly advertised. Smith and Ambrose were present, but gave no instructions or directions in regard to the sale either to the trustee or to his auctioneer. Wilson also attended and in the exercise of his own judgment and without previous conference with either Smith or Ambrose bid $491 and became the purchaser of the property. There was no evidence of any improper influence at the sale to prevent competition or to close competitive bidding or to bring about the sale to Wilson in preference to any one else. On the contrary, it affirmatively appears that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder.

Within a few days after the second sale

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Wilson and *Smith found, through the aid of real estate agents, a purchaser named Kite who was willing to pay $1,400 for the land. In order to convey a good title it was necessary to clear the land of tax liens and an outstanding tax title. This required $550—that is, $59 more than Wilson had bid. He voluntarily raised his bid by that amount. The land was conveyed by the trustee to Wilson and by Wilson to Kite, the deeds being recorded simultaneously when Kite paid the $1,400. Of this amount $652.32 was used to discharge taxes, tax liens and expenses of sale. The balance, $473.68 was divided equally between Wilson, Smith and Ambrose individually. Wilson had paid out in making the purchase no money of his own or theirs. The estate of which Ambrose was receiver got nothing, as the amount required to discharge the tax liens exceeded the amount bid by Wilson. Much later the facts were brought to the attention of the Supreme Court of the District. Ambrose resigned as receiver; Jackson was appointed in his stead, and as receiver brought this suit against Wilson and Smith to recover the profits which had been made by them and Ambrose.

[1, 2] Ambrose, had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. Baker v. Schofield, 243 U. S. 114, 37 Sup. Ct. 333, 61 L. Ed. 626; Robertson v. Chapman, 152 U. S. 673, 681, 14 Sup. Ct. 741, 38 L. Ed. 592. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. J. H. Lane & Co. v. Maple Cotton Mills, 232 Fed. 421, 146 C. C. A. 415. When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. Michoud v. Girod, 4 How. 503, 552, 11 L. Ed. 1076. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue.

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Magruder v. Drury, *235 U. S. 106, 119, 120, 35 Sup. Ct. 77, 59 L. Ed. 151. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. Magruder v. Drury, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. Ed. 151. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. Emery v. Parrott, 107 Mass. 95, 103; Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 134, 79 N. W.

229, 74 Am. St. Rep. 845; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver.

[3] It is said that, at a sale made under a mortgage deed of trust, the duty to obtain the highest possible price rests not upon the note holder, but upon the trustee under the deed of trust, and that the creditor may bid at the sale or refrain from so doing, as he may see fit. Richard v. Holmes, 18 How. 143, 148, 15 L. Ed. 304; Smith v. Black, 115 U. S. 308, 315, 6 Sup. Ct. 50, 29 L. Ed. 398. This is true so far as it concerns the duty of the note holder to the debtor or other owner of the mortgaged property. But the many cases cited to this effect in Smith's and Wilson's behalf do not bear upon the question before us. Smith and Wilson are held liable for knowingly confederating with one who, as receiver of the estate of the note holder, owed a duty to it, and who put himself in a position where his personal interest conflicted with his duty.

We have considered the many other arguments urged in defense, but find in them nothing which should relieve Smith and Wilson from this liability. The decree of the Court of Appeals of the District of Columbia is reversed, with costs, and that of the Supreme Court of the District is affirmed.

Reversed.

(254 U. S. 581)

JOURNAL & TRIBUNE CO. v. UNITED STATES.

(Argued Nov. 10, 11, 1920. Decided Jan. 24, 1921.)

No. 86.

1. Courts ⚿389—Amended petition in Court of Claims held to show appealable amount in controversy.

Where the original claim for postage paid under mistake sought to recover only the difference between the amount paid and the amount claimant would have had to pay for transportation of its papers by express, which was less than the $3,000 required to give the Supreme Court jurisdiction on appeal from the Court of Claims under Jud. Code, § 242 (Comp. St. § 1219), but an amended petition sought a return because of failure of consideration of the entire sum paid, which exceeded the jurisdictional amount, the amount in controversy is to be determined by the amended petition; and, since there is nothing in the nature of the case to prevent recovery of the entire amount, an appeal lies, though there may be a defense to a part claim that would not extend to the entire claim.

2. Post office ⚿15—Postage on newspapers intended for express shipment held not paid by mistake.

Where newspapers intended for shipment by express were sent to the station in the same conveyance as those intended for mailing, and on the failure of the express company to take charge of them were weighed and shipped by mail, the amount paid for the transportation of such papers was not paid under a mistake which entitles the publisher to recover either the total sum or the difference between that sum and the express rates on the newspapers so transported.

3. United States ⚿78—Has not consented to be sued for torts of agent.

The United States has not consented to be sued for the torts of its officers or agents, and therefore a newspaper publisher cannot recover the amount paid for transporting papers by mail which it intended to ship by express, even though the mailing clerk was negligent in sending them by mail.

Appeal from the Court of Claims.

Suit by the Journal & Tribune Company against the United States, to recover moneys paid under mistake of fact. From a judgment of the Court of Claims dismissing the petition (53 Ct. Cl. 612), the claimant appeals. Affirmed.

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*Mr. Benjamin Carter, of Washington, D. C., for appellant.

Mr. Frank Davis, Jr., Asst. Atty. Gen., for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

This suit was brought to recover moneys paid for the transportation of newspapers in the mails, upon the ground that they were paid under mistake of fact. The Court of Claims dismissed the petition. 53 Ct. Cl. 612.

The facts are as follows: Claimant was engaged in publishing at Knoxville, Tenn., a daily morning newspaper having a circulation in Eastern Tennessee and adjacent parts of Virginia and North Carolina. It sent out a considerable part of its daily issue, destined for points on the United States postal route between Bristol and Chattanooga or on other postal routes connecting therewith, upon a Southern Railway train leaving Knoxville at 4 a. m. daily. The mail was dispatched in wagons from the main post office at Knoxville to the office of a mail transfer clerk at the railway station, the wagons being operated by persons having contracts for the purpose with the United States postal authorities. For claimant's convenience, the post office authorities consented that its newspapers might be

weighed, for mailing, at the railway station instead of at the post office; claimant furnishing scales for the purpose. The mail wagons, under an arrangement between claimant and the contractor, called at claimant's place of business and carried the newspapers thence to the station. For this service claimant compensated the contractor or the driver. While this arrangement was in effect, and in the fall of the year 1906, claimant concluded to transport a part of the newspapers by express instead of mail, the express charges upon large lots being one-half the postal charge for transporting newspapers as second-class mail. It notified the express company of this purpose, and requested the express agent to be on the watch. There-
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*after it caused certain copies of its newspaper intended for news dealers—theretofore sent by mail—to be wrapped in bundles and labeled "Express or baggage," with directions for throwing them off the train at the several destinations. Other copies of the paper, intended for subscribers and for news dealers, were placed, properly addressed, in mail sacks. The method of transporting the papers to the railway station continued as before, those intended to go by express and those contained in mail sacks being carried upon the same wagon and the driver instructed to take them to the railway station, which he did, depositing bundles and sacks on the platform where all mail was deposited. In the fall of 1906, and for about a year thereafter, the express company's office adjoined that of the mail transfer clerk, the doors of the two opening upon the same platform. Claimant's representative had notified the express company's agent of the purpose to send certain of the papers by express, and pursuant to that notice, until about October, 1908, a porter from the express agent's office went to the platform, took the bundles of newspapers labeled as mentioned, and caused them to be transported by express. During the same period the United States mail transfer clerk took the sacks of papers, ascertained the net weight, and caused them to be transported as second-class mail matter upon the same train. The net weight was reported to the postmaster, and he charged to claimant's account the proper second-class postage thereon. The system adopted was that claimant made a deposit with the postmaster to cover postage to accrue, and renewed the deposit from time to time as it was reduced by charges against it. During the year 1907 the express company's office was removed to a distance of about 150 yards from the transfer clerk's office, and about a year after this the express messenger or porter ceased calling at the mail platform for the bundles of papers labeled for transportation by express. Why he did so does
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*not definitely appear. Thereafter and down to March 31, 1913, claimant's newspapers, whether in sacks or in bundles, were alike treated as mail matter by the United States mail transfer clerk, who weighed them all and reported the net weights to the postmaster, and the bundles and sacks were transported to their respective destinations as second-class mail matter. The charge appropriate for such mail matter was regularly made against claimant's deposit and paid by claimant during the entire period. In the spring of 1913 claimant's business manager, having his attention called to the fact that the express bills were small, discovered upon investigation that the bundles of papers labeled "Express" were being transported as second-class mail matter; and the present suit followed. During the period referred to approximately 358,442 pounds of newspapers were transported by the United States mail that were labeled "Express" and had been intended by claimant to be transported by express. Claimant paid thereon the regular second-class mail matter rate of 1 cent per pound, aggregating $3,584.42. The transportation of the same matter by express would have cost claimant $1,792.21.

[1] The government insists that this court is without jurisdiction to entertain the appeal, upon the ground that the amount in controversy is less than the $3,000 specified in the applicable provision, section 242 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157 [Comp. St. § 1219]). It is said that, viewing the claim in the most favorable light, and assuming a mistake was made entitling claimant to recover, the amount recoverable could not exceed the difference between what was paid as postage and what would have been paid had the newspapers been sent by express; that is to say, $1,792.21. But, while in its original petition claimant prayed recovery for only the latter amount, in an amendment made by leave of the court it sought a return of
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the entire $3,584.42, on the *ground that there was a failure of consideration and it was entitled to a return of the whole sum as paid by mistake. The amount in controversy is to be determined by the amended rather than the original petition (Washer v. Bullitt County, 110 U. S. 558, 561, 562, 4 Sup. Ct. 249, 28 L. Ed. 249); and since there is nothing in the nature of the case to prevent a recovery of the entire amount, were claimant's view of the law sustained, the amount claimed is the amount in controversy within the meaning of the jurisdictional act, notwithstanding there may be a defense to a part that would not extend to the entire claim (Barry v. Edmunds, 116 U. S. 550, 560, 561, 6 Sup. Ct. 501, 29 L. Ed. 729; Schunk v. Moline, etc., Co., 147 U. S. 500, 504, 505, 13 Sup. Ct. 416, 37 L. Ed. 255; Vance v. W. A. Vandercook Co. [No. 2], 170 U. S. 468, 472, 18 Sup. Ct. 645, 42 L. Ed. 1111; Smithers

v. Smith 204 U. S. 632, 642, 643, 27 Sup. Ct. 297, 51 L. Ed. 656).

[2, 3] Upon the merits, we concur in the opinion of the Court of Claims that there is no legal basis for a recovery. The money was not paid under any such mistake as to render it inequitable for the United States to retain it. The bundles of newspapers actually were transported as mail by the government, claimant being charged by the postmaster the amount fixed by law for the service rendered, and paying it without protest. No error is shown to have been made in the weights or in the rate charged. So far as any "mistake" appears from the findings it was that of claimant's agents in causing or permitting the papers to go by mail instead of by express as claimant intended. There is no finding attributing negligence or other fault to the mail transfer clerk; but if there were such and claimant's loss were attributable to it, this would not form a ground for recovery, since the United States has not consented to be sued in the Court of Claims for the torts of its officers or agents. Bigby v. United States, 188 U. S. 400, 404–407, 23 Sup. Ct. 468, 47 L. Ed. 519; Hijo v. United States, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994; Tempel v. United States, 248 U. S. 121, 129, 39 Sup. Ct. 56, 63 L. Ed. 162; Ball Engineering Co. v. White & Co., 250 U. S. 46, 57, 39 Sup. Ct. 393, 63 L. Ed. 835.

Judgment affirmed.

(254 U. S. 570)

LA MOTTE et al. v. UNITED STATES.

(Submitted Dec. 10, 1920. Decided Jan. 24, 1921.)

No. 121.

1. **Indians 🔑27(1)—United States entitled to sue to enjoin obtaining of leases without approval of Secretary of the Interior.**

The United States may maintain a suit to restrain persons not members of the Osage Tribe of Indians from intentionally and persistently obtaining leases of the allotted lands of members of such tribe without the approval of the Secretary of the Interior, as required by Act June 28, 1906, § 7.

2. **Indians 🔑2—Osage Indians still wards of the United States.**

The Osage Indians have not been fully emancipated and are still wards of the United States.

3. **Indians 🔑16(½)—Outsiders bound to observe restrictions on leasing and disposal of lands.**

Outsiders, not members of the Osage Tribe, are bound to respect statutory restrictions on the leasing and disposal of the allotments of members of the tribe, quite as much as the allottees and their heirs.

4. **Indians 🔑16(3)—Secretary of the Interior authorized to make regulations concerning leases of lands of Osage Indians.**

Under Act June 28, 1906, § 7, requiring leases of lands allotted to the members of the Osage Tribe to be approved by the Secretary of the Interior, and section 12, providing that all things necessary to carry the act into effect shall be done under the authority and direction of the Secretary, the Secretary had authority to promulgate regulations designating the manner of executing leases and bringing them to his attention, and stating the terms and conditions which should be embodied for the protection of the Indian lessors.

5. **Indians 🔑16(3) — Leases of restricted lands by guardians with consent of court requires approval by Secretary of the Interior.**

Under Act June 28, 1906, § 7, and Act April 18, 1912, §§ 3, 6, leases of restricted lands belonging to minor allottees or minor heirs of the Osage Tribe, though given by guardians with the sanction of the local courts in which the guardianships were pending, must be approved by the Secretary of the Interior.

6. **Indians 🔑16(3)—Leases by parents of minor allottees or heirs held to require approval by Secretary of the Interior.**

Under Act June 28, 1906, § 7, leases of restricted lands of minor allottees or minor heirs of the Osage Tribe, given by their parents, must be approved by the Secretary of the Interior, though one of the parents has a certificate of competency and the other is of white blood and not a member of the tribe.

7. **Indians 🔑16(3)—Lease of lands allotted to heirs of deceased member held to require approval by Secretary of the Interior; "restricted lands."**

Lands selected and allotted in the right of a deceased member of the Osage Tribe to his heirs, who are without certificates of competency, are restricted lands, and leases thereof require approval by the Secretary of the Interior, under Act June 28, 1906, § 7.

8. **Indians 🔑16(3) — Lands devised may be leased without consent of Secretary of the Interior.**

Under Act April 18, 1912, § 8, authorizing any adult member of the Osage Tribe of Indians not mentally incompetent to dispose of his estate by will with the approval of the Secretary of the Interior, lands so devised with the Secretary's approval are freed from restrictions, and may be subsequently leased without the approval of the Secretary, since a devisee takes by conveyance and not by descent as an heir.

9. **Indians 🔑15(2) — Restraint on alienation contained in devises held void.**

An attempt by a member of the Osage Tribe of Indians, devising his lands with the consent of the Secretary of the Interior under Act April 18, 1912, § 8, to impose an indefinite restraint on the devisee's right to alienate the land, is ineffective, whether tested by the common law or by local statutes.

10. Indians 🔑16(3)—Purchase of unrestricted lands by Indian without certificate of competency does not reimpose restrictions as to leasing.

When lands allotted to members of the Osage Tribe of Indians have in regular course become unrestricted, and are subsequently purchased by members of the tribe who are without certificates of competency, the restrictions are not reimposed, and the lands may be leased without the approval of the Secretary of the Interior.

11. Indians 🔑16(10)—Owners or lessees of undivided interests properly enjoined from exercising control under invalid leases or consents of other owners.

Where defendants, through valid purchases or leases had become owners or lessees of undivided interests in lands, the remaining interests in which were owned by members of the Osage Tribe of Indians and subject to restrictions, and defendants were using or exerting control over the lands to the exclusion of the Indian owners of the restricted interests, based on unapproved leases and other forms of consent given without legal sanction, they were properly enjoined from exercising such control.

12. Indians 🔑27(7) — Injunction against owners or lessees of undivided interests in lands held too broad, and to be limited.

Where defendants by valid purchases or leases had become owners or lessees of undivided interests in lands allotted to members of the Osage Tribe, the remaining interests in which were restricted, and were using or exerting control thereof under unapproved leases and other forms of consent without legal sanction, an injunction restraining them from dealing with the lands or any part thereof in any manner, without consent of the Secretary of the Interior, was too broad, as it would prevent them from selling their unrestricted interests, and it should be confined to the restricted undivided interests of the Indian owners.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against George G. La Motte and others. A decree for the United States, granting insufficient relief, was modified by the Circuit Court of Appeals (256 Fed. 5, 167 C. C. A. 277), and defendants appeal. Modified and affirmed.

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*Messrs. T. J. Leahy and Chas. S. MacDonald, both of Pawhuska, Okl., for appellants.

Messrs. F. K. Nebeker and E. M. Underwood, Asst. Attys. Gen., for the United States.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to enjoin the defendants (appellants here) from 572 asserting or exercising any *right under certain leases obtained from individual Osage Indians without the approval of the Secretary of the Interior, and from negotiating or obtaining other leases of the same class without conforming to statutory provisions and administrative regulations alleged to be applicable. The District Court granted the major part of the relief sought and denied the rest. On cross-appeals the Circuit Court of Appeals enlarged the relief granted, but refused a part of what was denied by the District Court. 256 Fed. 5, 167 C. C. A. 277. The United States then acquiesced and the defendants took a further appeal to this court.

Prior to the Act of June 28, 1906, c. 3572, 34 Stat. 539, the lands to which the suit relates were tribal lands of the Osage Indians, and after that act were divided under its provisions among the members of the tribe, as were also the tribal funds. Each member received 160 acres designated as a homestead and approximately 500 acres designated as surplus lands. The tribal funds were divided by placing a pro rata share to the credit of each member or his heirs in the United States Treasury. Except as otherwise provided, the homestead is to be "inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee," the surplus lands are to be "inalienable for twenty-five years" and nontaxable for 3 years, and the funds as distributed are to be held in trust by the United States for 25 years. These periods do not all have a common point of beginning, but nothing turns on that here. The act contains express provision (section 2, Seventh) that the Secretary of the Interior, in his discretion, upon the petition of any adult member, may issue to such member "a certificate of competency" authorizing him to sell and convey any of his surplus lands, if, upon investigation, he is found fully competent and capable of transacting his own business and caring for his own affairs, and that upon the issue of such certificate the surplus lands shall become *573 subject to taxation and the mem*ber shall have "the right to manage, control and dispose of his or her lands [other than the homestead] the same as any citizen of the United States." The interest on the funds held in trust and also certain revenues and moneys from other sources (section 4, First and Second) are to be paid quarterly to the members, except that in the case of minors payments are to be made to the parents, so long as the moneys are not misused or squandered, and where the parents are dead payments are to be made to legal guardians. Upon the death of a member his lands, moneys and interests "descend" to his "legal heirs" according to the laws of Oklahoma, with an exception not material here (section 6). The leasing of allotted lands is specially dealt with as follows:

"Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, that all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Besides several provisions indicating that the act is to be executed under the supervision of the Secretary of the Interior, there is a concluding section declaring:

"Sec. 12. That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

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*An amendatory Act of April 18, 1912, c. 83, 37 Stat. 86, by its third section, subjects the property of deceased, orphan minor, insane and some other allottees to the jurisdiction of the county courts of Oklahoma in probate matters, but with the qualification, first, "that no guardian shall be appointed for a minor whose parents are living unless the estate of said minor is being wasted or misused by such parents," and, secondly, "that no land shall be sold or alienated under * * * this section without the approval of the Secretary of the Interior." This amendatory act also contains a section dealing with disposals by will of which we shall speak presently.

In virtue of sections 7 and 12 of the Act of 1906 the Secretary of the Interior adopted and promulgated regulations designating the mode in which leases of restricted lands for farming or grazing purposes should be executed and brought to his attention, indicating the terms and conditions which should be embodied in the leases for the protection of the Indian lessors, and informing intending lessors and lessees that where the regulations were not complied with the leases would not be approved.

The defendants (appellants here) are engaged in procuring leases of Osage lands for farming and grazing purposes, especially the latter. At times the leases are procured for their own benefit and at other times in the interest of cattlemen who desire and need large pastures. Where cattlemen are to be the beneficiaries, the defendants often take the leases in their own names and agree to protect the cattlemen against claims for trespass or damage. Some of the leases are for homesteads, others for surplus lands. Some are procured from adult allottees, or adult heirs of allottees, having certificates of competency, and some from like allottees or heirs where no such certificate has been issued. Others are obtained from parents or legal guardians of minor allottees or minor heirs, and still others from devisees holding under

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wills approved by the *Secretary of the Interior. Many of the leases are for restricted lands and yet are taken without conforming to the regulations and without obtaining the Secretary's approval. But notwithstanding this, the defendants proceed to use the lands for grazing purposes, or to enable others to do so, as if the leases were properly obtained. The failure to conform to the statute and the regulations is not accidental, but intentional and persistent.

[1-3] The right of the United States to maintain the suit, although challenged by the defendants, is not debatable. The Osages have not been fully emancipated, but are still wards of the United States. The restrictions on the disposal and leasing of their allotments constitute an important part of the plan whereby they are being conducted from a state of tribal dependence to one of individual independence and responsibility; and outsiders, such as the defendants, are bound to respect the restrictions quite as much as are the allottees and their heirs. Authority to enforce them, like the power to impose them, is an incident of the guardianship of the United States. That relation and the obligations arising therefrom enable the United States to maintain the suit, notwithstanding it is without pecuniary interest in the relief sought. Heckman v. United States, 224 U. S. 413, 437–442, 32 Sup. Ct. 424, 56 L. Ed. 820; United States v. New Orleans Pacific Ry. Co., 248 U. S. 507, 518, 39 Sup. Ct. 175, 63 L. Ed. 388; United States v. Osage County, 251 U. S. 128, 133, 40 Sup. Ct. 100, 64 L. Ed. 184. And see Causey v. United States, 240 U. S. 399, 402, 36 Sup. Ct. 365, 60 L. Ed. 711.

[4] It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendants' disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian

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free to lease in his own way and on his *own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable, and for the following reasons:

The fact that the leasing provision says nothing about regulations is not important, for section 12 plainly enables the Secretary to employ any necessary means to carry that provision into effect. And, even without section 12, power to make regulations suitable to that end and consistent with the act would be implied. United States v. Bailey, 9 Pet. 238, 254, 255, 9 L. Ed. 113.

The need for some regulations is obvious. The Osages among whom the lands were divided number about 2,000 and each member received an aggregate of approximately 660 acres, often in scattered tracts. All the lands were restricted in the beginning and most of them probably will remain so for several years. The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected from their own improvidence and from overreaching by others. Both the lands and the Indians are remote from the seat of government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

We find nothing in the leasing provision indicating that no regulations are intended. True, the concluding proviso declares that "all leases given on said lands for the benefit of individual members of the tribe entitled thereto, or for their heirs, shall be subject *only* to the approval of the Secretary of the Interior." But this means, as the context and other parts of the act show, that leases given on restricted lands for the benefit of

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individual allottees, or *their heirs, and not for the benefit of the tribe, shall be subject to the approval of the Secretary of the Interior, but need not have the sanction of the tribal council. The word "only," on which the defendants place much emphasis, merely aids in marking an intended distinction between leases given for the benefit of individuals and those given for the benefit of the tribe—the latter, as section 3 shows, needing the sanction of the tribal council as well as the approval of the Secretary of the Interior.

Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

The regulations appear to be consistent with the statute, appropriate to its execution, and in themselves reasonable.

It follows from what has been said that in the main the action of both courts below was correct; that is to say, the defendants were properly enjoined from asserting or exercising any right under leases of restricted lands given by individual Osages without the approval of the Secretary of the Interior, and from negotiating or procuring other leases of the same class without conforming to the regulations prescribed.

Several questions relating to particular leases or lands remain to be noticed.

[5] The defendants have leases of restricted lands, belonging to minor allottees or minor heirs, which were given by guardians with the sanction of the local courts in which the guardianships were pending, but were not approved by the Secretary of the Interior. The District Court ruled that the Secretary's approval was not required and the Circuit Court of Appeals held to the contrary. We

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take the latter *view. It is supported by the comprehensive words of the concluding proviso of the leasing provision and is strengthened by the second qualification found in section 3 of the amendatory Act of 1912, under which the local courts obtain probate jurisdiction over the property of such minors, and by the proviso in section 6 of that act relating to the partition of inherited lands.

[6] Some of the defendants' leases of restricted lands were given by parents on behalf of minor allottees or minor heirs—one of the parents having a certificate of competency and the other being of white blood and not a member of the tribe. Both courts ruled that the Secretary's approval was essential, and rightly so, as we think. In giving such leases the parents act for the child, not for themselves, and approval by the Secretary is required by reason of the child's status, as would be true if the lease were given by a guardian.

[7] One of the leases held by the defendants is for lands which, in the course of the division, were selected and allotted in the right of a member then deceased. Under the statute the lands passed to the member's heirs and the lease was procured from them. They are members and without certificates of competency. The lease has not been approved by the Secretary. Both courts regarded the lands as restricted and the lease as requiring the Secretary's approval. That view has since been sustained by us in Kenney v. Miles, 250 U. S. 58, 39 Sup. Ct. 417, 63 L. Ed. 841.

[8, 9] Two leases, not approved by the Secretary, are for lands which passed to devisees under wills approved by that officer and duly admitted to probate. Both testators were adult members of the tribe, not mentally incompetent. One was an allottee and the other the sole heir of a deceased allottee. In their hands the lands were restricted. The defendants insist that under the approved wills the lands passed to the devisees

freed from the restrictions. If so, the leases did not require the Secretary's approval. *579 Both *courts held that the lands continued to be restricted. The question is not free from difficulty, but we think it must be ruled the other way. Strictly speaking a devisee takes under the will as an instrument of conveyance, and not by descent as an heir. This form of alienation was within the restriction imposed by the Act of 1906, Taylor v. Parker, 235 U. S. 42, 35 Sup. Ct. 22, 59 L. Ed. 137, but the amendatory Act of 1912 relaxed the restriction by declaring:

> "Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the state of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, in accordance with the state law, if his will be approved by the Secretary. True, it does not say that a disposal by an approved will shall put an end to existing restrictions, but that is an admissible, if not the necessary, conclusion from its words. After its enactment the Secretary of the Interior construed it as having that meaning, and it was administered accordingly in that department up to the time of this suit. And that Congress intended it should have that meaning is at least inferable from a general act of the next session respecting wills by Indian allottees and their approval by the Secretary (chapter 55, 37 Stat. 678 [Comp. St. § 4228]); for that act, while providing that "the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period," expressly excepted the Osages from its reach. These matters apparently were not brought to the attention of the courts be- *580 low. We regard them as of suffi*cient weight to put the question at rest. In one of the wills the testator attempted to impose an indefinite restraint on the devisee's right to alienate the land; but, whether the attempt be tested by the common law or by the local statutes, it plainly was of no effect. We modify the decree by excluding this class of leases from the injunction.

[10] Some of the leases are for lands which were purchased by the lessors after the lands in regular course had become unrestricted. Because the lessors were members of the tribe and without certificates of competency the Circuit Court of Appeals held that the leases were subject to the Secretary's approval. The District Court had held the other way. We think the District Court was right. There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all lands, however acquired, which a member without a certificate of competency may own. See McCurdy v. United States, 246 U. S. 263, 38 Sup. Ct. 289, 62 L. Ed. 706. The restrictions reach such lands only as were allotted to the member or were inherited by him from another in whose hands they were restricted. Many members who are without certificates of competency have incomes and property which they are free to deal with as they choose. Some have purchased from white men having full title and an undoubted right to sell. See Levindale Lead Co. v. Coleman, 241 U. S. 432, 36 Sup. Ct. 644, 60 L. Ed. 1080. As to this class of leases we so modify the decree that the injunction shall not include them.

[11, 12] Through purchases or leases from heirs who have certificates of competency, or are white men and not members of the tribe, the defendants have come lawfully to own, or have leases of, undivided interests in particular lands the remaining interests in which continue to be restricted; and the defendants are using or exerting control over these lands to the exclusion of the Indian owners of the restricted interests. This use or control is colorably based on unapproved leases and other forms of consent given by *581 *the other owners which are without legal sanction. Both courts rightly condemned these acts and portions of the injunction are directed against them. But as to some of the lands the injunction is open to an objection which the defendants urge against it, in that it prohibits them from "in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior." This prohibition would prevent them from selling their unrestricted interests, although that may not have been intended. It should be confined to the restricted undivided interests of the Indian owners; and we modify the decree accordingly.

Subject to the modifications here made the decree is affirmed.

Decree modified and affirmed.

(254 U. S. 590)

GEDDES et al. v. ANACONDA COPPER MINING CO. et al.

(Argued April 25, 26, 1919. Restored to Docket for Reargument. Dec. 8, 1919. Reargued March 3, 4, 1920. Decided Jan. 24, 1921.)

No. 25.

1. Monopolies 🔑24(2)—Evidence held not to justify injunction against sale of mining property as attempt to monopolize.

Evidence that a corporation produced only 22 per cent. of the copper produced in the United States, without any showing of the world production, that the price of copper had greatly fluctuated all during the corporation's existence, so that control of prices by it was not established, and that it had not restricted the output, does not show that the corporation constituted a combination to monopolize, which would authorize an injunction against a purchase of additional mining property by it under Clayton Act, § 16 (Comp. St. § 8835*o*).

2. Corporations 🔑182—Majority stockholders of solvent corporation which cannot transact its business may sell assets.

Though, as a general rule, the majority stockholders of a corporation cannot sell all its property over the protest of minority stockholders, they have authority to make such sale when it appears that the corporation, though not insolvent in the commercial sense is unable to continue the business for which it was organized, because it has proved unprofitable and there is no reasonable prospect that it can obtain the money necessary to pay its debts and continue its business.

3. Mines and minerals 🔑104 — Conditions held to authorize sale of mining property by majority stockholders.

Where a mining company had been engaged chiefly in mining silver, which had become unprofitable, and for years its only business had been leasing limited parts of its mines, from which it obtained insufficient revenue even to pay its limited expenses, and had incurred debts which it had no resources to pay except by sale of its mining property, which had a large speculative value, the conditions authorized the majority stockholders to sell the mining property of the corporation over the protest of the minority stockholders.

4. Corporations 🔑182—Sale of property for stock having market value equivalent to sale for money.

Though the majority stockholders of a corporation cannot sell all the corporation's property over the protest of the minority stockholders except for a money consideration, since the minority cannot be lawfully compelled to accept a change of investment made for them by others, a sale of the property for stock in another corporation, which has a wide and general market and can be converted into cash at any general market, is equivalent to a sale for cash at the market value of the stock received.

5. Corporations 🔑318—Transactions between corporations having common directors must be proved fair.

The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and a corporation, especially where a common director is dominating in influence or in character; and, where the fairness of such transactions is challenged, the burden is on those who would maintain them to show their entire fairness and full adequacy of consideration for any sale involved therein.

6. Appeal and error 🔑1094(1)—Concurrent findings in equity by two courts accepted, unless clearly erroneous.

In a suit in equity, a concurrent finding by two courts on a question of fact will be accepted by the Supreme Court, unless it be clear that it is erroneous.

7. Corporations 🔑189(13)—Collusive sale by one corporation to another for inadequate price cannot be affirmed, because better bid was not made at public sale.

Where the court found that a sale by one corporation to another which had a common controlling director was made for an inadequate consideration, it could not direct a public sale of the property, and thereafter confirm the original sale because no better bid was received at such sale, since the amount of the bid at a public sale is not a measure of the value of property, and especially since there was no support in the pleadings for an order to sell the property on terms other than those agreed on.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by Peter Geddes and others against Anaconda Copper Mining Company and others, to set aside a sale of mining property by the corporation, in which plaintiffs were minority stockholders. A decree of the District Court confirming the sale (222 Fed. 129) was affirmed by the Circuit Court of Appeals (245 Fed. 225, 157 C. C. A. 417), and complainants appeal. Reversed and remanded.

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*Messrs. Thomas J. Walsh and C. B. Nolan, both of Helena, Mont., for appellants.

Messrs. W. B. Rodgers, of Butte, Mont., and L. O. Evans, of Butte, Mont., for appellees.

Mr. Justice CLARKE delivered the opinion of the Court.

With formalities, which are not assailed, a special meeting of the stockholders of the Alice Gold & Silver Mining Company, by resolution, ratified a contract in writing theretofore authorized by the board of directors and executed by the officers of the company for the sale to the Anaconda Copper Mining Company of all the property, of every kind, of the Alice Company. The officers were authorized and directed to execute such deeds and assignments as should be necessary to complete the sale, and a deed in form conveying all of the Alice property to the Anaconda Company was executed and delivered

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by *them on May 31, 1910. The consideration, 30,000 shares of the capital stock of the Anaconda Company, was paid, and the purchaser took possession of the property.

Almost a year later, on April 15, 1911, at a special meeting of the stockholders of the Alice Company a resolution was adopted, by the vote of more than two-thirds of the issued capital stock, in favor of dissolving the corporation, and the board of directors was authorized to take the court action prescribed by the laws of Utah, under which the company was organized, to accomplish such dissolution. Suit for this purpose was instituted in the appropriate state court.

On November 6, 1911, five months after the resolution in favor of dissolution was adopted, the bill in this case was filed by minority stockholders, praying for a decree, that the deed of May 31, 1910, be declared void, that it be delivered up and canceled, that the consideration for it be returned to the Anaconda Company, and that all court proceedings to dissolve the Alice Company be stayed pending final decree in the case. The District Court approved and confirmed the sale, and its decree was affirmed by the Circuit Court of Appeals. The case is here on appeal.

The appellants claimed in the courts below and argue here that the sale was voidable for four reasons, viz.:

(1) Because the purchase was made in pursuit of the purpose of the Amalgamated Copper Company and the Anaconda Company to monopolize the production of copper in the Butte Camp and to restrain the sale of it in interstate commerce and in the markets of the world, in violation of the Sherman Anti-Trust Act;

(2) Because the owners of less than all of the capital stock of the Alice Company could not authorize the sale of all of the property of the corporation over the protest of owners of a minority of the stock;

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*(3) Because the Alice Company could not lawfully acquire stock in another corporation; and

(4) Because the sale was negotiated by two boards of directors, with a common membership, and for an inadequate consideration.

We shall consider these claims in the order stated.

With respect to the first contention. It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 (Comp. St. §§ 8820–8823, 8827–8830) for enforcing the rights created by it are exclusive, and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. Wilder v. Corn Products Refining Co., 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; Paine Lumber Co. v. Neal, 244 U. S. 459, 471, 37 Sup. Ct. 718, 61 L. Ed. 1256; United States v. Babcock, 250 U. S. 328, 331, 39 Sup. Ct. 464, 63 L. Ed. 1011. But the law has become thus settled since this suit was commenced in 1911, and the lower courts, upon the allegations in the bill, properly assumed jurisdiction and disposed of the case. Busch v. Jones, 184 U. S. 598, 599, 22 Sup. Ct. 511, 46 L. Ed. 707; Clark v. Wooster, 119 U. S. 322, 326, 7 Sup. Ct. 217, 30 L. Ed. 392.

It is, however, argued that section 16 of the Clayton Act (38 Stat. 730, 737 [Comp. St. § 8835*o*]), passed in 1914, was intended to, and does, modify the prior law, as declared by this court, and, since our decision will result in remanding the cause to the lower court, we shall consider its bearing upon the case.

The applicable provision of the Clayton Act is as follows:

> "Sec. 16. That any person * * * shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. * * *"

The contention of the appellants is that they will suffer irreparable loss by the sale

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of the Alice properties to the *Anaconda Company, and that the sale should therefore be enjoined because that company and the Amalgamated Copper Company constitute a combination in restraint of interstate commerce within the prohibitions of the Sherman Anti-Trust Act.

The Amalgamated Copper Company, organized in 1899, is a holding company, and in 1911, when this case was commenced, it controlled by capital stock ownership the Anaconda Company which, in turn, held the title to the physical property which had been owned by other corporations, the union of which in this manner in the Amalgamated and Anaconda Companies constituted the alleged unlawful combination in restraint of interstate trade or commerce.

The evidence in the case renders it probable, that the promoters of the Amalgamated Company, when it was organized in 1899, entertained schemes or dreams of controlling the supply and price of copper in the interstate markets of this country and in the markets of the world, and that they did what they could to make that company rich and powerful.

But we are dealing with the Anaconda Company as it was in 1911 and with the extent to which its control of production and of prices appears in the record before us.

There is evidence that the total production of copper in the United States and Alaska in 1899, was 581 million pounds, and of the Anaconda Company 1 million pounds (probably an error, 100 million pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086 million pounds, and of this the Butte Camp, in which there were several mines other than those of defendants, produced 238 million pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year.

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[1] *Whatever the fact may have been, it is obvious that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world.

The evidence with respect to price control, although meager, is more definite. The average price of copper in 1899, the year before the Amalgamated Copper Company was organized, was 17.6 per pound; in 1900 it was 16.1; in 1902, 11.6; in 1904, 12.8; in 1907, 20; in 1908, 13; in 1909, 12.98; 1912, 16; and in 1913, the last year for which the price is given, 15 cents.

It is obviously impossible to say that these fluctuating prices prove monopolistic control of the price of copper by the defendants.

No claim is made that the Anaconda Company restrained or restricted the production of copper, but so far as there is any evidence at all upon the subject it is to the effect that it maintained and perhaps increased the production in the Butte Camp.

Upon the case here made by the evidence it is impossible to conclude that the defendants constituted in 1911 such a combination, within the terms of the Anti-Trust Act, as would justify the granting of an injunction to the plaintiffs even under the provisions of section 16 of the Clayton Act, which we have quoted.

The decree of the lower courts as to this first claim must be affirmed.

[2] The second contention is that the owners of less than all of the capital stock of the Alice Company could not authorize the sale of all of the property of the corporation over the protest of owners of a minority of the stock.

It is, of course, a general rule of law that, in the absence of special authority so to do, the owners of a majority of the stock of a corporation have not the power to authorize the directors to sell all of the property of the

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company and *thereby abandon the enterprise for which it was organized. But to this rule there is an exception, as well established as the rule itself, viz. that when, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion exercised in good faith, may authorize the sale of all the property of the company for an adequate consideration, and distribute among the stockholders what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock. Thompson on Corporations (2d Ed.) §§ 2424–2429; Noyes on Intercorporate Relations, § 111; Cook on Corporations (7th Ed.) § 670, p. 217, note.

The rule that owners of a majority of the stock may not authorize the sale of all of the property of a going and not unprofitable company rests upon the principle that exercise of such power would defeat the implied contract among the stockholders to pursue the purpose for which it was chartered. But this principle fails of application when a business, unsuccessful from whatever cause, is suspended without prospect of revival, and the law recognizes that under such conditions the majority stockholders have rights as well as the minority, and that it should not require the former to remain powerless until the creeping paralysis of inactivity shall have destroyed the investment of both.

[3] The case before us is a typical one for the application of this exception to the general rule. The Alice Company was organized in 1880, under the general incorporation laws of the then territory of Utah,

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with authority *to buy, sell, lease, hold, own and operate mines, mining claims, etc., with many enumerated incidental powers. It acquired the mining properties in controversy in this case and conducted prosperously the mining chiefly of silver ores until 1893, when its business ceased to be profitable and was suspended. Extensive shafts and underground workings were permitted to fill with water and for 17 years before the sale the only business done by the company was leasing the upper workings of the old mines, and limited parts of the surface for shallow workings, to "tributors," who operated in such a small way that, although the expenses of the company, chiefly for caretakers, were very small, its income was less, so that when the sale was made an indebtedness of about $35,000 had accumulated. The stock of the company was nonassessable, it had no resources but the real estate which was sold to the Anaconda Company, and the evidence is clear that to reopen and operate the mines on its property, or to open new mines, would have been very expensive and the prospect of profitable operation of them wholly problematical. Although its properties had a large speculative value, and therefore the company cannot be said to have been insolvent, yet it must be accepted as established by the evidence that there was no reasonable prospect of the company being able to profitably resume the mining business for which it was incorporated, and that the only way in which the stockholders could realize anything from their investment was by sale of its property. Under such circumstances as these the sale of all of the property of the company, if authorized, in good faith and for an adequate consideration, by the owners of a majority of the stock would be a valid sale, which could not be defeated or set aside by the minority stockholders.

[4] It is next argued that the sale here in controversy is void for the reason that the *598 Alice Company could *not lawfully acquire and hold title to the stock in the Anaconda Company, in which the consideration for the sale was paid.

Here again the general rule is that while, under the circumstances of this case, a sale of all of the property of a corporation could be authorized by the owners of less than all of the stock for an adequate consideration, it must be for money only, for the reason that the minority stockholders may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company.

But it has been suggested that this rule, also, should be subject to the exception that when stock which has an established market value is taken in exchange for corporation property, it should be treated as the equivalent of money, and that a sale, otherwise valid, should be sustained. Noyes, Intercorporate Relations, § 120 and cases cited. We approve the soundness of such an exception. It would be a reproach to the law to invalidate a sale, otherwise valid, because not made for money, when it is made for stock which a stockholder receiving it may at once, in the New York or other general market, convert into an adequate cash consideration for what his holdings were in the corporate property.

In this case the trial judge determined without difficulty the market value of the stock received in payment for the Alice properties, and it is, of course, public knowledge that there was a wide and general market for Anaconda stock. This third contention of appellant must be denied.

Finally, it is argued that the sale of the Alice properties is void because negotiated and made by two boards of directors having a member in common and for an inadequate consideration.

John D. Ryan at the time of the sale was president and a director of the Alice Company; *599 he was also a director *and general manager of the Anaconda Company and had been its president from 1903 to 1909; he was elected a director and president of the Amalgamated Copper Company in 1909, and had been a director of each of the subsidiary companies of the combination prior to that year. In 1905 he obtained an option on the majority of the Alice stock for $600,000, and carried it until it was purchased by the Butte Coalition Company, an Amalgamated subsidiary, of which he was a director, and that company voted a majority of the Alice stock in favor of the disputed sale.

The record shows beyond controversy that Ryan was the representative of the chief investors in the enterprise involved in this litigation, that he dominated the conduct of the practical administration of the affairs of the Amalgamated and Anaconda Companies, and that he very certainly was in control of the boards of directors of the companies which were parties to the sale of the Alice properties.

[5] The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 588, 23 L. Ed. 328; Thomas v. Brownville, etc., R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; Wardell v. Railroad Co., 103 U. S. 651, 658, 26 L. Ed. 509; Corsicana National Bank v. Johnson, 251 U. S. 68, 90, 40 Sup. Ct. 82, 64 L. Ed. 141.

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[6] *The District Court found that the price agreed to be paid by the Anaconda Company was not an adequate one, and the Circuit Court of Appeals refused to disturb that finding. With this conclusion we agree, applying the settled rule of this court that in suits in equity a concurrent finding by two courts on a question of fact will be accepted unless it be clear that their conclusion is erroneous. Baker v. Schofield, 243 U. S. 114, 118, 37 Sup. Ct. 333, 61 L. Ed. 626, and cases cited.

[7] But the District Court, notwithstanding this finding of inadequacy of price, did not set the sale aside but ordered that the Alice properties should be offered at public

auction by a master and that if no bid should be received for an amount greater than that which the Anaconda Company had agreed to pay, the sale should be confirmed. The offer at public sale was made, no bid was received and the private sale to the Anaconda Company was thereupon confirmed. The Circuit Court of Appeals, by a divided court, affirmed that decree.

Both courts relied upon Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, as authority for approving the sale for a price which they found was inadequate, after a greater amount could not be obtained for the property when offered at public sale, and in this we think they fell into error.

In the Pewabic Case the charter period of the corporation having expired, a majority of the stockholders favored the organization of a new company, with the same amount of capital stock as the old, to take over the whole of its property, and that there should be allotted to the stockholders the same number of shares which they held in the old company, or, in the alternative, that those who did not desire the stock should receive the value of their shares computed on a basis of $50,000 for the entire property of the company. The minority stockholders favored sale of the property and division of *601 the proceeds. *On bill filed by the minority stockholders the Circuit Court enjoined the transfer to the new company and ordered a public sale of the property by a master, with a proviso in the decree that if no bids were offered in excess of $50,000 above the debts of the company then the proposal of the majority should be carried into effect under the direction of the master. Before the property was offered for sale each of the parties appealed to this court from separate parts of the decree. On that appeal, in addition to a question of accounting, not material here, this court considered and decided only the question, whether on such a winding up of the affairs of a corporation the majority of the stockholders could lawfully compel the minority to either take stock in a new company or accept for their stock a value to be fixed by the majority. No mention is made in the opinion of the court of the alternative character of the order of sale, and, although it was subsequently shown that the price proposed was an inadequate one, there had not been any finding by the lower court that such was the fact when the case was decided here. It is probable that there was no objection to this feature of the decree. The minority stockholders, praying, as they were, for a public sale, for obvious reasons would not object to it, and the contention of the majority was that no sale at all should be ordered, but that their reorganization plan should be adopted. The decree of the Circuit Court that the property should be sold at public sale was confirmed without any reference being made to the action ordered if the upset price should not be obtained, and we must conclude that that part of the decree was not considered by this court.

As an original proposition, we cannot think that the amount offered for property at a public sale for cash is such a measure of its value that the failure to obtain a bid at such sale for more should be accepted by courts as a sufficient reason for affirming a *602 sale for a price which they *found, on other evidence, to be inadequate. In business life forced sales for cash are such a last resort for obtaining money that a sale "under the hammer" is synonymous with a sale at a sacrifice, and prices obtained at such sales have usually been rejected by courts when tendered as evidence of value.

In this case, from evidence as to the character of the Alice properties, their location and surroundings, and from the opinions of experts, the trial court concluded that the price paid for them was inadequate, and we cannot doubt that from like or other evidence a more trustworthy conclusion could be obtained as to what their value was than would be derived from an offer at a public sale for cash.

To this it must be added that the resolutions of the Alice Company to sell and of the Anaconda Company to purchase were for a price named to be paid and received in designated stock. Neither contemplated a public offering of the properties, and that a sale should be made at another price, greater than an amount decreed by the court, if it should be offered. Under the pleadings the court had power to confirm the sale if it was found to have been lawfully made, but only upon the terms on which the parties had contracted to make it, and when the price was found to be inadequate, a decree should have been entered vacating and setting it aside, as prayed for by the appellants.

It results that the decree of the Circuit Court of Appeals must be reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

Mr. Justice McREYNOLDS concurs in the result.

(254 U. S. 554)

CENTRAL UNION TRUST CO. OF NEW YORK v. GARVAN, Alien Property Custodian.

MERRILL et al. v. SAME.

MARSHALL et al. v. SAME (two cases).

METROPOLITAN TRUST CO. OF THE CITY OF NEW YORK v. SAME.

(Argued Jan. 10 and 11, 1921. Decided Jan. 24, 1921.)

Nos. 392–396.

1. **War 🔑12 — Congress may authorize seizure of enemy property with or without the help of a court.**

Congress had power to provide for immediate seizure in war times of property supposed to belong to the enemy, as it could provide for attachment or distraint, if adequate provision be made for a return in case of mistake; and, as it could authorize seizure in pais, it could also authorize it through help of a court, as under trading with the Enemy Act Oct. 6, 1917, § 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), giving courts jurisdiction to make necessary orders and decrees for enforcing the act.

2. **War 🔑12—Demand of Alien Property Custodian establishes right to securities deposited by enemy insurance companies.**

Under Trading with the Enemy Act Oct. 6, 1917, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c), authorizing the President to exercise his authority under the act through such officers as he may direct, which he admittedly was doing through the Enemy Property Custodian, and Act Nov. 4, 1918, giving the custodian the right to seize enemy property, a demand by the custodian for securities deposited by German insurance companies establishes that the President had required the delivery thereof to the custodian, as authorized by Trading with the Enemy Act, § 7(c)—section 3115½d—which makes out a case for enforcement of the demand by the courts under section 17 (section 3115½i).

3. **War 🔑12—Court must order delivery to Enemy Property Custodian of property demanded without determining ownership.**

Trading with the Enemy Act Oct. 6, 1917, § 7(c), as amended by Act Nov. 4, 1918 (Comp. St. Ann. Supp. 1919, § 3115½d), requires an immediate transfer of property to the Enemy Property Custodian on demand after investigation and determination by the President that it is enemy property without awaiting resort to the courts, and the determination is as decisive as in other cases under section 7(a), and requires the court to order delivery of possession of the property to the custodian, without considering whether it is enemy property, which order is not final against the right of a claimant who may file a claim under section 9 (section 3115½e), and thereafter bring suit to establish his rights.

4. **War 🔑12—Custodian's seizure of enemy property gives merely preliminary custody.**

Although Act March 28, 1918, enlarging Trading with the Enemy Act Oct. 6, 1917, § 12 (Comp. St. Ann. Supp. 1919, § 3115½ff), vests the Alien Property Custodian with powers of common-law trustee to sell and manage as an absolute owner, it does not repeal section 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), amended by Act July 11, 1919, and Act June 5, 1920, permitting claimant to file claim with the Alien Property Custodian, and requiring the property in case of suit to be retained by the custodian, so that the custodian cannot sell seized property while a suit to recover it is pending.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Libels by Francis P. Garvan, Alien Property Custodian, against $20,000, par value, of bonds, the Central Union Trust Company of New York, trustee, claimant; against $100,000 of bonds, Edwin G. Merrill and others, claimants; against $50,000 of bonds, J. Markham Marshall and others, claimants; against $25,000 of bonds, J. Markham Marshall and others, claimants; and against $100,000 of bonds, the Metropolitan Trust Company of the City of New York, trustee, claimant. Decrees for libelant were affirmed by the Circuit Court of Appeals, Second Circuit (265 Fed. 477, 481), and the claimants separately bring error. Decrees affirmed.

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*Mr. Perry D. Trafford, of New York City, for plaintiffs in error Central Union Trust Co., Merrill, Speyer, and Vanderlip.

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*Mr. Emory R. Buckner, of New York City, for plaintiffs in error Marshall, Rosen, and Metz.

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*Mr. Walter F. Taylor, of New York City, for plaintiffs in error Metropolitan Trust Co.

Mr. Lucien H. Boggs, of Jacksonville, Fla., and Assistant Attorney General Spellacy, for defendant in error.

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*Mr. Justice HOLMES delivered the opinion of the Court.

These are libels brought by the Alien Property Custodian under the Trading with the Enemy Act October 6, 1917, c. 106, § 17, 40 Stat. 411, 425 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), to obtain possession of securities in the hands of the plaintiffs in error respectively as trustees. The libel in each case alleges that the Alien Property Custodian after investigation determined that a German insurance company named was an enemy not holding a license from the President, etc.; that certain specified securities belonged to it or were held for its benefit by the party now appearing as a plaintiff in error in that case; and that a demand for the property had been made but not complied with. The libellant prayed an order directing the marshal to seize the property and citing claimants of a right to possession to show cause why the same should not be delivered to him. The plaintiffs in error appeared as claimants in their several cases, denied that the funds were held for the benefit of an enemy, and *566 set up the trust under which they held *them as required by the laws of Massachusetts or Connecticut for the security of American policyholders and creditors, with reasons for their right to retain the funds alleged in detail. The libellant moved for decrees for possession upon the pleadings which were granted by the District Court. The decrees were affirmed by the Circuit Court of Appeals, Garvan v. $20,000 Bonds, 265 Fed. 477; Garvan v. $6,000 Bonds, 481. As the decision of the latter Court is not made final by the statute the cases have been brought on writ of error to this Court.

[1] As is obvious from the statement of the pleadings the libels are brought upon the theory that these are purely possessory actions and that for the purposes of immediate possession the determination of the Enemy Property Custodian is conclusive, whether right or wrong. The claimants on the other hand set up substantive rights and seek to have it decided in these suits whether the funds are enemy property in fact and whether they have not the right to detain them. Strictly possessory actions still survive in the laws of some States and have been upheld, leaving the party claiming title to a subsequent suit. Grant Timber & Manufacturing Co. v. Gray, 236 U. S. 133, 35 Sup. Ct. 279, 59 L. Ed. 501. There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of mistake. As it can authorize a seizure in pais it can authorize one through the help of a Court. The only questions are whether it has done so as supposed by the libellant and if so whether the conditions imposed by the Act have been performed.

[2] If the Custodian was entitled to demand the delivery of the property in question it does not seem to need argument to show that the demand could be enforced by the District Courts under section 17 of the Act, giving to those Courts jurisdiction to *567 make all such orders and decrees as may *be necessary and proper to enforce the provisions of the Act. The first question then is whether the Custodian had the right to make the demand. By section 5 (section 3115½c) the President may exercise any power or authority conferred by the Act through such officers as he may direct. It is admitted that he has exercised the powers material to these cases through the Enemy Property Custodian and by the Act of November 4, 1918, c. 201, 40 Stat. 1020, the Custodian is given the right to seize. By section 7 (c)—section 3115½d—as originally enacted:

> "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

We are to take it therefore that the President has "so required," and that a case is made out under section 17 unless we are to consider the defences interposed.

[3] If we look no further than section 7 (c), it is plain that obedience to the statute requires an immediate transfer in any case within its terms without awaiting a resort to the Courts. The occasion of the duty is a demand after a determination by the President and it is hard to give much meaning to the words "which the President after investigation shall determine is so * * * held" unless the determination and demand call the duty into being. The condition "after investigation" additionally points to the intent to make his act decisive upon the point, as it is in other cases mentioned in section 7 (a). But it is said that the subject of the section is enemy property only and therefore that the determination cannot be final in its effect. Day v. Micou, 18 Wall. 156, 21 L. Ed. 860. And it is true that it is not final against the claimant's rights. Upon surrender the claimant may at once file a claim under section 9 (section 3115½e), if he satisfies the repre*568 senta*tive of the President may obtain a return, and, if he does not obtain it in sixty days after filing his application, or forthwith if he has given the required notice but filed no application to the President, may bring a suit to establish his rights in the District Court, in which case the property is to be retained by the Custodian until final decree. These provisions explain the initial words of section 7 (c) as saving the ultimate rights of the claimant while the determination of the President still may be given effect to carry out an immediate seizure for the security of the Government until the final decision upon the right. The reservation implies that mistakes may be made and assumes that the transfer will take place whether right or wrong.

The argument on the original words of the Act in view of the manifest purpose seems to us to be strong, but it appears to us to be much strengthened by the amendments of later date. By the Act of November 4, 1918, c. 201, 40 Stat. 1020, section 7 (c), was amended among other things by adding after the requirements of transfer "or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act." This shows clearly enough the peremptory character of this first step. It cannot be supposed that a resort to the Courts is to be less immediately effective than a taking with the strong hand. Clinkenbeard v. United States, 21 Wall. 65, 22 L. Ed. 477, has no application. That was debt on a bond for a tax and turned on the right of the Government to the tax, not on possession. By a later paragraph "the sole relief and remedy of any person having any claim to any * * * property" transferred to the Custodian "or required so to be, or seized by him shall be that provided by the terms of this Act." The natural interpretation of this clause is that it refers to the remedies expressly provided, in this case by section 9; that property required to be transferred and property seized stand on the same footing, not that the resort by the Custodian *to the Courts instead of to force opens to the person who has declined to obey the order of the statute or who has prevented a seizure a right by implication to delay what the statute evidently means to accomplish at once.

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[4] To the conclusion that we reach it is objected that the Custodian gets a good deal more than bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460 (Comp. St. Ann. Supp. 1919, § 3115½ff), enlarging section 12, the Custodian "shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed," etc., to him, and is given the power to sell and manage the same as though he were absolute owner. All this may be conceded if no claim is filed. But this act did not repeal section 9, which is amended by the later Acts of July 11, 1919, c. 6, 41 Stat. 35, and of June 5, 1920, c. 241, 41 Stat. 977, and as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result. The present proceeding gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more.

Decrees affirmed.

The Chief Justice took no part in the consideration or decision of these causes.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(254 U. S. 617)

No. 301. NEW ORLEANS DRY DOCK & SHIPBUILDING COMPANY, plaintiff in error, v. John A. S. GRAY. Jan. 3, 1921. In error to the Supreme Court of the State of Louisiana. For opinion below, see Gray v. New Orleans Dry-Dock & Shipbuilding Co., 146 La. 826, 84 South. 109. Mr. John Flannery, of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(254 U. S. 653)

No. 612. UNITED STATES FIDELITY & GUARANTY COMPANY et al., plaintiffs in error, v. TRAVELERS INSURANCE MACHINE COMPANY. Jan. 3, 1921. For opinion below, see 224 S. W. (Ky.) 496. Petition for a writ of certiorari herein denied.

(254 U. S. 653)

No. 623. SEABOARD AIR LINE RAILWAY COMPANY, petitioner, v. Lee VANDIVER. Jan. 3, 1921. For opinion below, see 104 S. E. 24. Mr. Hollins N. Randolph, of Atlanta, Ga., for petitioner. Mr. Virgil E. Adams, of Atlanta, Ga., for respondent. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia denied.

(254 U. S. 654)

No. 625. Emma F. RUMSEY, petitioner, v. NEW YORK LIFE INSURANCE COMPANY et al. Jan. 3, 1921. For opinion below, see 267 Fed. 554. Mr. T. J. O'Donnell, of Denver, Colo., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 654)

No. 628. BOSTON, CAPE COD & NEW YORK CANAL COMPANY, petitioner, v. C. W. CHADWICK & COMPANY. Jan. 3, 1921. For opinion below, see 266 Fed. 775. Messrs. Samuel H. Pillsbury and Thomas H. Mahony, both of Boston, Mass., for petitioner. Messrs. Edward E. Blodgett and Foye M. Murphy, both of Boston, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(254 U. S. 654)

No. 630. Benjamin F. DORRANCE et al., petitioners, v. Charles Francis DORRANCE. Jan. 3, 1921. For opinion below, see 264 Fed. 53. Mr. Wm. A. Glasgow, Jr., of Philadelphia, Pa. (Mr. Wm. J. Hughes, of Washington, D. C., of counsel), for petitioners. Messrs. J. A. Collett, K. McC. De Weese, of Kansas City, Mo., and Charles A. Houts, of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 666)

No. 141. BLUMENSTOCK BROTHERS ADVERTISING AGENCY, plaintiff in error, v. The CURTIS PUBLISHING COMPANY. Jan. 10, 1921. In error to the United States Circuit Court of Appeals for the Seventh Circuit. For opinion below, see 258 Fed. 927, 170 C. C. A. 123. Mr. Colin C. H. Fyffe, of Chicago, Ill., for plaintiffs in error. Dismissed with costs on motion of counsel for the plaintiff in error.

(254 U. S. 619)

No. —, original. Ex parte In the matter of the CITY OF DALLAS, petitioner. Jan. 11, 1921. Mr. Francis Marion Etheridge, of Dallas, Tex., for petitioner. Motion for leave to file petition for a writ of mandamus herein submitted by Mr. Francis Marion Etheridge for the petitioner.

(254 U. S. 666)

No. 550. The UNITED STATES of America, appellant, v. UNITED SHOE MACHINERY CORPORATION et al. Jan. 11, 1921. Appeal from the District Court of the United States for the Eastern District of Missouri. For opinion below, see 264 Fed. 138. Mr. W. L. Frierson, Solicitor General, of Chattanooga, Tenn., for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the appellant.

No. —, original. Ex parte In the matter of The CITY OF DALLAS, petitioner. Jan. 17, 1921. See, also, 254 U. S. 619, 41 Sup. Ct. 217, 65 L. Ed. —. Motion for leave to file a petition for a writ of mandamus herein denied.

(254 U. S. 619)

No. —, original. Ex parte In the matter of HUSSEIN LUTFI BEY, Master of the Turkish Government Steamship GUL DJEMAL, petitioner. Jan. 17, 1921. Motion for leave to file a petition for writs of prohibition and/or mandamus herein denied.

(254 U. S. 617)

No. 132. Henry RALPH and Mary Thoms, plaintiffs in error, v. Harry W. HOWARTH, Administrator, etc. Jan. 17, 1921. In error to the Supreme Court of the State of Nebraska. Mr. Byron G. Burbank, of Omaha, Neb., for plaintiffs in error. Messrs. Oscar C. Anderson, Otto H. Zacek and Hugo M. Nicholson, all of West Point, Neb., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

(254 U. S. 618)

No. 135. The UNITED STATES of America ex rel. C. E. SYKES, plaintiff in error, v. John Barton PAYNE, Secretary of the Interior. Jan. 17, 1921. In error to the Court of Appeals of the District of Columbia. For opinion below, see United States v. Lane, 49 App. D. C. 48, 258 Fed. 520. Mr. Francis W. Clements, of Washington, D. C., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon authority of subdivision 5 of section 250 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1159 [Comp. St. § 1227]); United States ex rel. Champion Lumber Co. v. Fisher, Secretary of the Interior, 227 U. S. 445, 33 Sup. Ct. 329, 57 L. Ed. 591.

(254 U. S. 618)

No. 137. FITCH, CORNELL & COMPANY, plaintiff in error, v. The ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY. Jan. 17, 1921. In error to the Supreme Court of the State of New York. For opinion below, see 226 N. Y. 597, 123 N. E. 864, which affirms judgment, 170 App. Div. 222, 155 N. Y. Supp. 1079. Mr. Henry M. Wise, of New York City, for plaintiff in error. Messrs. Gardiner Lathrop and S. T. Bledsoe, both of Chicago, Ill., and A. S. H. Bristow, of New York City, for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

(254 U. S. 618)

No. 168. Louis H. DENEE, plaintiff in error, v. Peter MORRISON. Jan. 17, 1921. In error to the Supreme Court of the State of Washington. For opinion below, see 95 Wash. 76, 163 Pac. 382. Mr. Fred B. Morrill, of Spokane, Wash., for plaintiff in error. Mr. Reese H. Voorhees, of Spokane, Wash., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

No. 374. PUEBLO OF LAGUNA, appellant, v. Jose CANDELARIA et al. Jan. 17, 1921. Mr. Francis C. Wilson, of Santa Fé, N. M., for appellant. Motion for further consideration of the motion to dismiss or affirm denied.

(254 U. S. 666)

No. 469. The PULLMAN COMPANY, petitioner, v. The STATE INDUSTRIAL COMMISSION. Jan. 17, 1921. On writ of certiorari to the Supreme Court, Appellate Division, Third Department, of the State of New York. For opinion below, see Bryant v. Pullman Co., 228 N. Y. 579, 127 N. E. 909, which affirmed order, 188 App. Div. 311, 177 N. Y. Supp. 488. See, also, 254 U. S. 624, 41 Sup. Ct. 9, 65 L. Ed. —. Mr. Maurice C. Spratt, of Buffalo, N. Y., for petitioner. Dismissed per stipulation.

(254 U. S. 654)
No. 620. ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error, v. C. B. JOHNSON. Jan. 17, 1921. For opinion below, see 87 South. 866. Petition for a writ of certiorari herein denied.

(254 U. S. 655)
No. 627. Joshua SYKES et al., petitioners, v. The UNITED STATES of America. Jan. 17, 1921. For opinion below, see 264 Fed. 945. Mr. Theodore A. Bell, of San Francisco, Cal., for petitioners. Mr. Robert P. Stewart, Asst. Attorney General, and Mr. Harry S. Ridgely, of Washington, D. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 655)
No. 631. John Barton PAYNE, as Agent, etc., petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. Jan. 17, 1921. For opinion below, see Hines v. Industrial Accident Commission, 192 Pac. 859. Mr. Henle C. Booth, of San Francisco, Cal. (Mr. Wm. F. Herrin, of San Francisco, Cal., of counsel), for petitioner. Mr. Warren H. Pillsbury, of San Francisco, Cal., for respondent Industrial Commission. Mr. Neal Power, of San Francisco, Cal., for respondents Brizzolara. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

(254 U. S. 655)
No. 647. John W. SEAMAN et al., appellants, v. Samuel W. ADLER. Jan. 17, 1921. For opinion below, see Adler v. Seaman, 266 Fed. 828. Petition for a writ of certiorari herein denied.

(254 U. S. 655)
No. 658. LEE WING WAH et al., petitioners, v. Edward WHITE, as Commissioner of Immigration, etc. Jan. 17, 1921. For opinion below, see 264 Fed. 961. Messrs. Jackson H. Ralston and George W. Hott, both of Washington, D. C. (Mr. Geo. A. McGowan, of San Francisco, Cal., of counsel), for petitioners. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Harry S. Ridgely, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(254 U. S. 655)
No. 660. The FIRST NATIONAL BANK OF CASSELTON, NORTH DAKOTA, petitioner, v. Frank M. SMITH. Jan. 17, 1921. For opinion below, see Smith v. First Nat. Bank, 268 Fed. 780. Mr. Matthew W. Murphy, of Fargo, N. D., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(254 U. S. 656)
No. 661. The DIRECTOR GENERAL OF RAILROADS, petitioner, v. Mabel BENNETT, Administratrix, etc. Jan. 17, 1921. For opinion below, see 268 Fed. 767. Mr. Wm. Clarke Mason, of Philadelphia, Pa., for petitioner. Messrs. Frank F. Davis and John C. Oldmixon, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 656)
No. 662. The DIRECTOR GENERAL OF RAILROADS, petitioner, v. Minnie TEMPLIN, Administratrix, etc. Jan. 17, 1921. For opinion below, see 268 Fed. 483. Mr. Wm. Clarke Mason, of Philadelphia, Pa., for petitioner. Mr. Frank F. Davis, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 656)
No. 667. Walker D. HINES, as Agent, etc., petitioner, v. Harvey K. KEYSER. Jan. 17, 1921. For opinion below, see 268 Fed. 772. Mr. Wm. Clarke Mason, of Philadelphia, Pa., for petitioner. Messrs. Frank F. Davis and John C. Oldmixon, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(254 U. S. 656)
No. 676. George Francis ROWE, petitioner, v. John M. BOYLE, as United States Marshal, etc. Jan. 17, 1921. For opinion below, see 268 Fed. 809. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. Jan. 18, 1921. See, also, 254 U. S. 280, 41 Sup. Ct. 146, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for State of Texas. Fourth report of receiver filed, on motion of Mr. John S. Flannery, of Washington, D. C., of counsel for receiver.

(254 U. S. 666)
No. 169. WABASH RAILROAD COMPANY, plaintiff in error, v. BOARD OF REVIEW OF COOK COUNTY, ILLINOIS. Jan. 18, 1921. In error to the Supreme Court of the State of Illinois. For opinion below, see 288 Ill. 159, 123 N. E. 259. Mr. E. Marvin Underwood, of Atlanta, Ga., for plaintiff in error. Mr. Edward J. Brundage of Chicago, Ill., for defendant in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(254 U. S. 667)
No. 165. Joseph B. BEUTEL et al., plaintiffs in error, v. Oscar G. FOREMAN et al., Trustees, etc. Jan. 19, 1921. In error to the Supreme Court of the State of Illinois. For opinion below, see 288 Ill. 106, 123 N. E. 270. Messrs. Albert Fink and David D. Stansbury, both of Chicago, Ill., for plaintiffs in error. Messrs. Samuel A. Ettelson and Chester E. Cleveland, both of Chicago, Ill., for defendants in error. Dismissed with costs, pursuant to the tenth rule.

(255 U. S. 44)

ALASKA FISH SALTING & BY-PRODUCTS CO. v. SMITH.

(Argued Jan. 20 and 21, 1921. Decided Jan. 31, 1921.)

No. 166.

1. **Licenses 🔑7(3)—Greater tax on manufacturers of fertilizer, etc., from one kind of fish than from others, not unconstitutional.**

Assuming that Acts Alaska May 1, 1913 (Laws 1913, c. 52), April 29, 1915 (Laws 1915, c. 76), and May 3, 1917 (Laws 1917, c. 74), levying license taxes on manufacturers of fish oil, and fertilizer from herring, impose higher taxes than are imposed on manufacturers of fish oil or fertilizer from other fish or from the offal of salmon, they do not, for that reason, contravene the Constitution.

2. **Eminent domain 🔑2(11)—Licenses 🔑7(1)—That business is destroyed does not invalidate statute or require compensation.**

Though a license tax should destroy a business, it would not be made invalid or require compensation upon that ground alone, as those entering upon the business take that risk.

3. **Statutes 🔑279—Acts judged by contents, and not by allegations as to purpose.**

Statutes must be judged by their contents, and not by allegations as to their purpose in a complaint.

4. **Statutes 🔑55—Acts of Congress held not "fish laws" within act prohibiting repeal of such laws by territorial Legislature.**

Act Cong. June 6, 1900, § 29, and Act June 26, 1906 (Comp. St. §§ 3628–3643), imposing taxes on fish oil works and fertilizer works, are not "fish laws" within Act Aug. 24, 1912 (Comp. St. §§ 3528–3544), providing that the power of the Alaska Legislature to alter and repeal laws shall not extend to fish laws of the United States applicable to Alaska.

5. **Statutes 🔑55—Territorial statute licensing manufacturers of fertilizer, etc., held not contrary to acts of Congress.**

Act Cong. June 6, 1900, § 29, and Act June 26, 1906 (Comp. St. §§ 3628—3643), imposing taxes on fish oil works and fertilizer works, in Alaska, do not import a license to such works, and Acts Alaska, May 1, 1913 (Laws 1913, c. 52), April 29, 1915 (Laws 1915, c. 76), and May 3, 1917 (Laws 1917, c. 74), levying license taxes on manufacturers of fish oil and fertilizer, claimed to be prohibitory, are not in conflict therewith.

6. **Licenses 🔑7(3)—Not lacking in uniformity because greater tax imposed on one class of manufacturers than on others.**

Acts Alaska May 1, 1913 (Laws 1913, c. 52), April 29, 1915 (Laws 1915, c. 76), and May 3, 1917 (Laws 1917, c. 74), levying license taxes on manufacturers of fish oil, fertilizer, etc., from herring, do not violate Act Cong. Aug. 24, 1912, § 3 (Comp. St. § 3530), requiring taxes to be uniform upon the same class of subjects, though the tax is greater than that imposed on persons manufacturing oil and fertilizer from other fish or the offal of salmon, as the Legislature was warranted in making such classification.

7. **Licenses 🔑8(1)—Statutory provision limiting amount of taxes held inapplicable.**

Act Cong. Aug. 24, 1912, § 9 (Comp. St. § 3536) providing that no tax shall be levied in Alaska for territorial purposes in excess of one per centum upon the assessed valuation of property, does not apply to a license tax on manufacturers of fish oil, fertilizer, etc.

8. **Licenses 🔑7(8)—Double taxation by United States and territorial Legislature held permitted by statute.**

Under Act Cong. Aug. 24, 1912 (Comp. St. §§ 3528–3544), providing that the Alaska Legislature may not alter or repeal laws providing for taxes on business and trade, but that this shall not prevent the Legislature from imposing other and additional taxes or licenses, a taxpayer cannot object that license taxes are imposed both by the United States and by the territory.

In Error to the District Court, Division No. 1, of the Territory of Alaska.

Action by the Alaska Fish Salting & By-Products Company against Walstein G. Smith. Judgment for defendant, and plaintiff brings error. Affirmed.

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*Messrs. R. E. Robertson, of Juneau, Alaska, and Harvey M. Friend, of Washington, D. C., for plaintiff in error.

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*Mr. J. C. Murphy, of Anchorage, Alaska, for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action to recover the amount of taxes levied under statutes of Alaska which the plaintiff alleges to be contrary to the Act of Congress of August 24, 1912, c. 387, § 3, 37 Stat. 512 (Comp. St. § 3530), creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. Judgment was given for the defendant upon demurrer to the complaint, the parties agreeing that the foregoing grounds of recovery were the only matters in dispute. The statutes attacked, viz.: May 1, 1913 (Laws 1913, c. 52), April 29, 1915 (Laws 1915, c. 76), and May 3, 1917 (Laws 1917, c. 74), levy license taxes of two dollars a barrel and two dollars a ton respectively, upon persons manufacturing fish oil, fertilizer and fish meal in whole or in part from herring. The Act of Congress after giving effect to the Constitution and laws of the United States in the Territory provides that the authority therein granted to the legislature "to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the * * * fish * * * laws * * * of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade. * * * Provided, further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses." Some reliance is placed also upon section 9 (section 3536) that all taxes shall be uniform upon the same class of subjects, &c., and that no tax shall be levied for *48 *territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year.

[1-3] The complainant alleges that the tax will prohibit and confiscate the plaintiff's business, which is that of manufacturing fish oil, fertilizer, fish meal and by-products from herring either in whole or in part; that the tax unreasonably discriminates against the plaintiff, as it levies no tax upon the producers of fish oil, &c., from other fish, and is otherwise extortionate; and that it contravenes the Act of Congress in lack of uniformity and in exceeding one per centum of the actual value of the plaintiff's property. The prophecies of destruction and the allegations of discrimination as compared with similar manufactures from salmon are denied by the Attorney General for Alaska, the latter denial being based upon a comparison of the statutes which of course is open. We are content however to assume for the purposes of decision that, not to speak of other licenses, the questioned Acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the Constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. See Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 482, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. We need not consider whether abuses of the power might go to *49 *such a point as to transcend it, for we have not such a case before us. The Acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation. The case is different from those where the power to tax is limited to inspection fees and the like, as in Postal Telegraph & Cable Co. v. Taylor, 192 U. S. 64, 72, 24 Sup. Ct. 208, 48 L. Ed. 342.

[4, 5] But it is said that however it may be with regard to the Constitution taken by itself, the statutes brought into question are contrary to the act of Congress from which the local legislature derives its power. In the first place they are said to be an attempt to modify or repeal the fish laws of the United States. The Act of Congress of June 6, 1900, c. 786, § 29; 31 Stat. 321, 331; Alaska Compiled Laws, § 2569; imposes a tax on fish oil works of ten cents per barrel and on fertilizer works of twenty cents per ton, repeated in slightly different words by the Act of June 26, 1906, c. 3547; 34 Stat. 478 (Comp. St. § 3628); Alaska Compiled Laws, § 259. But these are not fish laws as we understand the phrase. It is argued, however, that at least they import a license, License Tax Cases, 5 Wall. 462, 470, 18 L. Ed. 497, and that a tax alleged to be prohibitory flies in their teeth. It would be going far to say that a tax on fish oil works in general terms imported a license to a specific kind of works deemed undesirable by the local powers, and when we take into account the express and unlimited authority to impose additional taxes and licenses we are satisfied that the objection should not prevail. We confine our decision to the statutes before us, repeating in this connection that they must be judged by their contents not by the characterization of them in the complaint.

[6-8] The requirement of uniformity in section 9 is disposed of by what we have said of the classification when considered with reference to the Constitution. The legis- *50 lature was *warranted in treating the making of oil and fertilizer from herring as a different class of subjects from the making of the same from salmon offal. The provisions against taxing in excess of one per centum of the assessed valuation of property does not apply to a license tax like this. This is not a property tax. Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52, 61, 149 C. C. A. 262. The objection that the plaintiff in error is doubly taxed, first by the United States and then by the Territory, is answered by the express authority to levy additional taxes to which we have referred heretofore. Without going into more detail we are of opinion that the tax must be sustained.

Judgment affirmed.

(255 U. S. 50)

STARK BROS. NURSERIES & ORCHARDS CO. v. STARK et al.

(Argued Jan. 21, 1921. Decided Jan. 31, 1921.)

No. 171.

1. Courts ⟹292—In suit for infringement of registered trade-mark, no damages recoverable for unfair competition before notice.

Under Trade-Mark Act, § 28 (Comp. St. § 9514), providing that in any suit for infringement no damages shall be recovered, except on proof that defendant was duly notified of the infringement and continued it after such notice, in a suit in the federal court between citizens of the same state for infringement of a registered trade-mark, damages for unfair competition or profits therefrom prior to the giving of notice are not recoverable, as any cause of action plaintiff has outside the statute must be asserted in some other court.

2. Courts ⟹292—Notice or willfulness held not to authorize recovery for unfair competition before notice of infringement of trademark.

Under Trade-Mark Act, § 28 (Comp. St. § 9514), notice by the owner of a registered trade-mark to defendants to "discontinue the unfair competition and infringement on our rights," or the willful character of defendants' wrongdoing, did not authorize recovery for unfair competition prior to notice of an infringement, in a suit in a federal court between citizens of the same state.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Stark Bros. Nurseries & Orchards Company against William P. Stark and another, trustees doing business as the William P. Stark Nurseries. A decree for plaintiff (248 Fed. 154) was modified by the Circuit Court of Appeals (Stark v. Stark Bros. Nurseries & Orchards Co., 257 Fed. 9, 168 C. C. A. 221), and plaintiff brings certiorari. Affirmed.

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*Mr. Andrew B. Remick, of St. Louis, Mo., for petitioner.

Mr. Xenophon P. Wilfley, of St. Louis, Mo., for respondents.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought September 11, 1916, in the District Court of the United States by the petitioner, a Missouri corporation, against citizens of Missouri, for an infringement of a trade-mark, "Stark Trees," registered under the Act of Congress of February 20, 1905, c. 592, 33 Stat. 724, and amendments (Comp. St. §§ 9485–9516). The District Court found infringement and unfair competition, granted an injunction, and made a decree for an account of profits from March 11, 1914, when the infringement began, limiting the damages, however, to those suffered after August 26, 1916, that being the date when the plaintiff gave the defendant notice of the registration of the mark. The Circuit Court of Appeals concurred with the District Court as to the facts but limited the account as well as the damages to the date when notice was given of the registered mark, a few days before the bringing of this suit. 248 Fed. 154; Stark v. Stark Bros. Nurseries & Orchards Co., 257 Fed. 9, 168 C. C. A. 221. This limitation is the only question here.

[1] By section 28 of the Trade-Mark Act it is made the duty of the registrant to give notice to the public by attaching certain specified words or abbreviations to the trademark or to the receptacle wherein the article is enclosed; "and in any suit for infringement by a party failing so to give notice of registration no damages shall be recovered, except on proof that the defendant was duly notified of infringement, and continued the same after such notice." 33 Stat. 730 (Comp. St. § 9514). The infringement that is sued for is infringement of a registered trade-

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mark, not infringement *of a trade-mark. That is the plain meaning of the above words and the necessary scope of this suit since that is the scope of the jurisdiction of the District Court. A. Lescher & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U. S. 166, 172, 26 Sup. Ct. 425, 50 L. Ed. 710. It seems very plain that the plaintiff had a cause of action outside the statute, but that would have to be asserted elsewhere, as the suit was between citizens of the same State. The statute alone gave the right to come into this Court of the United States. Coming in to assert its statutory rights we will assume in the plaintiff's favor that it could recover for unfair competition that was inseparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source.

[2] The plaintiff argues that a notice of March 11, 1914, calling on the defendants "to discontinue the unfair competition and infringement on our rights," coupled with the willful character of the defendants' wrongdoing ought to lead to a different result, and the District Judge seems to have had a similar notion. But that is to forget the origin and necessary limit of the jurisdiction in this case.

Decree affirmed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(255 U. S. 52)

HOGAN v. O'NEILL, Chief of Police.

(Submitted under Twentieth Rule Nov. 8, 1920. Decided Jan. 31, 1921.)

No. 120.

1. **Indictment and information 🔑86(8)—Indictment held to charge commission of crime within state under statute.**

Under Rev. Laws Mass. c. 218, § 20, providing that the name of the county and court in the caption of an indictment shall be considered an allegation that the act was committed within the territorial jurisdiction of the court, etc., an indictment for conspiracy the caption of which stated the county and court, was sufficient to charge the commission of a crime in Massachusetts.

2. **Evidence 🔑35—United States courts take judicial notice of laws of state courts.**

In habeas corpus by one in custody under an extradition warrant, the United States courts take notice of the laws of the demanding state as to the sufficiency of indictments.

3. **Extradition 🔑35—Governor entitled to take notice of laws of demanding state.**

The Governor of a state upon whom a requisition is made under Rev. St. § 5278 (Comp. St. § 10126), for surrender of a fugitive from justice, is at liberty to take notice of the laws of the demanding state as to the requisites of indictments.

4. **Habeas corpus 🔑92(2)—Sufficiency of indictment as pleading not open to inquiry.**

In a habeas corpus proceeding by one in custody under an extradition warrant, the sufficiency of the indictment as a pleading is not open to inquiry.

5. **Habeas corpus 🔑111 (1) — Defendant, charged with conspiracy, not entitled to discharge because overt act not alleged or proved.**

On habeas corpus by one in custody under an extradition warrant issued on requisition of the Governor of Massachusetts accompanied by an indictment for conspiracy, the petitioner is not entitled to discharge because there is no allegation or proof of an overt act, as under the law of Massachusetts a conspiracy to commit a crime is itself a criminal offense, though no overt act be done in pursuance of it.

6. **Conspiracy 🔑27—Overt act not essential in Massachusetts.**

By the law of Massachusetts, as by the common law, a conspiracy to commit a crime is itself a criminal offense, though no overt act be committed; there being no statute making criminality dependent upon the commission of an overt act.

7. **Extradition 🔑30—Person in demanding state about time of offense subject to extradition.**

Under Const. art. 4, § 2, and Rev. St. § 5278 (Comp. St. § 10126), defendant, who was charged by indictment with a criminal offense committed in Massachusetts on or about August 18, 1916, and by his own admission was in Massachusetts and in communication with his alleged co-conspirator at or about that time, could be returned to Massachusetts as a fugitive from justice.

8. **Habeas corpus 🔑92(2)—Governor's determination that prisoner is fugitive conclusive, unless clearly overthrown.**

In an extradition proceeding, the question whether the prisoner was in fact a fugitive from justice was for the determination of the Governor of the state where he was found, and his conclusion must stand in a habeas corpus proceeding, unless clearly overthrown.

9. **Extradition 🔑30—"Fugitive from justice" need not leave state for purpose of avoiding prosecution.**

To be regarded as a "fugitive from justice," it is not necessary that one shall have left the state for the very purpose of avoiding prosecution; it being sufficient that, having committed there an act constituting a crime, he afterwards has departed from its jurisdiction, and when sought to be prosecuted is found in another state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

Appeal from the District Court of the United States for the District of New Jersey.

Habeas corpus by Charles K. Hogan against William H. O'Neill, Chief of Police of the City of East Orange, N. J. From a final order discharging the writ and remanding petitioner to defendant's custody, the petitioner appeals. Affirmed.

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*Mr. Reuben D. Silliman, of New York City, for appellant.

Mr. Joseph C. Pelletier, of Boston, Mass., for appellee.

Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal from a final order of the District Court discharging a writ of habeas corpus and remanding appellant to the custody of appellee for rendition to a representative of the commonwealth of Massachusetts, pursuant to a warrant issued by the Governor of New Jersey under section 5278, Rev. Stat. U. S. (Comp. St. § 10126).

Upon the hearing before the District Court on return of the habeas corpus, it appeared that a demand for appellant's apprehension and extradition to Massachusetts *had been made by the Governor of that commonwealth upon the Governor of New Jersey, accompanied with a copy of an indictment found by the grand jury of Suffolk county, certified as authentic by the Governor of Massachusetts, and an affidavit to the effect that appellant was in the commonwealth for some time previous to and at the time of the commission of the alleged crime, and afterwards fled therefrom.

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The following is a copy of the indictment (signatures omitted):

"Commonwealth of Massachusetts, Suffolk, ss:

"At the Superior Court Begun and Holden at the City of Boston, Within and for the County of Suffolk, for the Transaction of Criminal Business, on the First Monday of February, in the Year of our Lord One Thousand Nine Hundred and Nineteen.

"The jurors for the commonwealth of Massachusetts on their oath present that Charles K. Hogan and Luther R. Hanson, on the eighteenth day of August in the year of our Lord one thousand nine hundred and sixteen, conspired together to steal the property, moneys, goods and chattels of the Market Trust Company, a banking corporation legally established and existing."

It appeared that since the month of May, 1915, appellant had resided continuously at East Orange, N. J.; but he admitted that in the summer of 1916—he said he could not remember the date—he visited Boston and spent some time in the company of Hanson, the alleged co-conspirator.

[1-3] It is objected that the indictment does not charge appellant with the commission of a crime in Massachusetts; but when it is read in the light of the laws of that commonwealth the difficulty disappears. Revised Laws of Massachusetts, c. 218, § 20, reads thus:

"The time and place of the commission of the crime need not be alleged unless it is an essen- *55 tial element of the crime. The allega*tion of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations. The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court. All allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place."

Of course the courts of the United States will take notice of the laws of the demanding state, as the Governor of New Jersey was at liberty to do. Roberts v. Reilly, 116 U. S. 80, 96, 6 Sup. Ct. 291, 29 L. Ed. 544.

[4] Were there any doubt of the sufficiency of the indictment, as a pleading, it would not be open to inquiry on habeas corpus. Munsey v. Clough, 196 U. S. 364, 373, 25 Sup. Ct. 282, 49 L. Ed. 515.

[5, 6] The suggestion that there is neither allegation nor proof of an overt act done by appellant in Massachusetts pursuant to the alleged conspiracy is without weight. By the law of Massachusetts, as by the common law, a conspiracy to commit a crime is itself a criminal offense, although no overt act be done in pursuance of it; such acts, however important as evidence of conspiracy or as matters of aggravation, not being of the essence of the offense, since there is no statute making criminality dependent upon the commission of an overt act. Commonwealth v. Judd, 2 Mass. 329, 337, 3 Am. Dec. 54; Commonwealth v. Tibbetts, 2 Mass. 536, 538; Commonwealth v. Warren, 6 Mass. 74; Commonwealth v. Hunt, 4 Metc. 111, 125, 38 Am. Dec. 346.

[7-9] Appellant being charged by authentic indictment with a criminal offense committed in Massachusetts on or about August 18, 1916, and having, by his own admission, been personally present there and in communication with the alleged co-conspirator at or about that time, and being afterwards *56 found in the state of New Jersey, there *is adequate ground for his return as a fugitive from justice under section 5278, Rev. Stat. U. S., enacted to give effect to article 4, § 2, of the Constitution. Whether in fact he was a fugitive from justice was for the determination of the Governor of New Jersey. The warrant of arrest issued in compliance with the demand of the Governor of Massachusetts shows that he found appellant to be a fugitive; and this conclusion must stand unless clearly overthrown, which appellant has not succeeded in doing. To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state. Roberts v. Reilly, 116 U. S. 80, 95–97, 6 Sup. Ct. 291, 29 L. Ed. 544; Munsey v. Clough, 196 U. S. 364, 372–375, 25 Sup. Ct. 282, 49 L. Ed. 515; Appleyard v. Massachusetts, 203 U. S. 222, 227, et seq., 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; McNichols v. Pease, 207 U. S. 100, 108, 109, 28 Sup. Ct. 58, 52 L. Ed. 121; Biddinger v. Commissioner of Police, 245 U. S. 128, 133, 134, 38 Sup. Ct. 41, 62 L. Ed. 193.

Final order affirmed.

(255 U. S. 1)

KAHN et al. v. ANDERSON, Warden of United States Penitentiary at Leavenworth, Kan.

(Argued Dec. 7 and 8, 1920. Decided Jan. 31, 1921.)

No. 421.

1. War 🔑32—Discretion as to number of members of court-martial not subject to judicial review.

Under the fifth Article of War (Comp. St. § 2308a), providing that a court-martial shall be composed of not less than 5 officers, and must be composed of 13 when that number can be convened without manifest injury to the service, the exercise of discretion as to the number of members of the court within the minimum and maximum limits is executive, and not subject to judicial review.

2. War 🔑32—Retired officers qualified to sit on court-martial; "Officers in military service."

Retired officers are "officers in the military service" of the United States competent to sit on a court-martial under the fourth Article of War (Comp. St. § 2308a), especially in view of Act April 23, 1904 (Comp. St. § 2078), providing that the Secretary of War may assign retired officers, with their consent, to duty upon courts-martial.

3. War 🔑32—Officers of United States Guards may sit on court-martial.

Under Selective Service Act, §§ 1, 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a, 2044b), the President had power to organize the United States Guards, and such force is a part of the army of the United States, and officers thereof may be assigned to court-martial duty under the fourth Article of War.

4. War 🔑32—Military prisoners held triable by court-martial for offenses committed during imprisonment.

Under Act March 4, 1915 (Comp. St. § 2458a), relative to the United States Disciplinary Barracks, and the second Article of War, par. (e) being Comp. St. § 2308a, providing that persons under sentence adjudged by courts-martial are subject to military law, military prisoners undergoing punishment under previous sentences were subject to military law and triable by court-martial for offenses committed during such imprisonment, even conceding that the previous sentences resulted in their discharge as soldiers.

5. Constitutional law 🔑267—War 🔑32—Constitution not violated by subjecting military prisoners to trial by court-martial.

The exercise of the power, long established and recognized, to try military prisoners by court-martial for offenses committed during the imprisonment, does not violate the Fifth Amendment.

6. Indictment and information 🔑2(2)—Jury 🔑11(4)—Constitutional guaranties not violated by military trial of persons subject to military law.

Under Const. art. 1, § 8, the guaranty of a jury trial, and the guaranty of presentment or indictment by a grand jury, secured by Amendment 5, are not violated by providing for trial by court-martial of persons subject to military law.

7. War 🔑32—Court-martial not without jurisdiction of murder since the Armistice; "peace."

In view of the other provisions of the Articles of War of 1916, especially Articles 74, 92, and 93 (Comp. St. § 2308a), and the differences between such articles and those of 1874, the provision of Article 92 that no person shall be tried by court-martial for murder committed within a state or the District of Columbia in time of "peace," refers to peace in a complete sense officially declared, and does not deprive a court-martial of jurisdiction of the offense of murder subsequent to the Armistice and the cessation of hostilities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Peace.]

Appeal from the District Court of the United States for the District of Kansas.

Habeas corpus by Alexander Kahn and others against August V. Anderson, Warden of the United States Penitentiary at Leavenworth, Kan. The petition was dismissed, and the petitioners appeal. Affirmed.

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*Messrs. Martin J. O'Donnell and Isaac B. Kimbrell, both of Kansas City, Mo., for appellants.

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*Mr. W. C. Herron, of Washington, D. C., for appellee.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The petition for habeas corpus filed by the appellants on June 11, 1920, to obtain their release from confinement in the United States Disciplinary Barracks at Leavenworth having, on motion of the United States, been dismissed on the face of the petition and documents annexed, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation.

It was charged in the petition that on November 4, 1918, the petitioners were placed on trial before a general court-martial for violation of the ninty-sixth Article of War (Comp. St. § 2308a), in having conspired to murder a named fellow prisoner, and of the ninety-second Article in having committed the murder, and that at the time of the alleged commission of the crimes stated they were undergoing imprisonment in the barracks in question under sentences which had been imposed upon them by courts-martial for military offenses. It was averred that the legality of the organization of the court and its jurisdiction was at once challenged, and on the challenge being overruled, each of the petitioners was, on November 25, 1918, found guilty of the murder charged, and as

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the result of the action of the President in mitigating and approving the sentences, they were each liable for a long term of imprisonment.

The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution *6 *of the court; (2) an assertion that the petitioners did not possess the military status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial. We come to consider whether the court erred in overruling these contentions.

[1] The fifth Article of War exacts that in any event a court-martial shall be composed of not less than 5 officers and must be composed of 13 when that number can be convened without manifest injury to the service. The court in this case was composed of 8 members, the order certifying that more than that number could not be convened without manifest injury to the service. The argument is that because the court was composed of less than 13 officers it was unlawfully constituted. But it has long been settled that the exercise of discretion as to fixing the number of the court with reference to the condition of the service, within the minimum and maximum limits, is executive and not subject to judicial review. Martin v. Mott, 12 Wheat. 19, 34, 35, 6 L. Ed. 537; Bishop v. United States, 197 U. S. 334, 340, 25 Sup. Ct. 440, 49 L. Ed. 780. The objection is therefore without merit.

[2, 3] Of the eight members of the court two were described in the order as retired officers and three as officers of the United States Guards. The contention is that, as by the fourth Article of War one must be an officer in the military service of the United States to be competent to sit on a court-martial, and as retired officers and officers of the United States Guards are not within that requirement, the constitution of the court was void. But both contentions, we are of opinion, are untenable; as to the retired officers, because it is not open to question, in view of the ruling in United States v. Tyler, *7 105 U. S. 244, 26 L. Ed. 985, that such *officers are officers in the military service of the United States, and because it is equally certain that the order assigning the retired officers to the court was within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264 (Comp. St. § 2078), which provides that:

> "The Secretary of War may assign retired officers of the Army, with their consent, to active duty * * * upon courts-martial. * * *"

As to the United States Guards officers, there can also be no doubt that the President was fully empowered by section 2 of the Selective Service Act of May 18, 1917, c. 15, 40 Stat. 77 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2044b), to exert the power which he did by Special Regulations, No. 101, organizing the military force known as the United States Guards, and that such force, under the express terms of section 1 of the same act, were a part of the Army of the United States, and that these officers were therefore competent to be assigned to court-martial duty.

[4] As we have seen, the pleadings disclose that the alleged crimes were charged to have been committed by the accused while they were confined in a United States military prison undergoing punishment inflicted upon them, and upon this it is contended that either by implications resulting from the length of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law. But as the allegations of the petition and the contention based upon them concede that the petitioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since as they remained military prisoners they were for that reason subject to military law and trial by court-martial for *8 offenses committed during such im*prisonment. Thus, in dealing with that question, in Carter v. McClaughry, 183 U. S. 365, 383, 22 Sup. Ct. 181, 188 (46 L. Ed. 236) it was said:

> "The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.
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> "He was a military prisoner though he had ceased to be a soldier, and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. § 1361."

See, in addition, Act of March 3, 1915, c. 143, 38 Stat. 1084 (Comp. St. 2458a); 2d Article of War, par. (e); 16 Op. Attys. At. Gen. 292; In re Craig (C. C.) 70 Fed. 969; Ex parte Wildman, Fed. Cas. No. 17,653a.

[5] And as the authorities just referred to and the principles upon which they rest adequately demonstrate the unsubstantial char-

never of the contention, that to give effect to the power thus long established and recognized would be repugnant to the Fifth Amendment, we deem it unnecessary to notice the question further.

[6] In connection with this subject we observe that a further contention, that conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury, respectively secured by article 1, § 8, of the Constitution, and article 5 of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained—a situation

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which was so *obvious more than 40 years ago as to lead the court to say in Ex parte Reed, 100 U. S. 13, 21 (25 L. Ed. 538):

> "The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const. art. 1, § 8, and Amendment 5. In Dynes v. Hoover, 20 How. 65. the subject was fully considered and their validity affirmed."

[7] This brings us to the final contention, that because when the trial occurred it was time of peace no jurisdiction existed to try for murder, as Article 92 provided that—

> "* * * No person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194. It is therefore difficult to appreciate the reasoning upon which it is insisted that although the government of the United States was officially at war, nevertheless so far as the regulation and control by it of its army is concerned, it was at peace. Nor is it any less difficult to understand why reliance to sustain that proposition is placed on Caldwell v. Parker, 252 U. S. 376, 40 Sup. Ct. 388, 64 L. Ed. 621, since that case involved no question of the want of jurisdiction of a court-martial over a crime committed by a soldier, but solely whether the jurisdiction which it was conceded such a court possessed was intended to be exclusive of a concurrent power in the state court to punish the same act, as the mere result of a declaration of war and without reference to any interruption, by a condition of war, of the power of the civil courts to perform their duty; and moreover in that case the question here raised was expressly reserved from decision.

Coming now to consider that question in

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the light (1) *of the rulings in Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213 and Caldwell v. Parker, 252 U. S. 376, 40 Sup. Ct. 388, 64 L. Ed. 621; (2) of the differences between the articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74); and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the limitation, "except in time of peace," contained in Article 92. See McElrath v. United States, 102 U. S. 426, 438, 26 L. Ed. 189, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

Affirmed.

(255 U. S. 11)

GIVENS v. ZERBST, Warden of the United States Penitentiary at Atlanta, Ga.

(Argued Oct. 13, 1920. Decided Jan. 31, 1921.)

No. 285.

1. War 🔑32—President authorized to confer power to appoint general court-martial on camp commander.

Under the eighth Article of War (Comp. St. § 2308a), authorizing the President to empower the commanding officer of any district or any force or body of troops to appoint general courts-martial, he had authority to confer such power on the commander of a military camp.

2. Evidence 🔑46—Order of President authorizing camp commander to appoint court-martial judicially noticed.

A general order of the President, conferring upon the commanders of designated camps authority to convene general courts-martial, is a part of the law of the land, which the court judicially notices without averment or proof.

3. War 🔑32—Court-martial properly convened, though commander did not refer to law empowering him to convene it.

Under the eighth Article of War (Comp. St. § 2308a), authorizing the President to empower commanding officers to appoint general courts-martial, a court-martial convened by the commander of a military camp under authority from the President was a legal court, though the commander, in convening it, did not refer to the law under which he possessed the power to do so.

4. War 🔑32—Judgments of courts-martial open to collateral attack on jurisdictional grounds.

Courts-martial are tribunals of special and limited jurisdiction, whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack.

5. War 🔑32—Grounds of jurisdiction of court-martial must exist at time of exercise of authority.

In consequence of the limited nature of the power of courts-martial, the right to exert their jurisdiction, when questioned collaterally, will be held not to have existed, unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion, and therefore were or should have been a part of the record.

6. War 🔑32—On collateral attack on record of court-martial status of defendant may be shown by evidence.

Where it appears on the face of the record that a court-martial was convoked by an officer having power to convoke it, and its authority to try a defendant for murder is unquestioned, if he belonged to the army, his military status may be shown by evidence, in the event of a collateral attack on the judgment, since such evidence does not change the court-martial record.

7. Habeas corpus 🔑113(9)—Evidence open to consideration on appeal, without bill of exceptions.

On appeal in a habeas corpus proceeding, the evidence upon which the court below acted is open for consideration, though there is no bill of exceptions.

8. Habeas corpus 🔑113(9)—Decree not disturbed for want of proof of fact, when proof omitted from the record.

In a habeas corpus proceeding by one convicted by a court-martial, if the proof was omitted from the record in compliance with appellant's præcipe, the decree cannot be disturbed for want of proof of the petitioner's military status.

9. War 🔑32—Documents held to show that place of confinement under sentence of court-martial was virtually designated by President.

A general order by the War Department, reciting a conviction by a court-martial, the approval of the sentence by the camp commander, and like approval, with direction that the sentence be executed by the President, a telegram from the War Department to the commander, announcing the approval of the sentence by the President, and that the United States penitentiary at Atlanta was designated as the place of confinement, and directing the commander to deliver the defendant to such penitentiary, and a letter from the Adjutant General to the warden of the penitentiary, *held* to show that the order for confinement at Atlanta was virtually the order of the President.

10. Habeas corpus 🔑109—Error in designating place of confinement merely requires retention of prisoner for new designation.

In a habeas corpus proceeding by one convicted by a court-martial, error in the designation of the place of confinement did not involve the jurisdiction of the court-martial, and would only lead to retaining the accused for a new designation.

Appeal from the District Court of the United States for the Northern District of Georgia.

Habeas corpus by William J. Givens against Fred G. Zerbst, Warden of the United States Penitentiary at Atlanta, Ga. From a judgment discharging the writ, and remanding the petitioner to custody (262 Fed. 702), he appeals. Affirmed.

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*Mr. John S. Strahorn, of Annapolis, Md., for appellant.

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*Mr. Solicitor General Frierson, of Chattanooga, Tenn., and Mr. R. P. Frierson, of Washington, D. C., for appellee.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In his return to a writ of habeas corpus, which was allowed on the petition of appellant, averring that he was restrained of his liberty in violation of his constitutional rights, the warden of the penitentiary at Atlanta, asserting the lawfulness of his custody of the petitioner, annexed as part of his return the following documents:

(1) A copy of General Orders, No. 56, issued by the President on June 13, 1918, conferring upon the commanders of designated camps, among them Camp Sevier, S. C., the authority to convene a general court-martial.

(2) General Court-Martial Orders No. 139, issued by the War Department under date of April 29, 1919, announcing that under Special Orders, No. 172, dated "October 10, 1918, Headquarters, Camp Sevier, S. C." (issued by the commanding officer of that camp), a general court-martial had convened at Camp Sevier on October 30, 1918, and before it there was arraigned and tried "Captain William J. Givens, Infantry, United States Army," under the charge of having murdered at or near Camp Sevier a named private soldier; that at the trial the accused officer had pleaded not guilty, and although acquitted of the charge of murder had been found guilty of manslaughter, and had been sentenced to dismissal from the army and to 10 years at hard labor at a place to be designated by the reviewing authority. The order *17 *further recited the approval of the sentence by the reviewing authority (the commander at Camp Sevier), and a like approval, with direction that the sentence be executed, made by the President on April 14, 1919, and concluded by announcing the dismissal of the convicted officer from the army as of the date of April 30, 1919.

(3) A telegram from the War Department to the commander at Camp Sevier announcing the approval of the sentence by the President, the dismissal of the officer from the army, that the United States penitentiary at Atlanta, Ga., was designated as the place of confinement, and directing the said commander to deliver the officer to that penitentiary.

(4) A letter from the Adjutant General of the Army of date April 29, 1919, directed to the warden of the penitentiary at Atlanta, transmitting him a copy of the telegram sent to the commanding officer at Camp Sevier, as previously stated, and informing him that in due season a copy of the official order promulgating the trial, conviction, and approval of the sentence, would be sent to him.

Upon a traverse of the return and the pleadings the case was heard and in a careful opinion the court, maintaining the sufficiency of the return, discharged the writ and remanded the petitioner to custody, and as the result of an appeal the correctness of its action is here for decision.

The grounds relied upon for reversal relate to three subjects: (1) The alleged illegality of the court because of want of power in the officer by whom it was called to convene it; (2) the failure of the record to show that the accused was an officer in the army or was in any way amenable to trial by court-martial, and the absence of jurisdiction in the court, in any event, to try a charge of murder because by law no person could be tried by court-martial for murder committed *18 within the United *States in time of peace, and there was no averment negativing a time of peace, and that in fact peace prevailed at the time of the trial; (3) the asserted unlawfulness of the confinement of the petitioner in the penitentiary at Atlanta because the record failed to establish that that place had been designated by the President, the final reviewing authority.

[1-3] We come to test these grounds in the order stated. The court was undoubtedly a general court-martial and was convened by the commander of Camp Sevier. The power to convoke it, however, is not to be solely measured by the authority possessed by a camp commander, but in the light of the authority given to the President by the eighth Article of War (Comp. St. § 2308a), to empower "the commanding officer of any district or of any force or body of troops" to appoint general courts-martial, and by the exertion of that power by the President manifested by General Orders, No. 56, conferring upon the commanding officer at Camp Sevier the authority to call a general court-martial. True, it is insisted that the words, "the commanding officer of any district or of any force or body of troops," are not broad enough to embrace the commanding officer at Camp Sevier; that, in issuing Order No. 56, the President therefore exceeded the power conferred upon him, and hence that Order No. 56, in so far as it gave the power stated to camp commanders, was void. But the text of article 8 so clearly demonstrates the unsoundness of the contention that we deem it unnecessary to refer further to it. And as General Orders, No. 56, was a part of the law of the land, which we judicially notice without averment or proof (Gratiot v. United States, 4 How. 80, 117, 11 L. Ed. 884; Jenkins v. Collard, 145 U. S. 547, 560, 12 Sup. Ct. 868, 36 L. Ed. 812; Caha v. United States, 152 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415), we think the contention that that law should not have been enforced because it was not referred to by the camp commander in exerting the power which he possessed in virtue of that order is also without merit.

*19 *These conclusions render no longer applicable the contention that the court-martial was without jurisdiction because a special court appointed by a camp commander had no jurisdiction to try an officer with the rank of captain, but they do not dispose of the proposition that the record failed to show that the accused belonged to the army without reference to his rank and was therefore subject to trial by a military court.

Conceding that the possession by the accused of a status essential to the exercise by the court-martial of its power was jurisdictional and therefore may not be held to have existed merely because of an estoppel, and conceding further that, except for the form of the charge, the record failed to establish such status, we are brought to determine, as was the lower court, whether evidence was admissible to show such capacity at the time of the trial and conviction and thus make clear the precise condition upon which the court acted.

[4, 5] Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack. True, also, is it that in consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record. Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457; Ex parte Watkins, 3 Pet. 209, 7 L. Ed. 650; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Runkle v. United States, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. Ed. 1167; McClaughry v. Deming, 186 U. S. 49, 62–63, 22 Sup. Ct. 786, 46 L. Ed. 1049.

[6] The question before us is thus a narrow one, since it comes only to this: In a case, such as that before us, where the power to convoke a court-martial is established

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*on the face of the record and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?

Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record but simply met the collateral attack by showing that at the time of the trial the basis existed for the exertion by the court of the authority conferred upon it.

It is true that general expressions will be found in some of the reported cases to the effect that wherever a fact upon which the jurisdiction of a court-martial or other court of limited jurisdiction depends is questioned it must appear in the record that such fact was established. But these expressions should be limited in accordance with the ruling which we now make. We so conclude because the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive. Indeed, some of the leading cases make clear the incongruity of any other conclusion and serve to indicate that the expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Runkle v. United States, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

[7, 8] Although there is no bill of exceptions,

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as the case is *here on appeal the evidence upon which the court below acted is open for our consideration and would seem to be in the record, although a compliance with the præcipe of the appellant would have required the clerk to exclude it. Under these conditions we content ourselves with saying that, if as a consequence of the action of the appellant the proof is not in the record, the means of examining the conclusion of the court in that respect would be wanting and we could not disturb the decree appealed from. If on the other hand the documents in the record, not referred to by the præcipe of the appellant, embraced the proof which the court admitted and upon which it acted, we are of opinion that they abundantly sustain the conclusion which the court based upon them and therefore make clear the existence at the time of the trial of a military status in the accused officer adequate to sustain the jurisdiction of the court-martial.

The contention, that the court was without jurisdiction because the trial occurred in a time of peace and that under that condition Article of War 92 deprived courts-martial of jurisdiction to try for murder, has been held to be without merit in Kahn et al. v. Anderson, Warden (No. 421, this day decided) 255 U. S. 1, 41 Sup. Ct. 224, 65 L. Ed. ——, which therefore disposes of that question as presented here. This renders it unnecessary to consider the government's insistence, that as the conviction was for manslaughter, the trial was for that crime, although the charge was murder.

[9, 10] As respects the designation of the penitentiary at Atlanta as the place for executing the sentence at hard labor which was imposed, we are of opinion that if effect be given to documents which are in the record and to which the lower court referred it would clearly result that the court rightly held that under the conditions disclosed, the order for confinement at Atlanta was virtually the order of the President, and the contention to the contrary now made is devoid of

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merit. United States v. *Page, 137 U. S. 673, 678–682, 11 Sup. Ct. 219, 34 L. Ed. 828; United States v. Fletcher, 148 U. S. 84, 88–91, 13 Sup. Ct. 552, 37 L. Ed. 378; Ide v. United States, 150 U. S. 517, 14 Sup. Ct. 188, 37 L. Ed. 1166; Bishop v. United States, 197 U. S.

334, 341–342, 25 Sup. Ct. 440, 49 L. Ed. 780. But, as pointed out by the court below, the mere designation of the place for carrying out the sentence did not involve the jurisdiction of the court (Schwab v. Berggren, 143 U. S. 442, 451, 12 Sup. Ct. 525, 36 L. Ed. 218; In re Cross, 146 U. S. 271, 277–278, 13 Sup. Ct. 109, 36 L. Ed. 969), and if erroneous would only lead to retaining the accused for a new designation of place of confinement, and we see no reason under the condition of the record to reverse the action of the court below on that subject.

What we have said disposes of every material contention in the case, although we have not expressly noticed the many suggestions based upon the supposed duty on the trial, before the court-martial, to negative every possible condition the existence of which might have prevented that court from trying the case, among which was the possibility that the officer under trial might have belonged to a command which did not come within the power to call a court-martial conferred upon the camp commander by General Orders, No. 56, particularly since the suggestion now made on that subject seems to have been an afterthought and not to have been called to the attention of the court below in any way.

Affirmed.

(255 U. S. 22)

BERGER et al. v. UNITED STATES.

(Argued Dec. 9, 1920. Decided Jan. 31, 1921.)

No. 460.

1. **Judges 🔑51(4)—When affidavit of disqualification legally sufficient is filed, judge cannot determine truth of facts or act further.**

Under Judicial Code, § 21 (Comp. St. § 988), providing that, when a party shall file an affidavit that the judge has a personal bias or prejudice against him, the judge shall proceed no further, but another judge shall be designated, and that such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, when an affidavit legally sufficient is filed, the judge against whom it is filed cannot pass on the truth of the matters alleged or preside on the trial.

2. **Judges 🔑51(3)—Reasons and facts for belief in prejudice must give fair support to charge.**

Under Judicial Code, § 21 (Comp. St. § 988), the reasons and facts stated in an affidavit charging a judge with bias or prejudice for the belief in such bias or prejudice are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.

3. **Judges 🔑51(3)—Affidavit of judge's bias against defendants of German birth or descent held sufficient.**

In a prosecution under the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212h) against five defendants, three of whom were of German or Austrian birth or descent, an affidavit that defendants believed that the judge had a personal bias and prejudice against such three defendants, and stating as the grounds for such belief that he was prejudiced and biased against them because of their nativity, and that on a specified date he said in substance that, if anybody had said anything worse about the Germans than he had, he would like to know it, so he could use it, that one must have a very judicial mind indeed not to be prejudiced against the German-Americans in this country, that their hearts were reeking with disloyalty, that this kind of propaganda had been spread until it had affected practically all the Germans in the country, etc., *held* sufficient, under Judicial Code, § 21 (Comp. St. § 988); the facts and reasons stated not being frivolous or fanciful, but substantial and formidable, and having relation to the attitude of the judge's mind towards defendants.

4. **Judges 🔑51(3)—Affidavit of bias held sufficient, though facts stated on information and belief.**

An affidavit of a judge's bias and prejudice under Judicial Code, § 21 (Comp. St. § 988), was not insufficient because the remarks alleged as the reasons for defendants' belief in such prejudice were alleged on information and belief to have been made, where the affidavit referred to a definite incident and gave the time and place thereof.

5. **Constitutional law 🔑70(1)—Court must enforce statute as expressed, and cannot approve or disapprove it.**

If Judicial Code, § 21 (Comp. St. § 988), construed as depriving a judge against whom an affidavit of prejudice is filed of power to pass on the truth of the facts alleged, permits such affidavits to be abusively used, the court must nevertheless deal with it as it is expressed, and enforce it according to its expressions, and it is not the function of the court to approve or disapprove it.

6. **Judges 🔑51(4)—May pass on legal sufficiency of affidavit of prejudice.**

Under Judicial Code, § 21 (Comp. St. § 988), a judge against whom an affidavit of bias and prejudice is filed has a lawful right to pass on the legal sufficiency of the affidavit.

Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice McReynolds, dissenting.

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Victor L. Berger and others were convicted of a violation of the Espionage Act, and they took the case by writ of error to the Circuit Court of Appeals for the Seventh Circuit, which certified certain questions to the Supreme Court. Questions answered.

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*Messrs. Seymour Stedman, of Chicago, Ill., and Henry F. Cochems, of Milwaukee, Wis., for Berger and others.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States.

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*Mr. Justice McKENNA delivered the opinion of the Court.

Section 21 of the Judicial Code (Comp. St. § 988) provides as follows:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such *27 judge *shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, * * * No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, an indictment against plaintiffs in error (it will be convenient to refer to them as defendants), charging them with a violation of the Act of Congress of June 15, 1917, known as the Espionage Act (40 Stat. 217, c. 30).[1] In due time they invoked section 21 by filing an affidavit charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge to preside at the trial. The motion was denied and upon the trial defendants were convicted and each sentenced to 20 years' imprisonment. From *28 the judgment and sentence they took *the case to the United States Circuit Court of Appeals for the Seventh Circuit. That court, reciting that certain questions of law under section 21 have arisen upon the affidavit and motion upon which the court is in doubt and upon which it desires the advice and instructions of this court, certifies questions of the sufficiency of the affidavit and the duty of the judge thereunder, and also certifies the affidavit and other proceedings upon such motion.

The affidavit, omitting formal and unnecessary parts, is as follows:

> Petitioners [defendants] represent "that they jointly and severally verily believe that his honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to wit, Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected *29 practically all the Ger*mans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.'
>
> "These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper, Adolph Germer, national secretary of the Socialist party, William F. Kruse, editor of the Young Socialists Magazine, a Socialist publica-

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[1] "Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, shall be punished. * * *"

tion, and J. Louis Engdahl disapproved the entrance of the United States into this war.

"Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse cannot receive a fair and impartial trial, and that the prejudice of said *30 Judge Landis against said *Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case."

The affidavit was accompanied by the certificate of Seymour Stedman, attorney for defendants, that the affidavit and application were made in good faith.

The questions certified are as follows:

(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge?

(2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

(3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said judge have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

The basis of the question is section 21, and the primary question under it is the duty and power of the judge, whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

These alternatives present the contentions in the case. Defendants contend for the first; the United States contends for the second. The assertion of defendants is that the mandate of the section is not subject to the discretion or judgment of the judge. The assertion of the United States is that the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of the judicial judgment upon them. In other words, the action of the affidavit is not "automatic," to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of its facts, and upon *31 both the judge has *jurisdiction to pass. The issue is therefore precise, and while not in broad compass is practically of first impression as now presented.

In Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, the section was referred to but not passed upon. In Ex parte American Steel Barrel Co., 230 U. S. 35, 33 Sup. Ct. 1007, 57 L. Ed. 1379, the phase of the section presented here was not presented. There proceedings in bankruptcy had progressed to a decree of adjudication, and the judge who had conducted them was charged by certain creditors with bias and prejudice based on his rulings in the case. Such use of section 21 was disapproved. "It was never intended," it was said, "to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause." As pertinent to the comment and to the meaning of section 21, we may say, that Judge Chatfield, against whom the affidavit was directed, said that he felt that the intention of section 21 was "to cause a transfer of the case without reference to the merits of the charge of bias," and he did so immediately, in order, as he said, "that the application of the creditors" might "be considered as speedily as possible by such judge as" might "be designated." Another judge was designated and to restrain action by the latter and vacate the orders that he had made, and to command Judge Chatfield to resume jurisdiction, mandamus was sought. It was denied. The case establishes that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case.

The cases at circuit in which section 21 was considered have not much guidance. They, however, deserve attention. Ex parte N. K. Fairbank Co. (D. C.) 194 Fed. 978, may be considered as expressing power in the presiding judge to pass upon the sufficiency of the facts affirmed. In Ex parte Glasgow (D. *32 C.) 195 Fed. 780, the question came up *upon an application for a writ of habeas corpus and it appeared that the affidavit of bias was not filed until after trial of the case and when the court was about to pass upon a motion in arrest of judgment and new trial. It was held that section 21 was not applicable at such stage of the proceedings. Henry v. Speer, 201 Fed. 869, 120 C. C. A. 107, was a petition for mandamus to require an affidavit of bias against District Judge Speer to be certified to the senior circuit judge that the latter might determine its sufficiency, and to restrain Judge Speer from exercising jurisdiction of the case. The writ was refused on the ground that the affidavit did not conform to section 21 in that it omitted to charge "personal" bias, a charge of such bias, it was held, being a necessary condition. The court (Circuit Court of Appeals for the Fifth Circuit) by Judge Meek, said:

> "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code (Comp. St. § 987). He is

relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

This comment sustains defendants' view of section 21 and marks a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statements, a distinction to which we shall presently advert.

[1] The cases (one being excepted), to the extent they go, militate against the contention of the government, and they have confirmation in the words of the section. Their declaration is that—

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a *33 personal bias or prej*udice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated * * * to hear such matter."

There is no ambiguity in the declaration and seemingly nothing upon which construction can be exerted—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.

[2, 3] But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the "affidavit shall state the facts and reasons for the belief" of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose, that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use as pointed out by Judge Meek in Henry v. Speer, supra. It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent *34 or im*pede impartiality of judgment. The affidavit of defendants has that character. The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of Judge Landis' mind toward defendants.

[4] It is, however, said, that the assertion and the facts are stated on information and belief and that hence the affidavit is wholly insufficient, section 21 requiring facts to be stated "and not merely belief." The contention is that "the court is expected to act on the affidavit itself" and that therefore "the act of Congress requires facts—not opinions, beliefs, rumors or gossip." Ex parte American Steel Barrel Company, supra, is cited for the contention. We do not know what counsel means by "opinions, beliefs, rumors or gossip." The belief of a party the section makes of concern and if opinion be nearer to or farther from persuasion than belief, both are of influence and universally regarded as of influence in the affairs of men and determinative of their conduct, and it is not strange that section 21 should so regard them.

We may concede that section 21 is not fulfilled by the assertion of "rumors or gossip," but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to section 21 would be arbitrary and make its remedy unavailable in many, if not in most cases. The section permits only the affidavit of a party, and Ex parte American Steel Barrel Co., supra, decides, that it must be based upon facts antedating the trial, not those occurring during the trial. In the present case the information was of a definite incident, and its time and place were given. Besides, it cannot be the assumption of section 21 that the bias or prejudice of a judge in a particular case would be known by everybody, and necessarily, therefore, to *35 deny to a party *the use of information received from others is to deny to him at times the benefit of the section.

We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside, and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

[5] Our interpretation of section 21 has therefore no deterring consequences, and we

cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit, and a charge of and the penalties of perjury restrain from that—perjury in him who makes the affidavit; connivance therein of counsel, thereby subjecting him to disbarment. And upon what inducement and for what achievement—no other than trying the case by one judge rather than another, neither party or counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate we can only deal with it as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it, but, we may say, that its solicitude is that the tribunals of the *36 *country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in * * * section twenty-three to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

After overruling the motion of plaintiffs for his displacement Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it because under our interpretation of section 21 it is excluded from consideration.

[6] We come then to the questions certified and to the first we answer, Yes; that is, that the affidavit of prejudice is sufficient to invoke the operation of the act. To the second we answer that to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer, No; that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment.

So ordered.

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*Mr. Justice DAY dissenting.

As this case is to settle the practice for this and similar cases which may arise in the federal courts, and as the opinion does not consider some aspects of the record, I venture to state the reasons which impel me to reach a different conclusion than that announced by the majority.

An examination shows that statutes exist in a number of states covering the subject under consideration. These statutes vary in character, and in the requirements for establishing the bias or prejudice of the judge which may require him to abstain from sitting at the trial of a particular case. In some of them an affidavit of belief of prejudice, or that a fair trial cannot be had before a particular judge, is sufficient to disqualify him. Other statutes require supporting affidavits and the certificate of counsel, and provide for a hearing on the matter of disqualification. In some states the matter is required to be heard before another judge.

The federal statute, now under consideration, had its origin in an amendment to the Judicial Code, introduced in the House of Representatives when the adoption of the Code was under consideration. As adopted in the House, the affidavit was required to set forth the reasons for the belief that personal bias or prejudice existed against the party, or in favor of the opposite party to the suit. (See Congressional Record, vol. 46, part 3, p. 2626 et seq.)

When the bill came before the Senate, the section was amended so as to require the facts, and the reasons for the belief that bias or prejudice existed, to be set forth, and the affidavit is required to be accompanied by a certificate of counsel of record that it and the application are made in good faith. (Senate Document, No. 848, 61st Congress, 3d Session.) It is thus apparent that the section in the form in which it finally became part of the Judicial Code intended that the bias *38 or prejudice which should disqualify *a judge should be personal against the objecting party, and that it should be established by an affidavit which should set forth the reasons and facts upon which the charge of bias or prejudice was based. The evident purpose of this requirement was to require a showing of such reasons and facts as would prevent imposition upon the court, and establish the propriety of the affidavit of disqualification. "It is not sufficient," said the late Mr. Justice Brewer, when a member of the Supreme Court of Kansas, in City of Emporia v. Volmer, 12 Kan. 627, "that a prima facie case only be shown, such a case as would require the sustaining of a challenge to a juror. It must be strong enough to overthrow the presumption in favor of the trial judge's integrity, and of the clearness of his perceptions."

I accept the opinion of the majority that the judge under the requirements of this statute may pass upon the sufficiency of the affidavit, subject to a review of his decision by an appellate court, and if it be sufficient to show personal bias and prejudice, the judge should not try the case. But I am unable to agree that in cases of the character now under consideration the statement of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainties and inadequacy of a prosecution for perjury if it should appear that the affidavit contains known misstatements.

Notwithstanding the filing of the affidavit purporting compliance with the statute, the court has a right to use all reasonable means to protect itself from imposition. Davis et al. v. Rivers et al., 49 Iowa, 435. The personal bias or prejudice of the judge against the defendants in this case is said to be established by language imputed to the judge as his utterances concerning the attitude of the German people during the progress of the war.

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*The affidavit filed contained a statement of alleged language of the judge concerning a German who was "charged" with making the statements set forth. Upon receiving the affidavit the judge at once inquired of counsel whether the language ascribed to him was not in fact uttered in connection with the disposition of the case of United States against one Weissensell in sentencing him after conviction by a jury of a violation of the Espionage Act in the same court. Counsel informed the judge that such was the fact. The judge asked counsel for Berger whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the court. Counsel replied that he had not. It would seem incredible that any judge could have made such statements concerning a defendant not yet tried in his court, in advance of trial and upon a mere charge of an offense. Counsel in open court admitted that the offending language was used in passing sentence after conviction in Weissensell's Case.

Moreover, upon the affidavit being filed, and after this admission of counsel, the district attorney offered in evidence a transcript of what took place and what was in fact said upon the sentencing of Weissensell. The judge permitted this stenographic report, sworn to by an experienced stenographer, who made it, to be a true and correct report of the statements made and the proceedings had, to be put into the record, saying that the truth should be shown of record in connection with the falsity, although he was of opinion that the facts stated in the affidavit failed to establish bias or prejudice against the defendants which would disqualify him from sitting at the trial.

This stenographic report, sent up with the certificate and made part of it, and which there is no reason to believe fails to state accurately what took place, is in marked contrast with statements of the affidavit which the defendants made when seeking the

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disqualification of the *judge. It shows, as we have already stated, that the utterances of the judge were after conviction of Weissensell, and were made when he was passing sentence. It shows that the statement of the judge concerning German-Americans was quite different from that stated in the affidavit, and referred to the type of man who had been convicted and was before him for sentence. The judge in speaking of the convicted defendant said that he was of the type of man who branded almost the whole American-German population, and that one German-American, such as the defendant, talking such stuff, did more damage to his people than thousands of them could overcome by being good and loyal citizens; and that he, the defendant, was an illustration of the occasional American of German birth whose conduct had done so much to damn the whole 10,000,000 in America. While this language might have been more temperate, there does not appear to be in it anything fairly establishing that the judge directed his observations at the German people in general, but rather that his remarks were aimed at one convicted, as was the defendant, of violation of law.

As I understand the opinion of the court, notwithstanding the admissions of counsel, and the sworn stenographic report of what took place, the affidavit must be accepted, and if it discloses matters, which, if true, would tend to establish bias and prejudice, the same must be given effect and the judge be disqualified. It does not seem to me that this conclusion comports with the requirements of the statute that reasons and facts must be set forth for the consideration of the judge. It places the federal courts at the mercy of defendants who are willing to make affidavits as to what took place at previous trials in the court, which the knowledge of the judge, and the uncontradicted testimony of an official report may show to be untrue, and in many districts may greatly retard the trial of criminal causes.

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*While, as I have said, in sentencing Weissensell the judge might have been more temperate in his observations, I am unable to find that the statements of the affidavit when read in connection with the admissions of counsel, and the established facts as to what took place as gathered from the stenographic report, showed such evidence of personal bias or prejudice against the defendants as required the judge upon the mere filing of this affidavit to permit its misleading statements to be placed of record, and to proceed no further with the case.

It does not appear that the trial judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial. To permit an ex parte affidavit to become in effect a final adjudication of the disqualification of a judge when facts are shown, such as are here established, seems to me to be fraught with much danger to the independent discharge of duties by federal judges, and to open a door to the abuse of the privilege which is intended to be conferred by the statute in question.

In my judgment the questions propounded, in the light of the disclosures of this record, should be answered: As to the first: That the affidavit of prejudice, when read in the light of the other disclosures in the record, was insufficient to meet the requirements of the act. As to the second: That while the judge might have called upon another judge to pass upon the sufficiency of the affidavit, he had jurisdiction to pass upon it himself if he saw fit to do so. As to the third: That the mere filing of the affidavit did not require the judge to proceed no further with the trial of the defendants upon the accusation against them.

Mr. Justice PITNEY concurs in this dissent.

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*Mr. Justice McREYNOLDS, dissenting.

I am unable to follow the reasoning of the opinion approved by the majority or to feel fairly certain of its scope and consequence. If an admitted anarchist, charged with murder, should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

The conclusion announced gives effect to the statute which seems unwarranted by its terms and beyond the probable intent of Congress. Bias and prejudice are synonymous words and denote "an opinion or leaning adverse to anything without just grounds or before sufficient knowledge"—a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisement of a class; e. g., revolutionists, assassins, traitors.

To claim personal bias without more is insufficient; "the facts and the reasons for the belief that such bias or prejudice exists" must be set out, and plainly, I think, this must be done in order that the judge or any reviewing tribunal may determine whether they suffice to support honest belief in the disqualifying state of mind.

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives, who unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed

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as show*ing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.

Of course, no judge should preside if he entertains such actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances. Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while "an overspeaking judge is no well-tuned cymbal," neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power. It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. The personal concern of the judge in matters of this kind is indeed small, but the concern of the public is very great.

In my view the trial judge committed no error when he considered the affidavit, held it insufficient, and refused to retire.

(255 U. S. 56)

PORT OF SEATTLE v. OREGON & W. R. CO. et al.

(Argued Dec. 6, 1920. Decided Jan. 31, 1921.)

No. 107.

1. Navigable waters 🔑2, 4, 36(1)—Right of United States is limited to control for purposes of navigation and ownership is in state.

The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation and subject to such right, the state is the owner of the navigable waters within its boundaries and of the land thereunder.

2. Navigable waters 🔑37(2)—State asserting title to tidelands in Constitution may grant or withhold rights in adjoining waters.

Under Const., Wash. art. 17, § 1, whereby the state asserts its ownership in the bed and shore of tidewaters up to and including the line of ordinary high tide, the state, being the absolute owner of tidelands and of the waters over them, is free, in conveying such lands, either to grant with them rights in the adjoining water area or to completely withhold all such rights.

3. Courts 🔑359, 365—Whether state grant confers rights in navigable waters is question of local law.

Whether a conveyance by the state of land abutting upon navigable water confers upon the grantee any right or interest in those waters or in the land thereunder is a matter of local law, upon which the Constitution and statutes of the state and the decisions of its highest court are conclusive on the Supreme Court.

4. Navigable waters 🔑37(4)—In Washington, grant of upland conveys no interest in land under water and no right in the water.

Under the law of Washington, a conveyance by the state of uplands abutting upon a natural navigable waterway grants no right either in the land below high-water mark or in or to the water or over the intervening land or water area to the navigable channel, except the limited preferential right conferred by statute (Act March 26, 1890 [Laws 1889–90, p. 435] §§ 11, 12) to purchase the shore land, if the state concludes to sell it.

5. Navigable waters 🔑39(3)—Owner of upland, tideland, or shore land has no right of access under law of Washington.

The law of Washington does not recognize as appurtenant to upland, tideland, or shore land in its natural condition, rights of any sort beyond the boundaries of the property, and a right of access to the navigable channel over intervening land above or below low water must arise from a grant by the owner of the intervening property.

6. Navigable waters 🔑37(4)—Grant of tidelands filled in by state does not convey riparian rights under law of Washington.

The mere fact that tideland adjoining a natural waterway, deepened and confined by the state, has been filled in, does not under the law of Washington confer upon the state's grantee, as appurtenant to the land, riparian rights in the adjoining navigable waters.

7. Navigable waters 🔑37(4)—Grant of riparian rights not implied, though no law authorized leasing of shoals.

Under Const. Wash. art. 17, § 1, whereby the state asserts its ownership in the bed and shore of tidelands, and the consistent policy of the state not to grant riparian rights in navigable waters, a grant by the state of filled-in tidelands did not by implication grant any riparian rights, assuming that at the date of the grant there was no law authorizing the leasing of the shoals lying between the land granted and the navigable channel for docking purposes, and no authority for permits to construct wharves thereon.

8. Navigable waters 🔑2—Government can change pierhead lines, though acted upon by erection of piers.

The power of the United States to fix pierhead lines in navigable waters is not exhausted by its first exercise, and the lines so fixed, though acted upon by the erection of piers, can be changed by the United States at any time.

9. Courts 🔑303(2)—Port of Seattle may be sued in federal court.

The port of Seattle, being a municipal corporation, under the laws of Washington is a citizen of that state, and can be sued in the federal court.

10. Removal of causes 🔑41—Suit by port of Seattle to quiet state's title to tidelands properly removed.

Under Laws Wash. 1913, p. 582, providing for payments by abutting owners in the nature of a rental for permits to use parts of waterways in the erection of wharves, docks, or other structures, and that 75 per cent. of such rental shall be paid to the county for the use of the port of Seattle, such port had an independent financial interest in a suit to quiet the title of the state to tidelands as against the right of an adjoining owner to build piers, wharves, and other structures, and the suit was properly removed to a federal court, as against the objection that the state was the real party in interest.

Appeal from the District Court of the United States for the Western District of Washington.

Suit by the Port of Seattle against the Oregon & Washington Railroad Company and another. From a decree for defendants, plaintiff appeals. Reversed and remanded.

*58

*Messrs. Leander T. Turner, Harold Preston, and O. B. Thorgrimson, all of Seattle, Wash., for appellant.

Messrs. W. H. Boyle, R. S. Terhune, and George F. Aust, all of Seattle, Wash., and Henry W. Clark, of New York City, for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The main question in this case is whether the Oregon & Washington Railroad Company acquired, as owner of land adjoining East waterway in the port of Seattle, the right to build in the waterway piers, wharves, and other structures over which it would secure access from its land to the navigable channel. The question arises in a suit to quiet the title of the state which was brought against the railroad in a state court of Washington, in 1917, by the Port, a municipal corporation,[1] created by the laws of Washington. J. F. Duthie & Co., lessees of the railroad's land, were joined as defendants; but they have no substantial interest in the controversy; and their peculiar rights do not require consideration. The case *59 *was removed to the District Court of the United States by petition of the railroad, which is an Oregon corporation, and a motion to remand was denied. Upon full hearing on the merits a decree was rendered dismissing the bill. The case comes here by direct appeal of the port under section 238 of the Judicial Code (Comp. St. § 1215); it having been contended by the railroad and held by the lower court that the validity of chapter 168 of the Laws of Washington of 1913, p. 582, is involved, and that its provisions violate the contract clause and the due process clause of the federal Constitution. The following facts are material:

When the state of Washington was admitted into the Union, there lay in front of the city of Seattle extensive tidelands in the area now comprised within the limits of the municipal corporation known as port of Seattle. Under appropriate legislation of the state this area has been developed as a port. Waterways have been established and in part dredged; tidelands abutting upon the waterways have been filled, platted as city blocks, and laid out with streets; and lots therein have been sold for business and other purposes. Among the waterways so established is that known as East waterway, which connects Duwamish river with Elliott Bay, an arm of Puget Sound. East waterway, as established, has at the point in question a width of 1,000 feet. The bed of the waterway was in its natural state tideland. The 750 feet of the waterway which lie in the center have been dredged to a depth at mean low tide of from 26 to 30 feet. The rest of the waterway, being that portion which extends on either side for a distance of 125 feet from the bulkhead of the filled land to the fairway, is of varying depth and is not navigable by large vessels. The bed of the waterway within these 125 feet areas slopes from the bulkhead to the line of the fairway. It is exposed at low tide ordinarily at points about 36 feet from the bulkhead.

*60 *The railroad's parcel here in question is filled land adjoining the west side of this waterway. The tract is a part of block 393, Seattle Tidelands, shown on a plat duly filed with the county auditor in 1895, and was acquired from the state by the railroad's predecessors in title prior to 1907. The deeds by which the state conveyed the land do not in words purport to grant any right in the waterway; nor is mention made of East waterway either in the granting clause or elsewhere in the deed.[2] On the plat, by which the land was sold, the boundaries of the block, and of the several lots comprised within it, are set forth clearly and lineal measurements are given. East waterway is shown on the plat and, on each side of the waterway, a broken line called "pierhead line," is marked at a distance of 250 feet from the bulkhead. It is alleged by the railroad that this pierhead line, established by the War Department as prescribing the limits beyond which structures obstructing navigation would not be permitted in the waterway, had been adopted also by the state authorities. In 1914, by joint action of the War Department and of the state authorities, *61 *and with the assent of abutting owners, the pierhead line was moved back to a point 125 feet from the bulkhead, leaving the fairway in the center 750 feet, as above stated, instead of 500 feet as originally indicated on the plat. The rights claimed by the railroad are limited to this 125-feet area.

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[1] Chapter 92 of the Laws of 1911, p. 412, as amended by Laws of 1913, c. 62, p. 202. It has power, among other things, to improve navigable and nonnavigable waters of the United States and of the state within the port district; "to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters * * * within the limits of such port district so far and to the full extent that this state can" and hereby does "grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters; * * * to execute leases of all lands, wharves, docks and property owned and controlled by said port district upon such terms as to the port commission may deem proper." It exercises also powers similar to those exercised by counties including the power to sue and be sued. State v. Bridges, 87 Wash. 260, 151 Pac. 490. The state did not transfer to the port districts its ownership in the beds and shores of navigable waters.

[2] The form of the deed is as follows:

First party does hereby grant, bargain, sell and convey unto the second party, and his heirs and assigns, the following described tidelands of the first class, situated in front of the city of Seattle, Kings county, Washington, to wit:

Lots one to nine, inclusive, block 393, as shown on the official map of Seattle Tidelands, filed with the board of state land commissioners at Olympia, Washington, March 15, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of an act of the Legislature of the state of Washington entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state," approved March 9, 1893.

Witness the seal of the state affixed.

Henry McBride, Governor.

Chapter 168 of the Laws of Washington 1913, p. 582, provides that:

> "Whenever, in any waterways created under the laws of the state of Washington, the government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the state, no structure shall be allowed in the strip of waterway between the boundary and the nearest pier head line except by consent of the state land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty (30) years: Provided, however, that the owner of land abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90 days following the date when this act shall go into effect, to obtain * * *"

—a permit authorizing the improvement and use of such area under conditions to be prescribed by the state authorities upon the payment of an annual rental dependent in amount upon the assessed value of an equal area of the abutting land.

The railroad failed to apply for such a permit. Asserting the rights above stated, it leased a part of its land to J. F. Duthie & Co. for a shipbuilding and manufacturing plant, and purported to authorize the construction of wharves, piers and other structures upon the adjoining water area up to the 125-foot pierhead line. By the act of 1913 the control over the waterways therein conferred upon land commissioners is to be exercised in *62 port dis*tricts by the port commissioners. This bill to enjoin such use of the waterway by the railroad and its lessees and to quiet title was therefore brought by the port of Seattle.

The decree entered by the lower court declared in substance (1) that the state has no proprietary interest in the water area between the bulkhead and the pierhead line; (2) that it is not entitled to lease the same or otherwise to deprive the railroad of access to the fairway; (3) that chapter 168 of the laws of 1913 in so far as it provides for such leasing violates the federal Constitution; (4) that the railroad has no proprietary interest in the waterway, but as owner of the abutting lots is entitled to access to the deep or navigable waters "subject to proper governmental supervision." The decree declared further that the state had never established harbor lines in the waterway, and expressly recited that the court does not determine whether or not the state now has power to establish harbor lines, nor what the effect might be of hereafter establishing them.

The main question presented for our decision is whether the railroad acquired, in connection with the lots of filled land abutting on the waterway, a private riparian or littoral right to construct wharves, dock and piers on this 125-foot area, in order to provide for itself, as owner of the land, and for those claiming under it, convenient access to the fairway for purposes of navigation and commerce. The port contends that the railroad acquired no such right, nor any private right whatsoever, in any part of the adjoining waterway; and that the state is free either to use this portion of East waterway directly for purposes of navigation, as the present fairway is used, or to use it as a part of the harbor; and that, since it is also the proprietor of the tideland, under this water area, it has the full right to develop it, or authorize its development by others, through the erec- *63 tion of wharves, *piers, docks or other structures in aid of navigation and commerce; and to charge a rental for the privilege.

[1-3] First. The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became upon its organization as a state the owner of the navigable waters within its boundaries and of the land under the same. Weber v. Board of Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798. By section 1 of article 17 of its Constitution the state asserted its ownership in the bed and shore "up to and including the line of ordinary high tide in waters where the tide ebbs and flows." The extent of the state's ownership of the land is more accurately defined by the decisions of the highest court, as being the land below highwater mark or the meander line, which ever of these lines is the lower.[3] The character of the state's ownership in the land and in the waters is the full proprietary right. The state, being the absolute owner of the tidelands and of the waters over them, is free in conveying tidelands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the state of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. Upon such questions the provisions of the Constitution and statutes of the state and the decisions of its highest court are accepted by us as conclusive. St. Anthony Falls Water Power Co. v. St. Paul Commissioners, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497. The precise question presented here is whether *64 the *state by executing the deed of the land, which in fact adjoined East waterway, conveyed rights in that waterway. That question is, in essence, one of construction of the

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[3] See Scurry v. Jones, 4 Wash. 468, 30 Pac. 726; Cogswell v. Forrest, 14 Wash. 1, 43 Pac. 1098; Washougal, etc., Transportation Co. v. Dalles, etc., Navigation Co., 27 Wash. 490, 68 Pac. 74; Johnson v. Brown, 33 Wash. 588, 74 Pac. 677; Van Siclen v. Muir, 46 Wash. 38, 40, 89 Pac. 188; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331, 95 Pac. 278.

deed taken in connection with the plat therein referred to.

[4] Second. Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the state of uplands abutting upon a natural navigable waterway grants no right of any kind either in land below highwater mark, Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; or in, to, or over the water, Van Siclen v. Muir, 46 Wash. 38, 41, 89 Pac. 188; except the limited preferential right conferred by statute upon the owner of the upland, to purchase the shoreland, if the state concludes to sell the same. Act of March 26, 1890, sections 11 and 12, Laws of Washington 1889–1890, p. 435. The grantee of the upland cannot complain of another who erects a structure below highwater mark, Muir v. Johnson, 49 Wash. 66, 94 Pac. 899. He does not acquire any right of access over the intervening land and water area to the navigable channel, Lowndsdale v. Grays Harbor Boom Co., 54 Wash. 542, 550, 551, 103 Pac. 833. So complete is the absence of riparian or littoral rights that the state may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. Newell v. Loeb, 77 Wash. 182, 193–194, 137 Pac. 811; Hill v. Newell, 86 Wash. 227, 228, 149 Pac. 951.[4]

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*Third. The railroad admits that such are the rights of a grantee from the state, where it is the upland which is conveyed. But it contends that a different rule applies where the sale is of tidelands. No basis for the distinction can be found either in the decisions of the highest court of the state or in reason. Since the upland owner has been denied riparian rights in deference to the asserted right of the state to control unhampered the course and development of navigable waters, the state's right must be superior also to the claim of the tideland owner. For the assertion of title in the state was obviously made in order that it might not be hampered in developing waterways and harbors in the manner and to the extent that the public interest should from time to time demand. Such development obviously includes harbor facilities, like piers, docks and wharves, as well as adequate channels. Compare State v. Bridges, 87 Wash. 260, 151 Pac. 490. The proprietary right of the state over navigable waters and of the soil thereunder is neither exhausted nor impaired by making a sale of a tract of tideland, be it the parcel nearest the upland or some other. The state may in one year fill and sell the 100 feet of tidelands nearest the upland and in the next year fill and sell the parcel *66 beyond. *Compare State v. Scott, 89 Wash. 63, 70, 72, 154 Pac. 165. Or it may sell first the parcel more remote from the upland and later the one immediately adjoining it, or any other. In every case it may, in conveying the tideland, either grant or withhold rights in the water or in the water area, as it sees fit. When land washed by the ebb and flow of the tide is conveyed by the state with clearly defined boundaries, no rights of any kind beyond those boundaries ordinarily pass under the deed. Pearl Oyster Co. v. Heuston, 57 Wash. 533, 107 Pac. 349, 832, 135 Am. St. Rep. 1007. Where a tideland owner acquires rights of access to deep water it is by arrangement with the owner of the intervening land. Compare Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co., 102 Wash. 608, 173 Pac. 508.

The cases most strongly relied upon by the railroad do not relate to tidelands. They deal with the rights of shore land owners on an inland lake, the level of which had been lowered by the government. State v. Sturtevant, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650; Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310. Shore lands differ from tidelands not only in their situation, which in many cases makes an almost indefinite filling in of the latter a possibility, but also in legal definition. Tidelands have a definite boundary at the line of mean low tide, or by later legislation, of extreme low tide. State v. Scott, supra, 89 Wash. 68, 69, 154 Pac. 165. The shore lands, on the other hand, were those "below the line of ordinary high water and not subject to tidal flow." They had no defined outer boundary. Accordingly when the waters of the lake there in question were lowered, it became necessary to determine the ownership both of the lands exposed and those below the new line of ordinary high water. The court held that the outer boundary of the shore land was the line of navigability, and that grantees were entitled to follow that line out when it was moved by act of their grantor. The considerations which brought the court to *67 this result were, it is true, largely the *same which in other jurisdictions led to the recognition of riparian rights; that is, the claim of the shore land owner to access to deep water. But the court did not secure this interest to the shore land owner by granting him extraterritorial rights—i. e., riparian or littoral rights. It did so by construing the outer boundary of his land to be the line of navigability; holding that since the Legislature had not limited the outer boundary of shore lands, as it had done in the case of tidelands, it must have intended that the shore lands granted should extend to the line of navigable water, in the absence of legislation to the contrary. Compare Bilger v. State, 63 Wash. 457, 116 Pac. 19. The Legislature confirmed this boundary, expressly restricting it to the lands to which the court had applied it; that is shore lands not within city limits. This doctrine can have no application to shore lands where the property line is fixed in the deed. And it cannot apply to tidelands, the dissimilarity of which to shore lands furnished the ground for enunciating the rule.

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[4] In some states the shore between the high and the low water mark belongs to the private owner of the upland and as such owner he has all rights not inconsistent with the public's rights incident to navigation. In other states, although the land below high-water mark belongs to the state, the private owner of the upland has the right of access over it to the navigable channel and the right to use the state's land in connection therewith. See 27 R. C. L., sections 273-279, 284. But, in Washington, it is "uniformly held that there is no riparian right in the owners of lands bordering on the navigable waters of the state," and that the state retains the proprietary right to the soil below high-water mark. State v. Sturtevant, 76 Wash. 158, 163, 135 Pac. 1035, 1037; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331, 95 Pac. 278. The language of some earlier cases apparently in conflict with these views, was explained in Hulet v. Wishkah Boom Co., 54 Wash. 510, 517, 103 Pac. 814. The cases referred to go no further than to hold that the owner of uplands has a right in common with the public to use the stream for navigation, as it flows past his land; and that others conducting operations upon the river may not willfully or negligently destroy his upland. Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; Burrows v. Grays Harbor Boom Co., 44 Wash. 630, 87 Pac. 937. See also Judson v. Tidewater Lumber Co., 51 Wash. 164, 98 Pac. 377.

[5] It appears, therefore, that the law of Washington does not recognize, as appurtenant to upland, tideland, or shore land in its natural condition, rights of any sort beyond the boundaries of the property. A right of access to the navigable channel over intervening land, above or below low water, must arise from a grant by the owner of the intervening property.

[6, 7] Fourth. The railroad contends that a different rule should be applied here where we are dealing with made land abutting on an artificial waterway. East waterway is not properly described as such. It is a natural waterway deepened and confined. Compare Fox River Flour & Paper Co. v. Kelley, 70 Wis. 287, 800, 35 N. W. 744. And obviously the mere fact that tideland conveyed has been filled would not, by the law of Washington, confer upon the grantee, as appurtenant to the land, riparian rights in adjoining navigable waters. But the railroad *68 insists *that even if the right of access to the navigable channel is not appurtenant to its land as a matter of riparian law, its predecessor in title received the right by implied grant from the state. The right, it says, "depends in the last analysis upon a proper construction of the grant by the state of the abutting lots" in the light of all the circumstances. Among the most important of those, is the fact that the whole development project was an artificial creation. Land, it is urged, was artificially made up to a bulkhead. At some distance beyond a navigable channel was artificially created out of an unnavigable stream. Between the bulkhead and the channel are shoals which prevent full use of waterside lots in connection with navigation unless wharves are erected. When the original grant was made no provision in the law authorized leasing these shoals for docking purposes, but on the contrary the whole waterway was reserved by the statute forever from sale or lease. And, finally, the plat, by reference to which all lots were sold, showed a pierhead line at the point of navigable water. This situation, it is urged, indicates that the lots were sold as part of a completed project, that it was intended they should have full shipping facilities, and that since the state could not lease the shoals under then existing legislation, it must have been the intention that abutting owners should have the right of access to the pierhead line. This argument of the railroad rests, however, upon an assumption which is at least open to serious doubt. It asserts that under then existing legislation no state official was authorized to permit the grantee to construct a wharf in East waterway. By the Constitution (article 15, section 1) and by Act of March 28, 1890, p. 239, provision had been made for the establishment of harbor lines in navigable waters. It appears from Wilson v. Oregon-Washington Railroad & Navigation Co., 71 Wash. 102, 107, 127 Pac. 847, to have been *69 the practice to permit parts of the *harbor area so created to be used for the erection of piers and wharves. East waterway was and is one of the navigable waters of the state. Our attention has not been called to any statute or decision which indicates that at the time of the original grant power to create harbor areas in it and to grant permits to erect wharves therein would not have been possessed by the harbor commissioners.

Even if the assumptions upon which the arguments rest were all true, the conclusion contended for would not follow. Ever since the organization of the state it has been the clearly defined policy of Washington not to grant riparian rights in navigable waters. This policy, declared in its constitution and expressed in careful legislation, has been consistently enforced by its courts. A grant by implication of the riparian right here asserted might perhaps be inferred in other jurisdictions from the circumstances stated. But in Washington such an implication seems wholly inadmissible. If in the development in question it had been the intention of the state to make such a radical departure as that for which the railroad contends, the intention would doubtless have been expressed by appropriate language in the deed. But East waterway was not even mentioned in it.

Until we are so informed by the Supreme Court of Washington, we cannot, in the light of the waterway history of the state, believe that there were implications in the situation described which without more are sufficient to indicate an intention to depart from the settled policy of the state.

[8] So far as the pierhead lines are concerned, the railroad concedes that their establishment by the United States did not create as against the state a right to wharf out. They merely fixed the line beyond which piers might not extend. Compare Wilson v. Oregon-Washington Railroad & Navigation Co., supra, 71 Wash. 107, 108, 127 Pac. 847. And the power of the United States in this *70 respect was not exhausted by *its first exercise. Philadelphia Co. v. Stimson, 223 U. S. 605, 638, 32 Sup. Ct. 340, 56 L. Ed. 570. The lines so fixed, although acted upon by the erection of piers, could be changed by the United States at any time. Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251.[1] From the authorities to which we have been directed it appears that under the laws of the state the presence of pierhead lines on the plat could have no effect other than as a publication of action taken by the federal government. In Puget Mill Co. v. State, 93 Wash. 128, 160 Pac. 310, decided in 1916, the power of state officials to establish such lines is expressly denied by Judge Chadwick, who said:

> "The use of the words 'pierhead line' on the plat prepared by the state, and in the decree, is an unfortunate misuse of terms. The word means nothing under our Constitution and statutes. In some of the Eastern states, we understand that 'pierhead lines' are defined, but the constitution makers in this state were careful to avoid the confusion that may result from the drawing of an arbitrary line beyond which piers and docks should not be erected, by providing for an inner and an outer harbor line with an intervening area subject to state ownership and control."

It is unnecessary, therefore, for us to consider whether on this record it is open to the port to contend that pierhead lines were in fact never fixed by any state official.

[9, 10] Fifth. The port renews here the objection that the case was improperly removed from the state court, Germania Insurance Co. v. Wisconsin, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; insisting that since the state is the owner of the bed of East waterway, it is the real party in interest, Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316; and that it has not merely a governmental interest, as in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. Ed. 1014, and in Mis- *71 souri, Kansas & Texas *Railway Co. v. Missouri Railroad & Warehouse Commissioners, 183 U. S. 53, 60, 22 Sup. Ct. 18, 46 L. Ed. 78. The objection to the jurisdiction of the District Court is clearly unsound. The port, being a municipal corporation under the laws of Washington, is a citizen of that state and could have been sued in the federal court. Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; Chicot County v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546. It had both the power and the duty to bring suit to protect the interests here involved; and it had a direct financial interest in the result. For chapter 168 of the Laws of 1913 provides for a payment by abutting owners, in the nature of a rental, for the permit to use parts of the waterways in the erection of wharves, docks or other structures, and that 75 per cent. of such rental shall be paid to the county "for the use of said port district." The port has thus an independent financial interest in this controversy; and although the state has also an interest, suit against the port would not be prevented by the Eleventh Amendment. What effect the judgment in this case will have upon the state's interest we have no occasion to consider. Compare Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; Hopkins v. Clemson Agricultural College, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

Reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

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[1] 35 Sup. Ct. 551, 59 L. Ed. 939.

(255 U. S. 180)

SMITH v. KANSAS CITY TITLE & TRUST CO. et al.

(Argued Jan. 6, 7, and 8, 1920. Restored to the Docket for Reargument April 26, 1920. Reargued Oct. 14 and 15, 1920. Decided Feb. 28, 1921.)

No. 199.

1. Courts 🔑282(1), 284—District Court has jurisdiction, when right to relief depends on construction or application of federal Constitution or statutes.

As a general rule, when it appears from the bill or statement of plaintiff that the right to relief depends on the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, but rests upon a reasonable foundation, the District Court has jurisdiction under Judicial Code, § 24 (Comp. St. § 991), giving jurisdiction of causes of action arising under the Constitution or laws of the United States.

2. Courts 🔑282(1), 385(6)—District Court has jurisdiction of stockholder's suit to enjoin purchase of farm loan bonds on ground of invalidity of statute, and direct appeal lies to Supreme Court.

A stockholder's suit to enjoin a trust company from investing its funds in farm loan bonds, issued under Act Cong. July 17, 1916 (Comp. St. §§ 9835a–9835z), as amended by Act Jan. 18, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9835w), on the ground that such acts are unconstitutional and void, and the bonds not valid securities, arises under the Constitution and laws of the United States, so as to give jurisdiction to the District Court under Judicial Code, § 24 (Comp. St. § 991), and a direct appeal lies to the Supreme Court on the constitutional grounds.

3. Banks and banking 🔑288¾, New, vol. 12A Key-No. Series—Creation of federal land banks and joint-stock land banks within power of Congress.

The creation of the federal land banks and joint-stock land banks authorized by Act July 17, 1916 (Comp. St. §§ 9835a–9835z), as amended by Act Jan. 18, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9835w), was within the creative power of Congress, in view of section 6, authorizing the designation of such banks as depositaries of public money and authorizing their employment as financial agents of the government, and the provisions authorizing such banks to buy and sell United States bonds, though they may be intended to facilitate the making of loans upon farm security at low rates of interest, and though they have acted as federal agents to a limited extent only, and have banking powers of a limited character.

4. Constitutional law 🔑70(3) — Motives of Congress cannot be questioned by courts.

When Congress acts within the limits of its constitutional authority, it is not within the province of the judicial branch of the government to question its motives.

5. Banks and banking 🔑2—"Bank" defined.

Speaking generally, a "bank" is a moneyed institution to facilitate the borrowing, lending, and caring for money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bank.]

6. Taxation 🔑191—Congress has power to exempt capital and surplus of land banks and mortgages executed to them.

As Congress had power to create the federal land banks and joint-stock land banks authorized by Act July 17, 1916 (Comp. St. §§ 9835a–9835z), as amended by Act Jan. 18, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9835w), it had power to exempt their capital, surplus, and income, and mortgages executed to such banks thereunder, from federal, state, municipal, and local taxation as was done by section 26.

Mr. Justice Holmes and Mr. Justice McReynolds dissenting in part.

Appeal from the District Court of the United States for the Western District of Missouri.

Suit by Charles E. Smith against the Kansas City Title & Trust Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

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*Messrs. Wm. Marshall Bullitt, of Louisville, Ky., and Frank Hagerman, of Kansas City, Mo., for appellant.

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*Messrs. Charles E. Hughes and George W. Wickersham, both of New York City, for appellees.

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*Mr. Justice DAY delivered the opinion of the Court.

A bill was filed in the United States District Court for the Western Division of the Western District of Missouri by a shareholder in the Kansas City Title & Trust Company to enjoin the company, its officers, agents and employees, from investing the funds of the company in farm loan bonds issued by Federal Land Banks or Joint-Stock Land Banks under authority of the Federal Farm Loan Act of July 17, 1916, 39 Stat. 360 (Comp. St. §§ 9835a–9835z), as amended by Act Jan. 18, 1918, 40 Stat. 431 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9835w).

The relief was sought on the ground that these acts were beyond the constitutional power of Congress. The bill avers that the *196 board of directors of the company are *about to invest its funds in the bonds to the amount of $10,000 in each of the classes described, and will do so unless enjoined by the court in this action. The bill avers the formation of 12 Federal Land Banks, and 21 Joint-Stock Land Banks under the provisions of the act.

As to the Federal Land Banks, it is averred that each of them has loaned upon farm lands large amounts secured by mortgage, and, after depositing the same with the Farm

Loan Registrar, has executed and issued collateral trust obligations, called "farm loan bonds," secured by the depositing of an equivalent amount of farm mortgages and notes, and that each of said Federal Land Banks has sold, and is continuing to offer for sale, large amounts of said farm loan bonds. The bill also avers that various persons in different parts of the United States have organized 21 Joint-Stock Land Banks the capital stock of which is subscribed for and owned by private persons; that the Joint-Stock Land Banks have deposited notes and mortgages with the Farm Loan Registrar, and issued an equivalent amount of collateral trust obligations called "farm loan bonds," which have been sold and will be continued to be offered for sale to investors in large amounts in the markets of the country. A statement is given of the amount of deposits by the Secretary of the Treasury with the Federal Land Banks, for which the banks have issued their certificates of indebtedness bearing interest at 2 per cent. per annum. It is averred that on September 30, 1919, Federal Land Banks owned United States bonds of the par value of $4,230,805, and the Joint-Stock Land Banks owned like bonds of the par value of $3,287,503 on August 31, 1919; that pursuant to the provisions of the act the Secretary of the Treasury has invested $8,892,130 of the public funds in the capital stock of the Federal Land Banks, and that on July 1, 1919, the Secretary of the Treasury, on behalf of the United States, held $8,265,809 of the capital stock of the Federal Land *197 Banks; *that pursuant to the provisions of section 32 of the act as amended, the Secretary of the Treasury has purchased farm loan bonds issued by the Federal Land Banks of the par value of $149,775,000; that up to September 30, 1919, bonds have been issued under the act by the Federal Land Banks to the amount of $285,600,000, of which about $135,000,000 are held in the Treasury of the United States purchased under the authority of the amendment of January 19, 1918; that up to September 30, 1919, 27 Joint-Stock Land Banks have been incorporated under the act, having an aggregate capital of $8,000,000, all of which has been subscribed, and $7,450,000 paid in; that bonds have been issued by Joint-Stock Land Banks to the amount of $41,000,000, which are now in the hands of the public; that the Secretary of the Treasury up to the time of the filing of the bill has not designated any of the Federal Land Banks nor the Joint-Stock Land Banks as depositaries of public money nor, except as stated later in the bill, has he employed them or any of them as financial agents of the government, nor have they or any of them performed any duties as depositaries of public money, nor have they or any of them accepted any deposits or engaged in any banking business. The bill avers that during the summer of 1918 the Federal Land Banks at Wichita, St. Paul, and Spokane were designated as financial agents of the government for making seed grain loans to farmers in drought-stricken sections; the President having at the request of the Secretary of Agriculture set aside $5,000,000 for that purpose out of the $100,000,000 war funds. The three banks mentioned made upwards of 15,000 loans of that character aggregating a sum upwards of $4,500,000, and are now engaged in collecting these loans all of which are secured by crop liens; that these banks act in that capacity without compensation, receiving only the actual expenses incurred.

Section 27 of the act provides that farm *198 loan bonds *issued under the provisions of the act by Federal Land Banks or Joint-Stock Land Banks shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits. The bill avers that the defendant Trust Company is authorized to buy, invest in and sell government, state and municipal and other bonds, but it cannot buy, invest in or sell any such bonds, papers, stocks or securities which are not authorized to be issued by a valid law or which are not investment securities, but that nevertheless it is about to invest in farm loan bonds; that the Trust Company has been induced to direct its officers to make the investment by reason of its reliance upon the provisions of the Farm Loan Acts, especially sections 21, 26 and 27, by which the farm loan bonds are declared to be instrumentalities of the government of the United States, and as such, with the income derived therefrom, are declared to be exempt from federal, state, municipal and local taxation, and are further declared to be lawful investments for all fiduciary and trust funds. The bill further avers that the acts by which it is attempted to authorize the bonds are wholly illegal, void and unconstitutional, and of no effect, because unauthorized by the Constitution of the United States.

The bill prays that the acts of Congress authorizing the creation of the banks, especially sections 26 and 27 thereof, shall be adjudged and decreed to be unconstitutional, void and of no effect, and that the issuance of the farm loan bonds, and the taxation exemption feature thereof, shall be adjudged and decreed to be invalid.

The First Joint-Stock Land Bank of Chicago and the Federal Land Bank of Wichita, Kan., were allowed to intervene and became parties defendant to the suit. The Kansas City Title & Trust Company filed a motion to dismiss in the nature of a general demurrer, and upon hearing the District Court entered a decree dismissing the bill. From this decree appeal was taken to this court.

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*No objection is made to the federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The company is authorized to invest its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress undertaking to organize the banks and authorize the issue of the bonds. No other reason is set forth in the bill as a ground of objection to the proposed investment by the board of directors acting in the company's behalf. As diversity of citizenship is lacking, the jurisdiction of the District Court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States. Judicial Code, § 24 (Comp. St. § 991).

[1] The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

At an early date, considering the grant of constitutional power to confer jurisdiction upon the federal courts, Chief Justice Marshall said:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either," Cohens v. Virginia, 6 Wheat. 264, 379 (5 L. Ed. 257); and again, when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." Osborn v. Bank of the United States, 9 Wheat. 738, 822 (6 L. Ed. 204).

These definitions were quoted and approved in Patton v. Brady, 184 U. S. 608, 611, 22 Sup. Ct. 493, 46 L. Ed. 713, citing Gold Washing Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; White v. Greenhow, 114 U. S. 307, 5 Sup. Ct. 923, 962, 29 L. Ed. 199; Railroad Co. v. Mississippi, 102 U. S. 135, 139, 26 L. Ed. 96.

*This characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other federal courts. See Macon Grocery Co. v. Atlantic Coast Line, 215 U. S. 501, 506, 507, 30 Sup. Ct. 184, 54 L. Ed. 300; Shulthis v. McDougal, 225 U. S. 569, § 3, 32 Sup. Ct. 704, 56 L. Ed. 1205. The principle was applied in Brushaber v. Union Pacific Co., 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414, in which a shareholder filed a bill to enjoin the defendant corporation from complying with the income tax provisions of the Tariff Act of October 3, 1913. In that case, while there was diversity of citizenship, a direct appeal to this court was sustained because of the constitutional questions raised in the bill, which had been dismissed by the court below. The repugnancy of the statute to the Constitution of the United States, as well as grounds of equitable jurisdiction were set forth in the bill, and the right to come here on direct appeal was sustained because of the averments based upon constitutional objections to the act. Reference was made to Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, where a similar shareholder's right to sue was maintained, and a direct appeal to this court from a decree of the Circuit Court was held to be authorized.

In the Brushaber Case the Chief Justice, speaking for the court, said:

> "The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong and multiplicity of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction, we at once say that in view of these averments and *the ruling in Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of section 3224, Rev. Stat., against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes referred to is without merit. * * *
>
> "Aside from averments as to citizenship and residence, recitals as to the provisions of the statute and statements as to the business of the corporation contained in the first 10 paragraphs of the bill advanced to sustain jurisdiction, the bill alleged 21 constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that in a wide sense they all charge a repugnancy of the statute to the Sixteenth Amendment under the more immediate sanction of which the statute was adopted."

[2] The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is therefore apparent that the controversy concerns the con-

stitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged *202 unconstitutional securities by mis*application of the funds of the corporation, gives jurisdiction under the principles settled in Pollock v. Trust Company and Brushaber v. Union Pacific Company, supra. We are therefore of the opinion that the District Court had jurisdiction under the averments of the bill and that a direct appeal to this court upon constitutional grounds is authorized.

We come to examine the questions presented by the attack upon the constitutionality of the legislation in question. The Federal Farm Loan Act is too lengthy to set out in full. It is entitled:

> "An act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositaries and financial agents for the United States, and for other purposes."

The administration of the act is placed under the direction and control of a Federal Farm Loan Bureau established at the seat of government in the Treasury Department, under the general supervision of the Federal Loan Board, consisting of the Secretary of the Treasury and four members appointed by the President, by and with the advice and consent of the Senate. The United States is divided into 12 districts for the purpose of establishing Federal Land Banks. Each of the banks must have a subscribed capital of not less than $750,000, divided into shares of $5.00 each, which may be subscribed for by any individual, firm or corporation, or by the government of any state, or of the United States. No dividends shall be paid on the stock owned by the United States, but all other stock shall share in dividend distributions without preference. The Federal Farm Loan Board is to designate five directors who shall temporarily manage the affairs of each Federal Land Bank, and who shall prepare an organization certificate, which, when approved by the Federal Farm Loan Board and filed with the Farm Loan Commissioner, *203 *shall operate to create the bank a body corporate. The Federal Farm Loan Board is required to open books of subscription for the capital stock of each Federal Land Bank, and if within 30 days thereafter any part of the minimum capitalization of $750,000 of any such bank shall remain unsubscribed, it is made the duty of the Secretary of the Treasury to subscribe the balance on behalf of the United States.

The amendment of January 18, 1918, authorizes the Secretary of the Treasury to purchase bonds issued by Federal Land Banks, and provides that the temporary organization of any such bank shall be continued so long as any farm loan bonds shall be held by the Treasury, and until the subscription to stock in such bank by National Farm Loan Associations shall equal the amount of the stock held by the United States government. When these conditions are complied with a permanent organization is to take over the management of the bank, consisting of a board of directors composed of nine members, three of whom shall be known as district directors and shall be appointed by the Farm Loan Board, who shall represent the public interest, six of whom to be known as local directors, shall be chosen by and be representative of national farm loan associations.

Federal Land Banks are empowered to invest their funds in the purchase of qualified first mortgages on farm lands situated within the Federal Land Bank district within which they are organized or acting. Loans on farm mortgages are to be made to co-operative borrowers through the organization of corporations known as National Farm Loan Associations, by persons desiring to borrow money on farm mortgage security under the terms of the act. Ten or more natural persons, who are the owners of or are about to become the owners of farm land qualified as security for mortgage loans, and who desire to borrow money on farm mortgage security, may unite to form a National *204 Farm *Loan Association. The manner of forming these associations, and the qualifications for membership, are set out in the act.

A loan desired by each such person must be for not more than $10,000 nor less than $100, and the aggregate of the desired loans not less than $20,000. The application for loan must be accompanied by subscriptions to stock of a Federal Land Bank equal to 5% of the aggregate sum desired on the mortgage loan. Provision is made for appraisal of the land, and report to the Federal Farm Loan Board. No persons but borrowers on farm loan mortgages shall be members or shareholders of National Farm Loan Associations.

Shareholders in Farm Loan Associations are made individually responsible for the debts of the association to the extent of the amount of the stock owned by them respectively, in addition to the amount paid in and represented by their shares.

When any National Farm Loan Association shall desire to secure for any member a loan on first mortgage from the Federal Land Bank in its district, it must subscribe to the capital stock of the Federal Land Bank to an amount of 5 per cent. of such loan, which capital stock shall be held by the Federal Land Bank as collateral security for the payment of the loan, the association shall be paid any dividends accruing and payable on the capital stock while it is outstanding. Such stock may, in the discretion of the directors and with the approval of the Federal Farm Loan Board, be paid off at par and retired, and shall be so retired upon the full payment of the mortgage loan. In such event, the National Farm Loan Association must pay off at par and retire the corresponding shares of its stock which were issued when the Land Bank stock so retired was issued; but it is further provided that the capital stock of the Land Bank shall not be reduced to less than 5 per cent. of the *205 principal of the outstanding farm *loan bonds issued by it. The shares in National Farm Loan Associations shall be of the par value of $5 each.

At least 25 per cent. of that part of the capital of any Federal Land Bank for which stock is outstanding in the name of National Farm Loan Associations must be held in quick assets. Not less than 5 per cent. of such capital must be invested in United States government bonds.

The loans which Federal Land Banks may make upon first mortgages on farm lands are provided for in section 12 of the act. By section 13 these banks are empowered, subject to the provisions of the act, to issue and sell farm loan bonds of the kind described in the act, and to invest funds in their possession in qualified first mortgages on farm lands, to receive and to deposit in trust with the Farm Loan Registrar, to be held by him as collateral security for farm loan bonds, first mortgages upon farm lands, and, with the approval of the Farm Loan Board, to issue and to sell their bonds secured by the deposit of first mortgages on qualified farm lands as collateral in conformity with the provisions of section 18 of the act. By the amendment of January 18, 1918, the Secretary of the Treasury was empowered during the years 1918 and 1919, to purchase farm loan bonds issued by Federal Land Banks to an amount not exceeding $100,000,000 each year, and any Federal Land Bank was authorized at any time to repurchase at par and accrued interest, for the purpose of redemption or resale, any of the bonds so purchased from it and held in the United States Treasury.

It is also provided that the bonds of any Federal Land Bank so purchased and held in the Treasury one year after the termination of the pending war shall, upon 30 days' notice from the Secretary of the Treasury, be redeemed and repurchased by such bank at par and accrued interest. By section 15 it is provided that whenever, after the act shall have been in effect for one year, it shall appear to the Federal Farm Loan Board that *206 National Farm Loan *Associations have not been formed and are not likely to be formed, in any locality, because of peculiar local conditions, the board may in its discretion authorize Federal Land Banks to make loans on farm lands through agents approved by the board, on the terms and conditions and subject to the restrictions prescribed in that section.

The act also authorizes the incorporation of Joint-Stock Land Banks, with capital provided by private subscription. They are organized by not less than 10 natural persons, and are subject to the requirements of the provisions of section 4 of the act so far as applicable. The board of directors shall consist of not less than five members. Each shareholder shall have the same voting privileges as the holders of shares in National Banking Associations, and shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. The Joint-Stock Land Bank is authorized to do business when capital stock to the amount of $250,000 has been subscribed, and one-half paid in cash, the balance remaining subject to call by the board of directors, the charter to be issued by the Federal Farm Loan Board. No bonds shall be issued until the capital stock is entirely paid up. Except as otherwise provided, Joint-Stock Land Banks shall have the powers of and be subject to all the restrictions and conditions imposed on Federal Land Banks by the act, so far as such conditions or restrictions are applicable.

Federal Land Banks may issue Farm Loan Bonds up to 20 times their capital and surplus. Joint-Stock Land Banks are limited to the issue of Farm Loan Bonds not in excess of 15 times the amount of their capital and surplus. Joint-Stock Land Banks can only loan on first mortgages upon land in the *207 state where located, or in a state *contiguous thereto. No loan on mortgage may be made by any bank at a rate exceeding 6 per cent. per annum exclusive of amortization payments. Joint-Stock Land Banks shall in no case charge a rate of interest on farm loans which shall exceed by more than 1 per cent. the rate established by the last series of farm loan bonds issued by them, which rate shall not exceed 5 per cent. per annum.

Provisions for the issue of farm loan bonds secured by first mortgages on farm lands or United States bonds, as collateral, are made for Federal Land Banks and Joint-Stock Land Banks; in each case the issue is made subject to the approval of the Federal Farm Loan Board. The farm loan mortgages, or United States bonds, which constitute the collateral security for the bonds must be deposited with the Farm Loan Registrar.

Section 26 of the act provides as follows:

"That every Federal Land Bank and every National Farm Loan Association, including the

> capital and reserve or surplus therein and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this act. First mortgages executed to Federal Land Banks, or to Joint-Stock Land Banks, and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation.
>
> "Nothing herein shall prevent the shares in any Joint-Stock Land Bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations *208 contained in section fifty-two*hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.
>
> "Nothing herein shall be construed to exempt the real property of Federal and Joint-Stock Land Banks and National Farm Loan Associations from either state, county or municipal taxes; to the same extent, according to its value, as other real property is taxed."

Since the decision of the great cases of McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204, it is no longer an open question that Congress may establish banks for national purposes, only a small part of the capital of which is held by the government, and a majority of the ownership in which is represented by shares of capital stock privately owned and held; the principal business of such banks being private banking conducted with the usual methods of such business. While the express power to create a bank or incorporate one is not found in the Constitution, the court, speaking by Chief Justice Marshall, in McCulloch v. Maryland, found authority so to do in the broad general powers conferred by the Constitution upon the Congress to levy and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and conduct war, to raise and support armies, and to provide and maintain a navy, etc. Congress it was held had authority to use such means as were deemed appropriate to exercise the great powers of the government by virtue of article 1, section 8, clause 18, of the Constitution, granting to Congress the right to make all laws necessary and proper to make the grant effectual. In First National Bank v. Union Trust Co., 244 U. S. 416, 419, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169, the Chief Justice, speaking for the court, after reviewing McCulloch v. Maryland and Osborn v. Bank, and considering the power given to Congress to pass laws to make the specific powers granted effectual, said:

> "In terms it was pointed out that this broad *209 authority *was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for."

That the formation of the bank was required in the judgment of the Congress for the fiscal operations of the government was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose being an appropriate measure in the judgment of the Congress, it was held not to be within the authority of the court to question the conclusion reached by the legislative branch of the government.

Upon the authority of McCulloch v. Maryland and Osborn v. Bank the national banking system was established, and upon them this court has rested the constitutionality of the legislation establishing such banks. Farmers' & Mechanics' National Bank v. Dearing, 91 U. S. 29, 33, 34, 23 L. Ed. 196.

[3] Congress has seen fit in section 6 of the act to make both classes of banks, when designated for that purpose by the Secretary of the Treasury, depositaries of public money, except receipts from customs, under regulations to be prescribed by the Secretary of the Treasury, and has authorized their employment as financial agents of the government, and the banks are required to perform such reasonable duties, as depositaries of public moneys and financial agents as may be required of them. The Secretary of the Treasury shall require of the Federal Land Banks and the Joint-Stock Land Banks, thus designated, satisfactory security, by the deposit of United States bonds or otherwise, for the safe-keeping and prompt payment of the public money de- *210 posited with them, and *for the faithful performance of their duties as the financial agents of the government.

Section 6 also provides that no government funds deposited under the provisions of the section shall be invested in mortgage loans or farm loan bonds.

It is said that the power to designate these banks as such depositaries has not been exercised by the government, and that the Federal Land Banks have acted as federal agents only in the case of loans of money for seed purposes made in the summer of 1918, to which we have already referred. But the existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it. Congress declared it necessary to create these fiscal agencies, and to make them authorized depositaries of public money. Its power to do so is no longer open to question.

[4] But, it is urged, the attempt to create these federal agencies, and to make these banks fiscal agents and public depositaries of the government, is but a pretext. But nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives. Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. Ed. 482; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Flint v. Stone-Tracy Co., 220 U. S. 107, 147, 153, 156, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 and cases cited.

[5] That Congress has seen fit, in making of these banks fiscal agencies and depositaries of public moneys, to grant to them banking powers of a limited character, in no wise detracts from the authority of Congress to use them for the governmental purposes named, if it sees fit to do so. A bank may be organized with or without the authority to issue currency. It may be authorized to receive deposits in only a limited way. Speaking generally, a bank is a moneyed institution to facilitate the borrowing, lending and caring for money. But whether

*technically banks, or not, these organizations may serve the governmental purposes declared by Congress in their creation. Furthermore, these institutions are organized to serve as a market for United States Bonds. Not less than 5 per cent. of the capital of the Federal Land Banks, for which stock is outstanding to Farm Loan Associations, is required to be invested in United States bonds. Both kinds of banks are empowered to buy and sell United States bonds.

In First National Bank v. Trust Co., 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169 supra, this court sustained the power of Congress to enable a national bank to transact business, which, by itself considered, might be beyond the power of Congress to authorize. In that case it was held to be within the authority of Congress to permit national banks to exercise, by permission of the Federal Reserve Board, when not in contravention of local law, the office of trustee, executor, administrator or registrar of stocks or bonds.

We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity on these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions.

[6] In the brief filed upon reargument counsel for the appellant seem to admit the power of Congress to appropriate money for the direct purposes named and in that brief they say: "Tax exemption is the real issue sought to be settled here." Deciding,

as we do, that these institu*tions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows. This principle was settled in McCulloch v. Maryland, and Osborn v. Bank, supra.

That the federal government can, if it sees fit to do so, exempt such securities from taxation, seems obvious upon the clearest principles. But it is said to be an invasion of state authority to extend the tax exemption so as to restrain the power of the state. Of a similar contention made in McCulloch v. Maryland, Chief Justice Marshall uttered his often quoted statement:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." 4 Wheat. 431, 4 L. Ed. 579.

The same principle has been recognized in the National Bank Cases, declaring the power of the states to tax the property and franchises of national banks only to the extent authorized by the laws of Congress. Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850, involved the validity of a franchise tax in Kentucky on national banks. In that case this court declared (173 U. S. 668, 669, 19 Sup. Ct. 538, 539 [43 L. Ed. 850]) that the states were wholly without power to levy any tax directly or indirectly upon national banks, their property, assets or franchises, except so far as the permissive legislation of Congress allowed such taxation; and the court declared that the right granted to tax the real estate of such banks, and the shares in the names of the shareholders, constituted the extent of the permission given by Congress, and any tax beyond these was declared to be void.

*In Farmers' Bank v. Minnesota, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706, this court held that a state may not tax bonds issued by the municipality of a territory; that to tax such bonds as property in the hands of the holder is, in the last analysis, an imposition upon the right of a municipality to issue them.

The exercise of such taxing power by the states might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the states can tax these bonds, they may destroy the means provided for obtaining the necessary funds for the future operation of the banks. With the wisdom and policy of this legislation we have nothing to do. Ours is only the function of ascertaining whether Congress in the creation of the banks, and in exempting these securities from taxation, federal and state, has acted within the limits of its constitutional authority. For the reasons stated, we think the contention of the government, and of the appellees, that these banks are constitutionally organized and the securities here involved legally exempted from taxation, must be sustained.

It follows that the decree of the District Court is

Affirmed.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

Mr. Justice HOLMES, dissenting.

No doubt it is desirable that the question raised in this case should be set at rest, but that can be done by the Courts of the United States only within the limits of the jurisdiction conferred upon them by the Constitution and the laws of the United States. As this suit was brought by a citizen of Missouri *214 against a Missouri corporation the *single ground upon which the jurisdiction of the District Court can be maintained is that the suit "arises under the Constitution or laws of the United States" within the meaning of section 24 of the Judicial Code. I am of opinion that this case does not arise in that way and therefore that the bill should have been dismissed.

It is evident that the cause of action arises not under any law of the United States but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act, that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable, that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.

But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action although not the whole, as held in Osborn v. Bank of United States, 9 Wheat. 738, 819–823, 6 L. Ed. 204, which perhaps is all that is meant by the less guarded expressions in Cohens v. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257. I am content to assume this to be so, although the Osborn *215 Case *has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a State law of a United States law as a criterion or test, when the law of the United States has no force proprio vigore, does not cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this Court again and again. Miller v. Swann, 150 U. S. 132, 136, 137, 14 Sup. Ct. 52, 37 L. Ed. 1028; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 303, 35 Sup. Ct. 598, 59 L. Ed. 965. See, also, Shoshone Mining Co. v. Rutter, 177 U. S. 505, 508, 509, 20 Sup. Ct. 726, 44 L. Ed. 864.

I find nothing contrary to my views in Brushaber v. Union Pacific R. R. Co., 240 U. S. 1, 10, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. It seems to me plain that the objection that I am considering was not before the mind of the Court or the subject of any of its observations, if open. I am confirmed in my view of that case by the fact that in the next volume of reports is a decision, reached not without discussion and with but a single dissent, that 'a suit arises under the law that creates the cause of action.' That was the ratio decidendi of American Wells Works Co. v. Layne & Bowler Co., 241 U. S. 257, 260, 36 Sup. Ct. 585, 60 L. Ed. 987. I know of no decisions to the contrary and see no reason for overruling it now.

Mr. Justice McREYNOLDS concurs in this dissent. In view of our opinion that this Court has no jurisdiction we express no judgment on the merits.

(255 U. S. 77)

THE JOHN TWOHY.

T. M. DUCHE & SONS, Limited, v. THE JOHN TWOHY (CUMMINS et al., Claimants).

(Argued Nov. 9, 1920. Decided Feb. 28, 1921.)

No. 84.

1. Admiralty 🔑117—Appeal opens whole case for hearing de novo.

An appeal by claimants from a decree denying the libel as to one claim, but sustaining it as to another, brings up for hearing de novo the decree of the court as to both claims; it being unnecessary that libelant appeal from so much of the decree as denied recovery on one claim.

2. Admiralty 🔑104 — Appellant cannot withdraw appeal to prevent review of favorable part of decree.

Where the claimant of a vessel libeled in admiralty appealed from the decree sustaining the libel as to one claim, but dismissing it as to another, thereby bringing the whole decree up for hearing de novo, he cannot, after continuing the appeal until the time for libelant to appeal has expired, withdraw his appeal and thereby deprive libelant of his right to review of a portion of the decree dismissing the libel as to one claim.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Libel by T. M. Duche & Sons, Limited, against the American schooner John Twohy; Albert D. Cummins and another, claimants. After the claimants appealed from a decree sustaining the libel as to one claim, but dismissing it as to the other, the Circuit Court of Appeals, over libelant's objection, permitted the claimants to withdraw their appeal (256 Fed. 224, 167 C. C. A. 440), and libelant brings certiorari. Decree of the Circuit Court of Appeals reversed, and cause remanded.

See, also, 249 U. S. 596, 39 Sup. Ct. 386, 63 L. Ed. 794.

Mr. William J. Conlen, of Philadelphia, Pa., for petitioner.

Mr. Howard M. Long, of Philadelphia, Pa., for respondents.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Consequent on the allowance of a writ of certiorari, the case is here to review the action of the court below in granting, in an admiralty case there pending, a motion for leave to withdraw an appeal made by the respondents, who were there appellants. 256 Fed. 224, 167 C. C. A. 440. The situation thus arose: The schooner John Twohy was chartered to carry a cargo of bones from Buenos Aires to Philadelphia. The voyage was made, and, following the discharge of the cargo, the charterers, who are the petitioners, *78 *libeled the vessel, asserting claims (1) for failure to deliver part of the cargo which, as evidenced by the intake weights recited in the bill of lading, had been loaded on the vessel at Buenos Aires; and (2) for damage by sea water to part of the delivered cargo in consequence of leakage alleged to be due to the unseaworthiness of the vessel.

Holding that the recital in the bill of lading of the intake weights was but prima facie evidence, and that the proof showed the delivery of all cargo received on board, the court dismissed the libel as to the first claim. As to the second, however, it found that the damage from leakage had resulted from unseaworthiness, and sustained that claim.

The claimants alone appealed, and, after having twice obtained a continuance, moved for leave to withdraw the appeal. Opposing this motion, the libelants asserted that under the practice in admiralty in that circuit an appeal opened up the whole case for reconsideration in the appellate court; that, relying upon that practice, they had refrained from themselves taking an appeal from the ruling of the trial court denying their claim for nondelivery of cargo; that, owing to the continuances allowed the appellants, the time within which the libelants might have taken an appeal had expired, and if the appellants prevailed in their motion the libelants would be without means of obtaining a review of the adverse action of the trial court.

Coming to consider these contentions, the court held them to be without merit, first, because the libelants, by themselves taking an appeal, could have required the appellate court to proceed and decide the same; second, because, having failed to adopt that course they could not complain if the court, in the exercise of its discretion, declined to grant them as a legal right that which they might have made such, had they availed *79 themselves of *the appropriate procedure; and, third, because the court conceived that the allowance of the withdrawal of the appeal would be in furtherance of the due administration of the admiralty in that it would tend to put an end to litigation, would afford appellants time within which to exercise a cooler judgment, would forewarn all persons to themselves appeal if they desired to insure a review of unfavorable decisions, and would prevent the hardship which would result from a contrary ruling, as many would be deterred from appealing from unjust decisions if, having once embarked on that course, they were powerless to withdraw. Upon compliance with certain conditions prescribed by the court, appellants' motion was therefore granted.

[1] We are unable to give our approval to this result or the reasons by which it was

sustained. As recognized by the court, the case of The Canadia, 241 Fed. 233, 154 C. C. A. 153, had settled in that circuit that in admiralty an appeal by either party operated to remove the case to the appellate court for a trial de novo. The decision was based solely upon the previous rulings of this court in Irvine v. The Hesper, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175, and Reid v. American Express Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156. In Irvine v. The Hesper, Mr. Justice Blatchford, speaking for the court, said:

> "It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court. Yeaton v. United States, 5 Cranch, 281; Anonymous, 1 Gallison, 22; The Roarer, 1 Blatchford 1; The Saratoga v. 438 Bales of Cotton, 1 Woods, 75; The Lucille, 19 Wall. 73; The Charles Morgan, 115 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a *80 trial of the case de novo. The whole *case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

And in the Reid Case this court, although pressed to repudiate the practice as opposed to the weight of adjudged cases, declined to do so, and reaffirmed the ruling made in Irvine v. The Hesper.

[2] In view, therefore, of the settled law as to the effect of appeals in admiralty, we are of opinion that the libelants were justified in regarding the appeal taken by the claimants as securing to libelants the right to be heard in the appellate court without the necessity of perfecting a cross-appeal in order to preserve that right. To hold, then, that the appellate court could nevertheless, without affording the libelants an opportunity to be heard, enter a decree the plain effect of which was to deny one of the two claims for which the libel was brought and which, in view of the settled effect of the appeal, the libelants could not be presumed to have abandoned, would be to subject them to a wrong without a remedy, even if it did not amount to a denial of due process of law.

And this renders it unnecessary to consider the supposed advantages which would arise from the adopting of a new rule, since, if the wisdom of so doing be arguendo conceded, that concession would not justify the misapplication of the existing rule and the destruction of rights vested in reliance, not only upon its existence, but upon the discharge of the duty to enforce and apply it.

It follows that the decree of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

(255 U. S. 144)

LOWER VEIN COAL CO. v. INDUSTRIAL BOARD OF INDIANA et al.

(Argued Jan. 27, 1921. Decided Feb. 28, 1921.)

No. 186.

1. Constitutional law 🔑70(3) — Legislative judgment as to remedies required by accidents to employés in coal mines not reviewable.

The different deductions which might be drawn from statistics concerning accidents to employés in coal mines as compared with accidents in other occupations, and the controversies over them, and the remedies justified or demanded thereby, are matters for legislative judgment, which judgment is not open to judicial review.

2. Constitutional law 🔑245, 301—Master and servant 🔑347—Indiana Workmen's Compensation Act, mandatory as to coal mining, is not unreasonable and does not deny due process or equal protection.

Workmen's Compensation Act Ind. § 18, as amended in 1919 (Laws 1919, c. 57), so as to make the act mandatory as to coal-mining companies, while permissive as to all other corporations, except municipal corporations, is not unreasonable or arbitrary, and does not deny due process of law, or the equal protection of the laws in violation of Const. U. S. Amend. 14, in view of the universally recognized fact that coal mining has peculiar conditions.

3. Constitutional law 🔑205(1)—Eminent domain 🔑2(7)—Indiana Workmen's Compensation Act not invalid, because including mine employés working above ground.

Workmen's Compensation Act of Indiana, as amended in 1919 (Laws 1919, c. 57), is not invalid as applied to coal-mining companies, nor violative of Indiana Bill of Rights, §§ 21, 23, providing that property shall not be taken without compensation, and that there shall be no grant of privileges to any citizen or class of citizens not belonging to all, because it includes employés of such companies working above ground, as well as those working underground.

4. Constitutional law 🔑245—Legislature may exercise power of classification in enacting Workmen's Compensation Act.

In adopting a Workmen's Compensation Act, the Legislature may exercise a power of classification in its judgment of what is necessary for the public welfare, and which cannot be pronounced arbitrary, because disputed and opposed by argument and opinion of serious strength.

Appeal from the District Court of the United States for the District of Indiana.

Suit for an injunction by the Lower Vein Coal Company against the Industrial Board of Indiana and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Messrs. William H. Thompson, of Indianapolis, Ind., and Henry W. Moore, of Terre Haute, Ind., for appellant.

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*Messrs. E. M. White, of Indianapolis, Ind., and John A. Riddle, of Vincennes, Ind., for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

Appellant, the Lower Vein Coal Company, is a corporation of the state of Indiana. The Industrial Board of Indiana is a board created by an act of the General Assembly of Indiana, approved March 8, 1915, known as "the Indiana Workmen's Compensation Act." Laws 1915, c. 106. The personal appellees are members of the board.

This suit was brought by the Coal Company to enjoin the Industrial Board, the Governor and Attorney General of the state, from enforcing in any manner section 18 of the Workmen's Compensation Act of the state, as amended by the General Assembly in 1919 (Laws 1919, c. 57), from asserting that plaintiff is compelled to operate under the Compensation Act, from hearing any claim for compensation asserted by any employé of the plaintiff so long as plaintiff elects not to come within the provisions of the act from making any award to any injured employé, or his or her dependents, during such time, and from doing any other act or thing prejudicial to the rights of the plaintiff, so long as it elects not to be bound by the act.

The grounds for this relief were set forth in a complaint of considerable length to which the defendants separately and severally answered. After trial of the issues thus presented the District Court entered its decree dismissing the bill for want of equity. This appeal was then prosecuted.

The Compensation Act is very long and declares its purposes to be to promote the *145 prevention of industrial *accidents; to cause provision to be made for adequate medical and surgical care for injured employés in the course of their employment; to provide methods of insuring the payment of such compensation; to create an Industrial Board for the administration of the act and to prescribe the powers and duties of such board; to abolish the state Bureau of Inspection, and provide for the transfer to the Industrial Board certain rights, powers and duties of the Bureau of Inspection.

The original act passed in 1915 was elective and left employer and employé the option of rejecting its terms with certain exceptions. It was amended in 1917 (Laws 1917, c. 165), and railroad employés engaged in train service were exempted from its provisions.

The amendment of 1919 made the act mandatory as to all coal-mining companies of the state and its political divisions and as to municipal corporations. To all other employers the act remains permissive. They may elect to operate under its provisions. Railroad employés engaged in train service are not within them.

The sole question presented is the validity of section 18 as amended; that is, the compulsion of coal companies to the operation of the act, while to other employers it is permissive, or does not apply at all. The grounds of attack upon it are that it violates the due process clause and the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States and sections 21 and 23 of the Indiana Bill of Rights. Specifically, the question is, as the Coal Company expresses it:

> "Whether the Indiana General Assembly may pass a general compensation law, applicable to all employers within the state, and make it compulsory as to one hazardous employment, and elective as to all others (many equally as hazardous) except railroad employés in train service to which it does not apply at all."

And the insistence is "that such a class- *147 ification rests upon no *sound or just basis," and hence is inimical to the Constitution of the United States and that of Indiana.

The principle of law involved and the power of a state to distinguish and classify objects in its legislation have been too often declared, too abundantly and variously illustrated, to need repetition and we pass immediately to the contention of counsel. It is that the act is addressed to hazardous employments and where in employments that character exists, sameness exists, and a law which ignores such sameness discriminates in its operation and offends the Constitution of the United States. It may be that the Coal Company does not contend for so broad a principle but may assert protection by a comparison of its business with other businesses equally hazardous, or even more hazardous than coal mining, and that necessarily the exemption of the businesses so compared from the law taints it with illegal discrimination. To support and justify the comparison, statistics of accidents are given in the complaint, and in the number of accidental injuries coal mines are made to run fifth. Notwithstanding those other companies may go in or out of the law—coal-mining companies must stay.

The answer replies with counter assertions and statistics and a detail of the methods of coal mining and what their methods cause of accidents to the miners, and to these are added it is said, the risks that come from the generation of noxious and explosive gases.

And there is evidence in the case addressed to the conflicting statistics and the conclusions to be deduced from them which occupies about ninety-three pages of the record. In this evidence occupations and businesses are compared with estimates of accidents in each and their character, severity and consequences, fatal and otherwise. There is also testimony of the wages that mine workers get and of their prosperity, and that they have a legal department and paid attorneys.

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And there is averment and testimony *of two organizations of mine owners who retain officers and attorneys to defend suits and secure releases from personal injury claims.

[1] The length and character of the reports and tables of statistics preclude summary. It may be conceded that different deductions may be made from them, but they and the controversies over them and what they justified or demanded of remedy were matters for the legislative judgment and that judgment is not open to judicial review. Indeed, there may be a comprehension of effects and practical influences that cannot be presented to a court and measured by it, and which it may be the duty of government to promote or resist, or deemed advisable to do so. Degrees of policies if they have bases are not for our consideration and the bases cannot be judged of by abstract speculations or the controversies of opinion. Legislation is impelled and addressed to concrete conditions deemed or demonstrated to be obstacles to something better, and the better, it may be, having attainment or prospect in different occupations (we say occupations as this case is concerned with them) dependent in the legislative consideration upon their distinctions in some instances, upon their identities in others, and as the case may be, associated or separated in regulation. And this is the rationale of the principle of classification and of the cases which are at once the results and illustrations of it.

[2] There are facts of especial pertinence that make the principle apply in the present case and justify the legislation of the state. That coal mining has peculiar conditions has been quite universally recognized and declared. It has been recognized and declared by this court and is manifested in the laws of the states where coal mining obtains. There is something in this universal sense and its impulse to special legislation—enough certainly to remove such legislation from the charge of being an unreasonable or arbitrary exercise of power.

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*The action of the Coal Company indicates that it considered the coal business distinctive. Other businesses though according to the Coal Company's assertion as hazardous as coal mining, accepted the law, the Coal Company and other coal companies rejected it. To this, of course, the coal companies were induced by comparison of advantages but the inducements to reject the legislation might well have been the inducement to make it compulsory. At any rate, there is, taking that and all other matters into consideration, grounds for the legislative judgment expressed in the amendment of 1919 under consideration, that is, section 18 as amended. And the fact is to be borne in mind that there are 30,000 employés in the state engaged in coal mining.

[3] The Coal Company further contends that the law includes within its terms all the company's employés whether engaged in the hazardous part of its business or not so engaged. In other words, it asserts that the conditions of those who work underground may justify the law but do not justify its application to those who work above ground. The contention has a certain speciousness but cannot be entertained. It commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts and this against the same company. The contention is answered in effect by Booth v. State of Indiana, 237 U. S. 391, 35 Sup. Ct. 617, 59 L. Ed. 1011.

Appellant invokes against the law sections 21 and 23 of the Indiana Bill of Rights which respectively provide that no man's property or particular services shall be taken without just compensation, nor except in the case of the state, without compensation being first assessed and tendered, nor shall there be a grant of privileges to any citizen or class of citizens that shall not belong to all citizens.

Appellant, however, while admitting, in-

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deed, citing *cases to show that the classification of objects of legislation under the Bill of Rights of the state has the same bases of power and purposes as the classification of objects under the Fourteenth Amendment of the Constitution of the United States, yet contends that the Supreme Court of the state has strictly construed the Bill of Rights of the state, and has observed a precision in classification not required or practised in the application of the Fourteenth Amendment—citing for this Indianapolis T. & T. Co. v. Kinney, 171 Ind. 612, 617, 85 N. E. 954, 23 L. R. A. (N. S.) 711; Cleveland, etc., R. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165; Richey v. Cleveland, etc., R. R. Co., 176 Ind. 542, at page 558, 96 N. E. 694, 47 L. R. A. (N. S.) 121.

These cases were constructions of the Employers' Liability Act of the state. It was held in Indianapolis T. & T. Co. v. Kinney, supra, that that act was constitutional as to railroads because it related "to the peculiar hazards inherent in the use and operation of" them, and only applied to employés operating trains. It is the contention of the Coal Company that it is a deduction from that decision and the others cited, which may be said to be of the same effect, that there must be a difference observed between employés of coal-mining companies as they are or are not engaged in the hazardous part of the business, and as that distinction is not observed in the Compensation Act it infringes the Bill of Rights of the state because it is made compulsory "upon coal-mining companies with respect to their employés not engaged in the hazardous part of the business, and as to all other private business enterprises within the state, except railroad employés in train service, which are excluded, it is purely optional."

The argument in support of the contention is that the act requires all employés in the coal-mining business to be paid compensation under the act whether employed above ground or under ground, that is, whether hazardously employed or otherwise, whereas in *151 the cited cases, *it is insisted, the court considered such employment as a material distinction and that legislation which disregarded it would have unconstitutional discrimination.

[4] The contention only has strength by regarding Employers' Liability Acts and Workmen's Compensation Acts as practically identical in the public policy respectively involved in them and in effect upon employer and employé. This we think is without foundation. They both provided for reparation of injuries to employés but differ in manner and effect, and there is something more in a compensation law than the element of hazard, something that gives room for the power of classification which a Legislature may exercise in its judgment of what is necessary for the public welfare, to which we have adverted, and which cannot be pronounced arbitrary because it may be disputed and "opposed by argument and opinion of serious strength." German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. International Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

Decree affirmed.

(255 U. S. 271)

MAGUIRE et al. v. REARDON et al.

(Argued Jan. 28, 1921. Decided Feb. 28, 1921.)

No. 202.

1. Courts 🔑366(8)—Effect of charter and ordinances questions of local law.

The construction of the charter and ordinances of a city, as prohibiting, at the time plaintiff's building was erected, the erection of such a building within the fire limits as therein defined, is a question of local law, on which the determination of state courts was conclusive.

2. Constitutional law 🔑320—Municipal corporations 🔑628—Removal of building unlawfully erected not unconstitutional.

The demolishing or removal of a wooden building erected within the fire limits at a time when such construction was unlawful under the city charter and ordinances does not violate the United States Constitution.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division 1.

Suit by Michael Maguire and another against Timothy A. Reardon and others to restrain the defendants from demolishing a wooden building owned by plaintiffs. Judgment for defendants was affirmed by the District Court of Appeal of California (183 Pac. 303), and plaintiffs bring error. Affirmed.

Mr. J. F. Riley, of San Francisco, Cal., for plaintiffs in error.

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*Messrs. Maurice T. Dooling, Jr., and George Lull, both of San Francisco, Cal., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Defendants in error, officers and agents of the City of San Francisco, purporting to act under an ordinance approved May 8, 1917, gave notice of their intention to demolish and remove a wooden building on Van Ness avenue, the property of plaintiffs in error. Thereupon the latter instituted this proceeding for an injunction upon the ground, among others, that as the building was lawfully erected the ordinance violated the federal Constitution.

The court below, following Bancroft v. Goldberg, Bowen & Co., 166 Cal. 416, 137 Pac. 18, held that the building was erected in 1906 within the fire limits theretofore prescribed in violation of valid local regulations duly enacted under the charter, and consequently there could be no reasonable doubt of the municipality's power to direct its removal.

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[1, 2] *The meaning and effect of the charter and ordinances thereunder are questions of local law determination of which by the state courts we commonly accept as conclusive. It is admitted that the building was constructed within defined fire limits, and the Supreme Court of the state has said this was contrary to valid regulations then in force. The challenged ordinance must therefore be treated as affecting an unlawful structure, and as so applied we can find no plausible ground for holding it in conflict with the federal Constitution.

The judgment below is

Affirmed.

(255 U. S. 257)

UNITED STATES v. FIELD.

(Argued Dec. 9, 1920. Decided Feb. 28, 1921.)

No. 442.

1. **Statutes 🔑245 — Statutes not to be extended by implication.**

The provisions of statutes imposing taxes are not to be extended by implication.

2. **Internal revenue 🔑8—Interest as to which decedent had power of appointment not taxable unless it fulfills conjunctive conditions of statute.**

Under Revenue Act 1916, § 202, cl. "a" (Comp. St. § 6336½c), providing, relative to the estate tax that the value of property shall be included to the extent of the interest therein of decedent, which, after his death, is subject to the payment of charges against his estate and the expenses of administration and is subject to distribution as part of his estate, as the conditions are expressed conjunctively, and not disjunctively, the exercise of a power of appointment is not taxable unless it fulfills all three of the statutory conditions.

3. **Powers 🔑25—Donee of power of appointment has no estate.**

The existence of a power of appointment does not, of itself, vest any estate in the donee.

4. **Executors and administrators 🔑45 — Appointed property is equitable and not legal assets, and passes to donee's executor merely as representative of creditors.**

Where one having a power of appointment dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable and not legal assets of his estate, and, in the absence of statute, if it passes to the executor at all, it does so as matter of convenience and because he represents the rights of creditors, and not by virtue of his office.

5. **Powers 🔑26—Appointed estate is liable to creditors to extent only to which donee's estate is insufficient.**

Where a power of appointment is executed, creditors of the donee can claim the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands.

6. **Powers 🔑26—Creditors have no redress when donee does not execute power.**

Creditors of one having a power of appointment have no redress in case of the donee's failure to execute the power.

7. **Executors and administrators 🔑45—Property held under power of appointment not subject to distribution as part of donee's estate.**

Whether a power of appointment be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the donee's estate, but, if there be no appointment, passes according to the disposition of the donor, and, if there be an appointment to volunteers, goes to such appointees subject to whatever rights creditors have.

8. **Internal revenue 🔑8—Transfer under power of appointment not taxable.**

Property passing under a testamentary execution of a general power of appointment created prior to Revenue Act 1916 was not taxable either under section 202, cl. "a" (Comp. St. § 6336½c), as property in which the decedent had an interest and which was subject to the payment of debts and expenses of administration and subject to distribution as part of his estate, or under clause "b" as property in which the decedent had an interest and which was transferred by him in contemplation of death, etc.

9. **Internal revenue 🔑8 — Express provision taxing transfer held to indicate doubt as to taxability under prior act.**

The insertion in Act Feb. 24, 1919, of the provision not contained in Revenue Act Sept. 8, 1916, imposing a tax on property passing under a general power of appointment exercised by a decedent, indicates that Congress at least was doubtful whether the previous act included property passing by appointment.

Appeal from the Court of Claims.

Suit by Stanley Field, as executor of Kate Field, deceased, against the United States. From a judgment for the claimant, the United States appeals. Affirmed.

*Mr. Assistant Attorney General Davis and Mr. Solicitor General Frierson, for the United States.

*Mr. John P. Wilson, of Chicago, Ill., for appellee.

Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims sustaining a claim for refund of an estate tax exacted under title 2 of Revenue Act Sept. 8, 1916, c. 463, 39 Stat. 756, 777 (Comp. St. §§ 6336½a–6336½m), as amended by Act March 3, 1917, c. 159, 39 Stat. 1000, 1002. It presents the question whether the act taxed a certain interest that passed under testamentary execution of a general power of appointment created prior, but executed subsequent, to its passage.

The facts are as follows: Joseph N. Field, a citizen and resident of Illinois, died April 29, 1914, leaving a will which was duly admitted to probate in that state, and by which he gave the residue of his estate, after payment of certain *legacies, to trustees, with provision that one-third of it should be set apart and held as a separate trust fund for the benefit of his wife, Kate Field, the net income to be paid to her during life, and from and after her death the net income of one-half of said share of the trust estate to be paid to such persons and in such shares as she should appoint by last will and testament. The trust was to continue until the death of the last surviving grandchild of the testator who was living at the time of his death, and at its termination the undistributed estate was to be divided among named beneficiaries or their issue, per stirpes, in proportions specified. Kate Field died April 29, 1917, a resident of Illinois, leaving a will which was duly probated in that state, by which she executed the power of appointment, directing that the income to which the power related should be paid in equal shares to her children surviving at the date of the respective payments, the issue of any deceased child to stand in the place of such deceased child. The collector of internal revenue, assuming to act under the Revenue Act of 1916, as amended, and regulations issued by the Commissioner of Internal Revenue, included as a part of the gross estate of Kate Field the appointed estate passing under her execution of the power, and proceeded to assess and collect an estate tax based upon the net value thereof, and amounting to $121,059.60. Her executor, having paid the tax under protest, and having made a claim for refund which was considered and rejected by the Commissioner of Internal Revenue, brought this suit and recovered judgment, from which the United States appeals.

The Revenue Act of 1916, in section 201 (39 Stat. 777), imposes a tax equal to specified percentages of the value of the net estate "upon the transfer of the net estate of every decedent dying after the passage of this act." By section 203 (page 778) the value of the net estate is to be determined by subtracting from the value of the gross estate certain *261 *specified deductions. The gross estate is to be valued as follows:

> "Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> "(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> "(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. * * *"

The amendment of March 3, 1917 (39 Stat. 1002), pertains merely to the rates, and need not be further considered.[1]

The provision quoted from section 202 was construed by the Treasury Department, in U. S. Internal Revenue Regulations No. 37, relating to Estate Taxes, Revised May, 1917, art. XI, as follows:

> "Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor."

[1] No question being suggested as to the *262 power of Congress *to impose a tax upon the passing of property under testamentary execution of a power of appointment created before, but executed after, the passage of the taxing act (see Chanler v. Kelsey, 205 U. S. 466, 473, 478, 479, 27 Sup. Ct. 550, 51 L. Ed. 882; Knowlton v. Moore, 178 U. S. 41, 56–61, 20 Sup. Ct. 747, 44 L. Ed. 969), the case involves merely a question of the construction of the act. Applying the accepted canon that the provisions of such acts are not to be extended by implication (Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211), we are constrained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment.

The government seeks to sustain the tax under both clauses above quoted from section 202.

[2] The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

The chief reliance of the government is upon the rule, well established in England and followed generally, but not universally, in this country, that where one has a general power of appointment either by deed or by will, and executes the power, equity will regard the property appointed as part of his assets for the payment of his creditors in preference to the claims of his voluntary appointees. See Brandies v. Cochrane, 112 U. S. 344, 352, 5 Sup. Ct. 194, 28 L. Ed. 760.

*263 *The English cases are fully reviewed by the House of Lords in O'Grady v. Wilmot, [1916] 2 A. C. 231, 246, et seq. Illustrative cases in the American courts are Johnson v. Cushing, 15 N. H. 298, 307, 41 Am. Dec. 694; Rogers v. Hinton, 62 N. C. 101, 105; Clapp v. Ingraham, 126 Mass. 200, 202; Knowles v. Dodge, 1 Mackey (D. C.) 66, 72; Freeman's Adm'r v. Butters, 94 Va. 406, 411, 26 S. E. 845;

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[1] The act was further amended October 3, 1917 (chapter 63, 40 Stat. 300, 324); superseded and repealed by act of February 24, 1919 (chapter 18, 40 Stat. 1057, 1096, 1149).

Tallmadge v. Sill, 21 Barb. (N. Y.) 34, 51, et seq.; contra, per Gibson, C. J., in Commonwealth v. Duffield, 12 Pa. 277, 279–281; Pearce v. Lederer (D. C.) 262 Fed. 993, affirmed Lederer v. Pearce (C. C. A.) 266 Fed. 497.

It is tacitly admitted that the rule obtains in Illinois, and we shall so assume.

[3] But the existence of the power does not of itself vest any estate in the donee. Collins v. Wickwire, 162 Mass. 143, 144, 38 N. E. 365; Keays v. Blinn, 234 Ill. 121, 124, 84 N. E. 628, 14 Ann. Cas. 37; Walker v. Treasurer, etc., 221 Mass. 600, 602, 603, 109 N. E. 647; Shattuck v. Burrage, 229 Mass. 448, 451, 118 N. E. 889. See Carver v. Jackson, 4 Pet. 1, 93, 7 L. Ed. 761.

[4] Where the donee dies indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal assets of his estate (Clapp v. Ingraham, 126 Mass. 200, 203; Patterson Co. v. Lawrence, 83 Ga. 703, 707, 10 S. E. 355, 7 L. R. A. 143), and (in the absence of statute), if it passes to the executor at all, it does so, not by virtue of his office, but as a matter of convenience, and because he represents the rights of creditors (O'Grady v. Wilmot, [1916] 2 A. C. 231, 248–257; Smith v. Garey, 22 N. C. 42, 49; Olney v. Balch, 154 Mass. 318, 322, 28 N. E. 258; Emmons v. Shaw, 171 Mass. 410, 411, 50 N. E. 1033; Hill v. Treasurer, etc., 229 Mass. 474, 477, 118 N. E. 891, L. R. A. 1918D, 337).

[5] Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. Patterson Co. v Lawrence, 83 Ga. 703, *264 708, 10 S. E. 355, 7 L. R. A. 143; *Walker v. Treasurer, etc., 221 Mass. 600, 602, 603, 109 N. E. 647; Shattuck v. Burrage, 229 Mass. 448, 452, 118 N. E. 889.

[6] It is settled that (in the absence of statute) creditors have no redress in case of a failure to execute the power. Holmes v. Coghill, 7 Ves. 499, 507, affirmed 12 Ves. 206, 214–215; Gilman v. Bell. 99 Ill. 144, 150; Duncanson v. Manson, 3 App. D. C. 260, 273.

[7] And, whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. If there be no appointment, it goes according to the disposition of the donor. If there be an appointment to volunteers, then, subject to whatever charge creditors may have against it, it goes not to the next of kin or the legatees of the donee, but to his appointees under the power.

[8] It follows that the interest in question, not having been property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).

We deem it equally clear that it was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own.

[9] It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (section 402 [e], 40 Stat. 1097):

> "To the extent of any property passing un- *265 der a general power of *appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except," etc.

Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment. See Matter of Miller, 110 N. Y. 216, 222, 18 N. E. 139; Matter of Harbeck, 161 N. Y. 211, 217, 218, 55 N. E. 850; United States v. Bashaw, 50 Fed. 749, 754, 1 C. C. A. 653. The government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d Sess.). It is evident, however, that this statement was based upon the interpretation of the act of 1916 adopted by the Treasury Department. The same report proceeded to declare (page 102) that "the absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax"; and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance.

The tax in question being unsupported by the taxing act, the Court of Claims was right in awarding reimbursement.

Judgment affirmed.

(255 U. S. 266)

NEW ORLEANS LAND CO. v. LEADER REALTY CO., Limited.

(Argued Jan. 18, 1921. Decided Feb. 28, 1921.)

No. 152.

1. **Judicial sales ⚷48—Persons not parties not concluded.**

A sale of real estate under judicial proceedings concludes no one who is not in some form a party to the proceedings.

2. **Judgment ⚷243—In suit for sale of land held by city to secure warrants, rights of third parties cannot be adjudicated.**

A suit by one recovering judgment on drainage warrants seeking a sale of land held by a city as trustee to secure such warrants was not a proceeding in rem to which all persons having an interest in the land were deemed parties with the right to intervene, and rights of third parties were not subject to adjudication therein.

3. **Courts ⚷264(5)—Suit to restrain enforcement of state court judgment held not ancillary to former suit.**

Where, in a suit brought for that purpose in a federal court, land was sold in satisfaction of a judgment on drainage warrants for which it was held by a trustee as security, and thereafter one claiming a superior title obtained a favorable judgment in the state court, a suit to restrain the enforcement of such judgment was not within the jurisdiction of the federal courts as ancillary to the former suit, as the action of the state court did not interfere with anything done in the federal court, and the relief sought was not necessary to protect or render effectual the former decree.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Suit by the New Orleans Land Company against the Leader Realty Company, Limited. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Messrs. Charles Louque and W. O. Hart, both of New Orleans, La., for appellant.

Messrs. William Winans Wall and Gustave Lemle, both of New Orleans, La., for appellee.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Having recovered a judgment upon certain drainage warrants issued under Act La. No. 30 of 1871, James W. Peake, of New York, instituted a second suit in the United States Circuit Court, Eastern District of Louisiana, May 30, 1891, against New Orleans, seeking sale of land which that city held as trustee to secure all such warrants. See Peake v. New Orleans (1891) 139 U. S. 342, 11 Sup. Ct. 541, 35 L. Ed. 131. Neither the appellee nor any of its predecessors in interest was party to the proceeding. By direction of the court a duly appointed receiver sold the land, January 15, 1892, to Dr. Gaudet, who shortly thereafter transferred it to appellant, a Louisiana corporation, which took immediate possession.

Setting up superior title to some of the land under patent from the state issued June 3, 1874, appellee, also a Louisiana corporation, brought suit against appellant in the state court December 8, 1909, and obtained a favorable judgment, afterwards affirmed by the Supreme Court. Leader Realty Co. v. New Orleans Land Co., 142 La. 169, 76 South. 599. Thereupon appellant began this proceeding to restrain enforcement of the judgment of the state court or interference with its possession, and alleged that the District Court's jurisdiction was invoked solely in aid of the decree for sale in Peake v. New Orleans. No diversity of citizenship existed, and, deeming the bill not ancillary, but original, the court below dismissed it for want of jurisdiction.

[1-3] "The rule is well settled that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to such proceedings." Pittsburgh, etc., Ry. v. Loan & Trust Co., 172 U. S. 493, 515, 19 Sup. Ct. 238, 246 (43 L. Ed. 528). Clearly Peake v. New Orleans (1891) was not a proceeding in rem to which all persons having

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an interest in the land *were deemed parties with the right to intervene. Its only purpose was to secure sale and transfer of such right and title as the city held. Rights of third parties were not subject to adjudication therein. High on Receivers (4th Ed.) § 199a. The subsequent action by the state court did not interfere with anything done by the federal court (Dupasseur v. Rocherau, 21 Wall. 130, 136, 137, 22 L. Ed. 588), and the relief now sought by appellant is not necessary to protect or render effectual any former decree (Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629, and similar cases are not pertinent). Their purpose was to protect or enforce some right theretofore duly adjudicated, while here the defendant's claim in no way conflicts with any right arising under the former adjudication, and nothing is required in order to render that effectual.

The decree below is affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(255 U. S. 138)

UNITED STATES v. RUSSELL.

(Argued Jan. 17, 1921. Decided Feb. 28, 1921.)

No. 143.

1. **Bribery ⚷1(2)—Approach to juror is "endeavor" to corrupt him.**

Within Criminal Code, § 135 (Comp. St. § 10305), making it punishable to endeavor to influence a petit juror, the use of the word "endeavor" avoids the technical difficulties which would have been involved by using the word "attempt," and defendant, who visited the wife of a petit juror and conveyed to her an intimation that the juror would be paid for returning a verdict favorable to one accused of an offense, was guilty of the endeavor, though his acts had not progressed far enough to amount to an attempt, since, under the section, it is the endeavor that is punished, and not its success.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Endeavor.]

2. **Bribery ⚷6(1) — Knowledge person approached was juror not selected is sufficient.**

An indictment charging an endeavor to influence a juror, contrary to Criminal Code, § 135 (Comp. St. § 10305), which alleged that defendant knew the person to be influenced was a petit juror in the discharge of his duty, was sufficient to bring the charge within the statute, though that person had not yet been selected and sworn as a juror.

In Error to the District Court of the United States for the Northern District of Illinois.

L. C. Russell was indicted for corruptly endeavoring to influence a petit juror. Demurrer to the indictment was sustained, and the United States brings error. Reversed, and cause remanded.

Mr. Assistant Attorney General Stewart, for the United States.

*Messrs. Otto Christensen and Seymour Stedman, both of Chicago, Ill., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Review of an indictment in two counts for violation of section 135 of the Criminal Code of the United States (Comp. St. § 10305) which provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

*The government does not press the case on count 2. It is only necessary, therefore, to consider count 1. It charges defendant with unlawfully and corruptly endeavoring to influence one William D. Russell, who, he well knew, was a petit juror in the court in the discharge of his, the juror's duty, and who he knew had been summoned as a petit juror on April 3, 1918, at which time the trial of William D. Haywood and others was to begin. The manner of the execution of the violation of the section the indictment details as follows:

"Endeavoring to ascertain in advance of the examination of said William D. Russell in said court as to his qualifications to sit as a petit juror at said trial whether said William D. Russell was favorably inclined towards said William D. Haywood and his codefendants, and corruptly to induce said William D. Russell to favor the acquittal of said William D. Haywood and his codefendants in case he should be selected as a petit juror at said trial, said L. C. Russell, on said April 1, 1918, called at the home of said William D. Russell at No. 604 West Thirty-First street, in said city of Chicago, and engaged Lucy Russell, wife of said William D. Russell, in a conversation, in the course of which said L. C. Russell told said Lucy Russell that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; by means of which request and statement said L. C. Russell conveyed to Lucy Russell, and endeavored to convey to said Wil-

*liam D. Russell, an offer to pay money to said William D. Russell in return for his favoring such acquittal. * * *"

Defendant demurred to the indictment on the ground that it did not appear therefrom by any sufficient averment or recital of—

"jurisdictional facts that any cause involving any issue of fact triable by a jury, was at the time in said indictment mentioned, pending in the District Court of the United States, or any other court, whereby the above named United States District Court does or could acquire jurisdiction in the premises."

The enumeration of the deficiencies of the indictment may be summarized as follows:

It did not appear that William D. Russell possessed the qualifications to act as a juror; or had been duly and regularly drawn and summoned; or had been examined and accepted as a juror at the array; it cannot be ascertained at what time and place the alleged conversation was had; or at what time Lucy Russell received the impression of the meaning of the conversation; or that she had access to her husband or had opportunity, or could have communicated the conversation to him; or that defendant knew she had such opportunity; or that William D. Russell was a juror in any particular case.

The demurrer was sustained and the indictment dismissed. This writ of error was then allowed.

Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to "find out what his [L. C. Russell's] attitude was towards the defendants to be tried," and that this (we are stating the effect of counsel's contention) was only in preparation of a sinister purpose, that the defendants in the case did not wish to undertake, or, to use the language of the *143 indictment, did *not "want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal"; and this, counsel says, "only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation" and "could be interpreted only * * * to be *preparation* [italics counsel's] for an 'endeavor' or 'attempt' to influence the juror, but falls far short of an actual endeavor to do so."

Counsel enters into quite a discussion, with citation of cases, of the distinction between preparations for an attempt and the attempt itself, and charges that there is a wide difference between them.

[1] We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal, because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror, but at the "endeavor" to do so. Experimental approaches to the corruption of a juror are the "endeavor" of the section. Guilt is incurred by the trial—success may aggravate; it is not a condition of it.

[2] The indictment charges that defendant knew that William D. Russell was a petit juror in the discharge of his duty as such juror, and therefore an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn. *144 State v. Woodson, 43 *La. Ann. 905, 9 South. 903. The court, hence, erred in sustaining the demurrer and dismissing the indictment.

Judgment reversed, and cause remanded for further proceedings in conformity with this opinion.

(255 U. S. 298)

GOULED v. UNITED STATES.

(Argued Jan. 4, 1920. Decided Feb. 28, 1921.)

No. 250.

1. Searches and seizures 🔑7—Witnesses 🔑293—Provisions against unreasonable searches and compelling testimony liberally construed.

The provisions of Const. Amend. 4, protecting against unreasonable searches and seizures, and Amendment 5, providing that no person shall be compelled in any criminal case to be a witness against himself, are indispensable to the full enjoyment of personal security, liberty, and private property, and should receive a liberal construction to prevent an encroachment on the rights secured by them.

2. Criminal law 🔑693 — Objection to seized paper at trial held not too late.

The rule of practice that an objection first made at the trial to the introduction of a paper seized from defendant is too late to be considered does not apply where the paper was seized from defendant by stealth, and he did not know of its seizure until it was offered in evidence against him, and in such case the objection should be considered.

3. Searches and seizures 🔑7 — Secret search after lawful entry is illegal.

The prohibition of Const. Amend. 4, against unreasonable searches and seizures, is violated when a representative of any branch or subdivision of the government gains entrance to the home or office of a person suspected of crime by stealth, through social acquaintance, or in the guise of a business call, and subsequently makes a secret search, in the absence of the suspected person, and seizes papers to be used in evidence against him.

4. Criminal law 🔑393(2)—Use of paper secretly seized violates provision against compelling self-incriminating testimony.

The admission in evidence against a defendant of a paper secretly seized from his possession by a representative of the United States government, in violation of Const. Amend. 4, is contrary to Const. Amend. 5, providing that no person shall in any criminal case be compelled to be a witness against himself.

5. Searches and seizures 🔑7 — Lawful seizures are not prohibited.

Const. Amend. 4, prohibiting unreasonable searches and seizures without warrant issued on probable cause, implies that search warrants were in familiar use when the Constitution was adopted, and that when issued upon probable cause properly supported and particularly describing the place to be searched and the persons or things to be seized, are not to be regarded as unreasonable, and are not prohibited by the amendment.

6. Searches and seizures 🔑1 — Seizure of property must be based on right additional to use as evidence.

Search warrants may not be used as the means of gaining access to a man's house or office and papers, solely to secure evidence to be used against him in a criminal or penal proceeding, but may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or complainant may have in the property to be seized, or when a valid exercise of the police power renders possession of the property by accused unlawful.

7. Searches and seizures 🔑1 — Public may have interest in contract to defraud government, justifying seizure.

There is no special sanctity in papers, as distinguished from other forms of property, which renders them immune from search and seizure, and contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them, which would justify the search for and seizure of them under a properly issued search warrant for the purpose of preventing further frauds.

8. Searches and seizures 🔑1 — Want of pecuniary value does not justify seizure.

The fact that papers seized from defendant possessed no pecuniary value, and were of value as evidence only, is of no significance in determining whether they may be seized under a proper search warrant.

9. Searches and seizures 🔑1—Public held to have no right to seized papers.

The public or the government could have no interest in an unexecuted form of contract with a stranger to the indictment, in a bill by an attorney for legal services to defendant, or in an executed contract with a stranger to the indictment, which was said to possess no value, except as evidence, and therefore such papers could not be legally seized, even under proper search warrant.

10. Criminal law 🔑393(2)—Admission of papers unlawfully seized from defendant compels testimony.

The use in evidence of papers seized in a search unconstitutional under Const. Amend. 4, is in effect to compel defendant to become a witness against himself contrary to Amendment 5.

11. Criminal law 🔑386 — Property lawfully seized may be used in prosecution for different offense.

Property lawfully seized from defendant's possession under a proper search warrant can be used against defendant in a prosecution for an offense different than that alleged in the affidavit on which the warrant was issued.

12. Criminal law 🔑695½, New, vol. 17 Key-No. Series—Court should re-examine at trial government's right to possession of papers.

The rule that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained is a rule of practice, which must not be allowed to prevail over a constitutional right, so that, after a motion by defendant for return of papers as unlawfully seized had been denied before trial, a different judge presiding at the trial should re-examine the question on objection of defendant to the introduction of the papers in evidence against him.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Felix Gouled was convicted of conspiracy, and he prosecuted error to the Circuit Court of Appeals, which certified to the Supreme Court six questions, 264 Fed. 839. Questions answered in the affirmative.

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*Messrs. Charles E. Hughes and Martin W. Littleton, both of New York City, for Gouled.

Mr. Solicitor General Frierson, for the United States.

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*Mr. Justice CLARKE delivered the opinion of the Court.

In a joint indictment the plaintiff in error, Gouled, one Vaughan, an officer of the United States Army, and a third, an attorney at law, were charged in the first count with being parties to a conspiracy to defraud the United States, in violation of section 37 of the federal Criminal Code (Comp. St. § 10201), and, in the second count, with having used *303 the mails to *promote a scheme to defraud the United States, in violation of section 215 of that Code (section 10384). Vaughan pleaded guilty, the attorney was acquitted, and Gouled, whom we shall refer to as the defendant, was convicted, and thereupon prosecuted error to the Circuit Court of Appeals, which certifies to this court six questions which we are to consider.

Of these questions, the first two relate to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under direction of officers of the Intelligence Department of the Army of the United States, and the remaining four relate to papers taken from defendant's office under two search warrants, issued pursuant to the Act of June 15, 1917 (40 Stat. 217, 228 [Comp. St. 1918, Comp. St. Ann.

Supp. 1919, §§ 10496¼a–10496¼v]). It was objected on the trial, and is here insisted upon, that it was error to admit these papers in evidence because possession of them was obtained by violating the rights secured to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Amendment reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The part of the Fifth Amendment here involved reads:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

[1] It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed *304 under the Consti*tution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property"; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.

In the spirit of these decisions we must deal with the questions before us.

The facts derived from the certificate, essential to be considered in answering the first two questions, are: That in January, 1918, it was suspected that the defendant, Gouled, and Vaughan were conspiring to defraud the government through contracts with it for clothing and equipment; that one Cohen, a private in the Army, attached to the Intelligence Department, and a business acquaintance of defendant Gouled, under direction of his superior officers, pretending to make a friendly call upon the defendant gained admission to his office and in his absence, without warrant of any character, seized and carried away several documents; that one of these papers, described as "of evidential value only" and belonging to Gouled, was subsequently delivered to the United States District Attorney, and was by him introduced in evidence over the objection of the defendant that possession of it was obtained by a violation of the Fourth or Fifth Amendment to the Constitution; and that the defendant did not know that Cohen had *305 carried away any of his papers until *he appeared on the witness stand and detailed the facts with respect thereto as we have stated them, when, necessarily, objection was first made to the admission of the paper in evidence.

Out of these facts arise the first two questions, both relating to the paper thus seized. The first of these is:

> "Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government of the United States, a violation of the Fourth Amendment?"

The ground on which the trial court overruled the objection to this paper is not stated, but from the certificate and the argument we must infer that it was admitted, either because it appeared that the possession of it was obtained without the use of force or illegal coercion, or because the objection to it came too late.

[2] The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.

[3] The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search *306 and *seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative.

[4] The second question reads:

> "Is the admission of such paper in evidence against the same person when indicted for crime a violation of the Fifth Amendment?"

Upon authority of the Boyd Case, supra, this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

The remaining four questions relate to three other papers which were admitted in evidence on the trial over the same constitutional objections as were interposed to the admission of the first paper. One was an unexecuted form of contract between the defendant and one Lavinsky; another was a written contract, signed by the defendant and one Steinthal; and the third was a bill for

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*disbursements and professional services rendered by the attorney at law to the defendant Gouled.

Of these papers, the first was seized in defendant's office under a search warrant dated June 17, and the other two under a like warrant dated July 22, 1918, each of which was issued by a United States commissioner on the affidavit of an agent of the Department of Justice. It is certified that it was averred in the first affidavit that there were in Gouled's office "certain property, to wit, certain contracts of the said Felix Gouled with S. Lavinsky which were used as a means of committing a felony, to wit, * * * as a means for the bribery of a certain officer of the United States." It is also certified that the second affidavit declared that Gouled had at his office "certain letters, papers, documents and writings which relate to and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States." Neither the affidavits nor the warrants are given in full in the certificate, but no exception was taken to the sufficiency of either.

After the seizure of the papers, a joint indictment was returned, as stated, against Gouled, Vaughan, and the attorney, and before trial a motion was made by Gouled for a return of the papers seized under the search warrants, which was denied, and when the motion was renewed at the trial, but before any evidence was introduced, it was again denied. The denial of this motion is not assigned as error.

The contract of the defendant with Steinthal, which was seized under the warrant, was not offered in evidence but a duplicate original, obtained from Steinthal, was admitted over the objection that the possession of the seized original must have suggested the existence and the obtaining of the counterpart, and that therefore the use of it in evidence would violate the rights of the defendant under the Fourth or Fifth Amendment.

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Silverthorne *Lumber Co. v. United States, 251 U. S. 385, 40 Sup. St. 182, 64 L. Ed. 319. The unsigned form of contract and the attorney's bill were offered and also admitted over the same constitutional objection. There is no statement in the certificate of the contents of these papers, but it is said of them only, that they belonged to Gouled, that they were without pecuniary value, and that they constituted evidence "more or less injurious to the defendant."

It is apparent from this statement that to answer the remaining four questions involves a consideration of the applicable law of search warrants.

[5] The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the amendment. Searches and seizures are as constitutional under the amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them—the permission of the amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd and Weeks Cases, supra, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling "and many other things of like character" might be searched for in home or office and if found might be seized, under search war-

rants, lawfully applied for, issued and executed.

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[6] *Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, supra, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. Boyd Case, 116 U. S. 623, 624, 6 Sup. Ct. 524, 29 L. Ed. 746.

[7] There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, Langdon v. People, 133 Ill. 382, 24 N. E. 874, and lottery tickets, under a statute prohibiting their possession with intent to sell them, Commonwealth v. Dana, 2 Metc. (Mass.) 329, and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

With these principles of law in mind, we come to the remaining questions.

The third question reads:

> "Are papers of no pecuniary value but possessing evidential value against persons presently *310 suspected and subsequently indicted under *sections 37 and 215 of the United States Criminal Code, when taken under search warrants issued pursuant to the Act of June 15, 1917, from the house or office of the person suspected, seized and taken in violation of the Fourth Amendment?"

[8] That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners and are property of a most important character (Boyd Case, supra, 116 U. S. 627, 628, 6 Sup. Ct. 524, 29 L. Ed. 746), and since those here involved possessed "evidential value" against the defendant, we must assume that they were relevant to the issue.

[9] Restraining the questions to the papers described, and first as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that under the principles of law stated it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment: It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality in the bribing of a public servant and in perpetrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds, but the facts necessary to give this contract such a character do not appear *311 in the certificate. On the con*trary, this third question recites that the papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are "of evidential value only," so that it is impossible to say, on the record before us, that the government had any interest in it other than as evidence against the accused, and therefore as to all three papers the answer to the question must be in the affirmative.

[10] The fourth question reads:

> "If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?"

The same papers being involved, the answer to this question must be in the affirmative, for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the Boyd Case, to compel the defendant to become a witness against himself."

[11] The fifth question reads:

> "If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?"

It has never been required that a criminal prosecution should be pending against a per-

son in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the government, may not be used in the prosecution of a suspected person for a crime other
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than that which may have been described *in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

[12] The sixth question reads:

> "If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted; if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The papers being of "evidential value only" and having been unlawfully seized, this question really is whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider
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*and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

Each question is answered, Yes.

(255 U. S. 313)

AMOS v. UNITED STATES.

(Argued Dec. 13, 1920. Decided Feb. 28, 1921.)

No. 114.

1. Criminal law 🔑395—Searches and seizures 🔑5—Petition for return of unlawfully seized property and motion to strike evidence obtained by seizure should be granted.

A petition by accused, presented after the jury was sworn, but before any evidence was offered, for the return to him of property unlawfully seized from him without warrant, and intended to be used in evidence against him, was not presented too late, and should have been granted, and the motion to strike the evidence obtained by the seizure should have been granted, where the testimony of the government officers who made it showed conclusively that it was made without warrant.

2. Searches and seizures 🔑7—Wife held not to have waived defendant's rights against unlawful search.

Even if the wife of accused could waive his constitutional rights against unlawful search in his absence, she did not waive such rights by admitting to the house the government officers, who presented themselves as such and announced their intention to search, since it is clear that the search was permitted under implied coercion.

In Error to the District Court of the United States for the Eastern District of South Carolina.

Lawrence Amos was convicted of removing whisky on which the revenue tax had not been paid to a place other than a government warehouse, and of selling whisky on which the tax required by law had not been paid, and he brings error. Reversed and remanded.

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*Messrs. H. H. Obear and Charles A. Douglas, both of Washington, D. C., for plaintiff in error.

The Attorney General and Mr. W. C. Herron, of Washington, D. C., for the United States.

Mr. Justice CLARKE delivered the opinion of the Court.

The plaintiff in error, whom we shall designate defendant as he was in the court below, was tried on an indictment containing six counts. He was found not guilty on the first four counts, but guilty on the fifth, which charged him with having removed whisky on which the revenue tax had not been paid to a place other than a government warehouse, and also on the sixth, which charged him with having sold whisky on which the tax required by law had not been paid.

After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was averred the District Attorney intended to use in evidence at the trial and which had been seized by P. J. Coleman and C. A. Rector, officers of the government, in a search of defendant's house and store "within his curtilage," made unlawfully and without warrant of any kind, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Upon reading of this petition and hearing
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of the applica*tion it was denied, and exception being noted, the trial proceeded.

Coleman and Rector were called as witnesses by the government and testified: That as deputy collectors of internal revenue, they went to defendant's home, and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers and had come to search the premises "for violations of the revenue law"; that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half pint of illicitly distilled whisky, which they called "blockade whisky"; and that they then went into the home of defendant, and on searching found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whisky. The government introduced in evidence a pint bottle containing whisky, which the witness Coleman stated "was not one of the bottles found by him, but that the whisky contained in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated." On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

After these two government witnesses had described how the search was made of defendant's home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by government agents without warrant of any kind, in plain violation of
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the *Fourth and Fifth Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, and also denied his motion to exclude such property and the testimony relating thereto given by the government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

[1] The answer of the government to the claim that the trial court erred in the two rulings we have described is that the petition for the return of defendant's property was properly denied, because it came too late when presented after the jury was impaneled and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

Plainly the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, Felix Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. ——.

There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of
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the court *by the government itself. The petition should have been granted; but, it having been denied, the motion should have been sustained.

[2] The contention that the constitutional rights of defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.

It results that the judgment of the District Court must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

(255 U. S. 221)

BODKIN v. EDWARDS.

(Submitted on Motion to Dismiss or Affirm Dec. 6, 1920. Decided Feb. 28, 1921.)

No. 495.

1. **Appeal and error 🔑635(3)—Motion to dismiss denied, though record shows no error and does not contain all of the evidence.**

   A motion to dismiss an appeal from a decree of the Circuit Court of Appeals in a case in which its decision is not final will be denied, though the record does not contain all of the evidence, and shows no error authorizing the court to disturb the concurring findings of the two lower courts.

2. **Appeal and error 🔑1094(1)—Concurring findings of lower courts accepted, unless clear error is shown.**

   The concurring findings of the District Court and Circuit Court of Appeals on the facts are accepted by the Supreme Court unless clear error is shown.

3. **Appeal and error 🔑1126—Judgment affirmed on motion, when record does not contain all of the evidence nor show error in concurring findings.**

   In a case turning essentially on questions of fact, where the record shows no clear error in the concurring findings of the two lower courts, and does not contain all the evidence that was before those courts, the decree will be affirmed on motion, under Supreme Court rule 6 (222 U. S. Appendix, 10, 32 Sup. Ct. v), instead of retaining the case for oral argument in the regular course, when this would result in harmful delay.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by William B. Edwards against Patrick H. Bodkin. A decree for plaintiff was affirmed by the Circuit Court of Appeals (265 Fed. 621), and defendant appeals. On motion to dismiss or affirm. Decree affirmed.

*Mr. Samuel Herrick, of Washington, D. C., for appellee.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by Edwards to have Bodkin declared a trustee for him of the title to a quarter section of land in California. While the land was public and subject to entry under the homestead law, Edwards, a qualified applicant, made a homestead entry of it and afterwards submitted final proofs in due course. Bodkin instituted a contest against the entry and obtained its cancellation by the Land Department. The land officers then permitted Bodkin to make a homestead entry of the tract, afterwards allowed him to relinquish that entry and make others of the same tract under soldiers' additional rights of which he was the assignee, and finally patented the tract to him. During all these proceedings Edwards actively asserted the validity of his claim, and sought to interpose it as an obstacle to passing the title to Bodkin. This suit was brought shortly after the patents issued. Apparently Edwards himself drafted the bill. The District Court dismissed it without leave to amend, and he appealed. The Circuit Court of Appeals, while recognizing that the bill was somewhat inartificial, held that it contained allegations which, if true, disclosed a right to the relief sought. The decree of dismissal was accordingly reversed. Edwards v. Bodkin, 249 Fed. 562, 161 C. C. A. 488. When the case got back to the District Court the form of the bill was helped by amendments, but the substance remained substantially *as before. Bodkin answered, and the issues were tried. The court found that the material allegations of the bill were true; that in the proceedings before the Land Department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards. A decree for the latter followed, and Bodkin appealed. The Circuit Court of Appeals affirmed this decree, and in the course of its opinion said:

> "A careful review of the testimony assures us that all material allegations of the bill of complaint have been substantiated." 265 Fed. 621.

Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under section 128 of the Judicial Code (Comp. St. § 1120).

The appellee, Edwards, now moves that the appeal be dismissed, or in the alternative that the decree be affirmed, under rule 6, 222 U. S. Appendix, p. 10, 32 Sup. Ct. v. The appellant, Bodkin, although served with the motion and supporting brief, has not presented any brief in opposition.

[1-3] The motion to dismiss must be denied, and the one to affirm sustained. The

case as presented here turns essentially on questions of fact. Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. Page v. Rogers, 211 U. S. 575, 577, 29 Sup. Ct. 159, 53 L. Ed. 332; Washington Securities Co. v. United States, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; Wright-Blodgett Co. v. United States, 236 U. S. 397, 402, 35 Sup. Ct. 339, 59 L. Ed. 637; National Bank of Athens v. Shackelford, 239 U. S. 81, 36 Sup. Ct. 17, 60 L. Ed. 158. No such error is shown by the record before us. Besides it does not contain all the evidence that was before the courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay, and serve no useful purpose.

Decree affirmed.

(255 U. S. 252)

ST. LOUIS, I. M. & S. RY. CO. et al. v. J. F. HASTY & SONS et al.

(Submitted Jan. 21, 1921. Decided Feb. 28, 1921.)

No. 178.

1. Courts ⚷391(3)—Supreme Court has jurisdiction of appeal from supplementary decree rendered after remand.

Where a railroad company brought a suit in a federal court attacking intrastate freight rates established by a state railroad commission, on the ground that they violated the federal Constitution, but the decree was reversed by the Supreme Court, with directions to dismiss the bill, that court has jurisdiction of an appeal from a decree allowing claims of shippers for overcharges during the time an injunction was in force, though the appeal involves only the construction of the tariff adopted by the commission; the decree being but supplementary to the main cause.

2. Carriers ⚷189—Tariff held to provide a milling in transit rate for rough materials for barrel headings; "bolt."

A tariff of freight rates containing a table of "rough material rates applicable on rough lumber, staves, flitches, bolts and logs," conditional upon the manufactured product being reshipped in specified proportions, and including, in the table of percentages applicable, "finished staves" and "staves and headings," gave the benefit of such milling in transit rates to rough material for heading for barrels, as the word "bolt" should be understood in its generic sense as meaning a mass or block of wood from which anything may be cut or formed.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Bolts.]

3. Carriers ⚷189—Tariff held so free from doubt as to render application to railroad commission unnecessary.

The application to rough headings for barrels of a table of "rough material rates applicable on rough lumber, staves, flitches, bolts, and logs," contained in a tariff of freight rates prescribed by a state railroad commission, *held* so free from doubt that there was no occasion to apply to the commission for a construction.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Suit by the St. Louis, Iron Mountain & Southern Railway Company against the Railroad Commission of Arkansas. From a decree in favor of J. F. Hasty & Sons and others, for the excess of freight charges during the continuance of an injunction, the plaintiff and the United States Fidelity & Guaranty Company appeal. Affirmed.

Messrs. George A. McConnell and John M. Moore, both of Little Rock, Ark., for appellants.

Messrs. W. E. Hemingway, G. B. Rose, D. H. Cantrell and J. F. Loughborough, all of Little Rock, Ark., for appellees.

Mr. Justice PITNEY delivered the opinion of the Court.

[1] This case is a sequel of Allen v. St. Louis, Iron Mt. & Southern Ry., 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625, and Ar- *253 kadelphia Co. v. *St. Louis S. W. Ry. Co., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517. See, also, St. Louis, Iron Mtn. & Southern Ry. Co. v. McKnight, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200. The Arkansas Railroad Commission having in June, 1908, adopted Standard Distance Tariff No. 3, establishing maximum intrastate freight rates, the present appellant railway company attacked its validity in a suit brought against the commission in the United States Circuit Court for the Eastern District of Arkansas, contending that the rates were noncompensatory and therefore violative of the "due process of law" clause of the Fourteenth Amendment. A temporary injunction was issued and continued in force until May 11, 1911, when the Circuit Court entered a final decree making the injunction permanent, and discharging the surety from further liability on the injunction bond. On appeal to this court the decree was reversed June 16, 1913, with directions to dismiss the bill without prejudice, and for further proceedings in conformity with the opinion and decree of this court. 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. Upon the going down of the mandate the United States District Court (successor of the Circuit Court) entered a decree in obedience thereto, at the same time making a reference to a special master for the purpose of ascertaining the claims of in-

tervening shippers for refund of the difference paid by them in freight rates between those prescribed by the commission and the higher ones maintained by the railway company during the pendency of the injunction. Under this reference the present appellees J. F. Hasty & Sons presented a claim based upon the difference between rates charged on rough material transported from forest to milling points and the rates provided in the commission tariff on such movements. That tariff contained maximum rates on such lumber applicable generally, and in addition provided for a "milling-in-transit privilege," by fixing certain "rough material rates" lower than the others, conditioned upon a specified percentage of the manufactured *254 product *being shipped out on the same line that brought in the rough material. The railway company excepted to the claim on two grounds: (a) That the rough material rates were descriminatory; and (b) that they were not applicable to the shipments of Hasty & Sons because these constituted interstate commerce and hence were not subject to the commissioner's rates. The District Court sustained both exceptions. The resulting decree so far as adverse to Hasty & Sons was reversed by this court (249 U. S. 134, 147–152, 39 Sup. Ct. 237, 63 L. Ed. 517), and the cause remanded for further proceedings in conformity with our opinion. Upon the going down of this mandate there were further hearings before the referee and the District Court upon the claim of Hasty & Sons and claims of the same type presented by three other intervening shippers; and from the resulting decree in their favor the present appeal is taken. Although the only question immediately involved is the proper construction of the Standard Distance Tariff, we have jurisdiction, as we had in the Arkadelphia Case, supra, because the decree is but supplementary to the main cause—bringing to effective conclusion, if not vitiated by error, the controversy that arose out of the railway company's attack upon the rates on constitutional grounds—and hence must be regarded as involving the construction and application of the Constitution of the United States, within the meaning of section 238, Judicial Code (Comp. St. § 1215). See 249 U. S. 140–142, 39 Sup. Ct. 237, 63 L. Ed. 517.

[2] The disputed claims are based in the main upon alleged overcharges on rough material shipped over appellant's road to the respective mills of appellees, and there manufactured into heading for barrels. The question is whether item 79 of Distance Tariff No. 3 provided a rough-material rate for heading. It reads as follows:

> "Item 79. Rough Material Rates.
>
> "(a) Rough material rates applicable on rough lumber, staves, flitches, bolts, and logs, *255 carloads, *between all points in Arkansas, minimum weight. * * *
>
> "[Here follows a table of rates graduated according to distance.]
>
> "(b) The above named rates are conditional upon the manufactured product being reshipped over the same line bringing in the rough material, and may be only used subject to the following conditions: The proportion of the tonnage of out-bound manufactured product to the tonnage of in-bound rough material shall not be less than the following: * * *
>
> "[Here follows a table of percentages applicable to various products, among them:]
>
> "Finished staves, 40 per cent. of weight of rough staves. * * *
>
> "Staves and heading, 30 per cent. of weight of bolts."

At the hearing before the master it was admitted that the claimants shipped out over the line of road that brought in the rough material the requisite percentages of manufactured product in the usual course of business; nevertheless, appellant objected to the allowance of the claims, on the ground that item 79 provided no rate on in-bound rough heading, but the same was covered by item 41, and since the general rates provided therein were higher than those actually charged, there was no basis for a refund. The objection was renewed in an exception to the master's report and urged at the hearing before the court on the report and exceptions. The master found that rough heading was covered as rough material in item 79, and the District Court sustained that conclusion.

Appellant's contention is based upon a literal reading of the opening sentence of item 79: "Rough material rates applicable on rough lumber, staves, flitches, bolts, and logs," etc.; and since "rough heading" is not mentioned here, while the associated material "staves" is specified, it is contended that rough heading is not provided for.

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*From the testimony taken before the master it would appear that the raw material from which barrel heads are made is variously described as rough heading, sawed heading, split heading, and bolts or heading bolts; but it also appears that, whatever may be the distinctions, the terms are used loosely and indiscriminately in the trade and in billing shipments, material of either description being considered rough material, and all having been handled by the railway company under the rough material rate on its own schedules, without regard to particular terms.

We regard appellant's reading of item 79 as altogether too narrow. The scope and effect of the rough material rates should be determined not by regarding the opening sentence alone, but by looking also to the list of finished products to be manufactured from the material, and considering the general purpose of item 79. In the table of percentages, there are specified "finished staves, 40 per cent. of weight of rough staves," and "staves and heading, 30 per cent. of weight of bolts." The purpose is manifest to give the benefit of the milling in transit rate to rough material out of which heading is manufactured, and no reason appears for limiting it to material of a particular description. The word "bolts," used in connection with staves and heading, should be taken not as confining the privilege to rough material of a particular form, but in the generic sense in which it is employed in wood working, as meaning:

> "A mass of wood from which anything may be cut or formed" (Century Dict.); "A block of wood from which something is to be made; as a shingle bolt, a stave bolt" (Standard Dict.); "A block of timber to be sawed or cut into shingles, staves, etc." (Webster's Dict.).

[3] The matter is so free from doubt that there is no occasion to apply to the commission for a construction, as insisted by appellant under Texas & Pacific Ry. v. American Tie Co., 234 U. S. 138, 146, 34 Sup. Ct. 885, 58 L. Ed. 1255.

Decree affirmed.

(255 U. S. 224)

BAENDER v. BARNETT, Sheriff.

(Argued Jan. 11, 1921. Decided Feb. 28, 1921.)

No. 614.

1. **Constitutional law 🔑258—Counterfeiting 🔑3—Statute prohibits only conscious and willing possession of dies in similitude of those for making genuine coin.**

Criminal Code, § 169 (Comp. St. § 10339), prescribing the punishment for having possession of any die in the likeness or similitude of a die designated for making genuine coin of the United States, applies only to a willing and conscious possession, and hence does not violate the due process clause of the Fifth Amendment.

2. **Counterfeiting 🔑12—Congress has power to penalize possession of dies in similitude of those for making genuine coin.**

Const. art. 1, § 8, cl. 5, authorizing Congress to coin money and regulate the value thereof, authorized the passage of Criminal Code, § 169 (Comp. St. § 10339), providing for the punishment of any one having possession of any die in the likeness or similitude of a die designated for making genuine coin, independent of clause 6. authorizing Congress to provide for the punishment of counterfeiting.

Appeal from the District Court of the United States for the Northern District of California.

Habeas corpus by Charles L. Baender against Frank Barnett, Sheriff, etc. From an order denying a petition for a writ of habeas corpus, petitioner appeals. Affirmed.

Mr. Levi Cooke, of Washington D. C., for appellant.

Mr. Assistant Attorney General Stewart, for appellee.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from an order denying a petition for a writ of habeas corpus. The *225 petitioner was indicted under *section 169 of the Criminal Code (Comp. St. § 10339), which declares that "whoever, without lawful authority, shall have in his possession" any die in the likeness or similitude of a die designated for making genuine coin of the United States shall be punished, etc. The indictment charged that he "willfully, knowingly," and without lawful authority had in his possession certain dies of that description. He entered a plea of guilty and was sentenced to pay a fine and suffer a year's imprisonment. He made an explanatory statement to the effect that the dies were in some junk he had purchased, and that he did not know at the time of their presence nor of their coming into his possession; but, so far as appears, the statement was made without his being under oath and with the purpose only of inviting a lenient sentence.

Originally the statute contained the qualifying words "with intent to fraudulently or unlawfully use the same" (chapter 127, § 1, 26 Stat. 742), but they were eliminated when it was incorporated into the Criminal Code (35 Stat. 1088, 1120, c. 321, § 169).

[1] The petitioner makes two contentions. One is that the statute is repugnant to the due process of law clause of the Fifth Amendment, in that it makes criminal a having in possession which is neither willing nor conscious. The District Court, in denying the petition, held otherwise, saying that the statute, rightly construed, means "a willing and conscious possession," and the court added:

> "Such is the possession intended by the indictment, and such is the possession, the petitioner having pleaded guilty to the indictment, that he must be held to have had. Otherwise he was not guilty. He might have pleaded not guilty, and upon trial shown that he did not know the dies were in his possession."

We think the court was right. The statute is not intended to include and make criminal a possession which is not conscious and willing. *226 While its words are general, *they are to be taken in a reasonable sense, and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts. A citation of three will illustrate our view. In Margate Pier Co. v. Hannam, 3 B. & Ald. 266, 270, Abbott, C. J., quoting from Lord Coke, said:

> "Acts of Parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged."

In United States v. Kirby, 7 Wall. 482, 486 (19 L. Ed. 278), this court said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, citeu by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'"

And in United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854) we said:

> "A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

[2] The other contention is that the clause in the Constitution empowering Congress "to provide for the punishment of counterfeiting

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the securities and current coin of *the United States" (article 1, § 8, cl. 6) is a limitation as well as a grant of power; that the act which the statute denounces is not counterfeiting, and therefore that Congress cannot provide for its punishment. The contention must be rejected. It rests on a misconception, not only of that clause, but also of the clause investing Congress with power "to coin money" and "regulate the value thereof." Article 1, § 8, cl. 5. Both have been considered by this court, and the purport of the decisions is (1) that Congress not only may coin money in the literal sense, but also may adopt appropriate measures, including the imposition of criminal penalties, to maintain the coin in its purity and to safeguard the public against spurious, simulated, and debased coin; and (2) that the power of Congress in that regard is in no wise limited by the clause relating to the punishment of counterfeiting. United States v. Marigold, 9 How. 560, 567, 568, 13 L. Ed. 257; Legal Tender Cases, 12 Wall. 457, 535, 536, 544, 545, 20 L. Ed. 287. It hardly needs statement that in the exertion of this power the conscious and willing possession, without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States may be made a criminal offense. If this be not a necessary, it is at least an appropriate, step in effectively suppressing and preventing the making and use of illegitimate coin.

Final order affirmed.

(255 U. S. 288)

DAWSON, Atty. Gen. of Kentucky, et al. v. KENTUCKY DISTILLERIES & WAREHOUSE CO.

SAME v. J. & A. FREIBERG CO., Inc.

(Argued Jan. 6, 1920. Decided Feb. 28, 1921.)

Nos. 439 and 582.

1. Courts ⚷366(6)—Whether tax is occupation tax or property tax held question of local law.

The question whether the tax of 50 cents a gallon on all whisky withdrawn from bond or transferred in bond to another state imposed by Act Ky. March 12, 1920 (Acts 1920, c. 13), is an occupation tax or a property tax is one of local law, as to which a decision by the highest court of Kentucky would be accepted by the federal Supreme Court as conclusive.

2. Licenses ⚷1—Character of tax determined from incidents, and not from name.

The character of a tax as a property tax or an occupation tax must be determined by its incidents, and the name by which it is described in the statute imposing it is immaterial.

3. Licenses ⚷1—Tax per gallon on whisky withdrawn from bond or taken from state held a property tax.

The tax imposed on persons engaged in the business of owning and storing whisky in bonded warehouses amounting to 50 cents a gallon on whisky withdrawn from bond or transferred in bond to points outside the state imposed by Act Ky. March 12, 1920 (Acts 1920, c. 13), cannot be sustained as a tax on the business or occupation of warehousemen or on the business of owning and storing, or owning, storing, and removing, or removing whisky in bond, but is a property tax subject to the requirements of a property tax specified in Const. Ky. § 171.

4. Licenses ⚷35—Statutes held not to give remedy at law preventing suit in equity to enjoin collection of tax.

Ky. St. § 162, requiring the auditor to refund money paid for taxes when no taxes were due, as construed by the highest court of the state prior to April and May, 1920, did not give such a remedy at law for the recovery of money paid on account of the so-called license tax imposed by Act Ky. March 12, 1920 (Acts 1920, c. 13), as prevented a suit in equity to enjoin collection of the tax as the right thereunder to recover back the amount paid was doubtful.

5. Courts ⚷371(2) — Equitable remedy in state court not lost by suing in federal court.

If the remedies conferred by a statute for the recovery of taxes paid are not regarded by the state courts as ousting the jurisdiction of equity to enjoin the illegal collection of the tax, the equitable remedy available in the state courts is not lost by suing in the federal court.

6. Equity 🔑50—Jurisdiction not lost by construction of statutes, since filing of bill so as to give legal remedy.

Where at the time a bill was filed to enjoin collection of taxes equity had jurisdiction, the equitable jurisdiction was not lost because the statutes were subsequently construed by the state court, so as to give an adequate legal remedy.

7. Courts 🔑506—Order of state court, restraining enforcement of statute, held not to abate suit in federal court.

Where, in a suit by an owner of whisky in bond against the warehouseman, plaintiff joined the Attorney General and auditor of public accounts, and asked a restraining order against the collection of a tax on the whisky, and an order was granted restraining defendants from requiring plaintiff to pay the tax, a suit in a federal court to enjoin collection of the tax did not abate, under Judicial Code, § 266 (Comp. St. § 1243), as, even treating that action as one to enforce the statute, the stay contemplated by section 266 is a general one, and not a restraining order in purely private litigation.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Two suits by the Kentucky Distilleries & Warehouse Company against Charles I. Dawson, Attorney General of the State of Kentucky, and others, and by the J. & A. Freiberg Company against Charles I. Dawson, Attorney General of the State of Kentucky, and others. From an order in each suit, granting an interlocutory injunction, defendants appeal. Affirmed.

For opinion below, see 274 Fed. 420.

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*Mr. Charles I. Dawson, of Frankfort, Ky., for appellants.

Mr. W. Overton Harris, of Louisville, Ky., for an appellant in No. 582.

Mr. Wm. Marshall Bullitt, of Louisville, Ky., for appellee Kentucky Distilleries & Warehouse Co.

Messrs. T. Kennedy Helm, of Louisville, Ky., and Levi Cooke, of Washington, D. C., for appellee J. & A. Freiberg Co., Inc.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On March 12, 1920, the Legislature of Kentucky passed and the Governor approved an act (Acts 1920, c. 13) which imposed upon every person engaged in the business of manufacturing whisky or "in the business of owning and storing" the same in bonded warehouses within the state what was called an "annual license tax" of 50 cents a gallon upon all whisky either withdrawn from bond or transferred in bond from Kentucky to a

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point outside that state. *The act took effect, by its terms, on its approval by the Governor. At that time there were stored in such bonded warehouses about 30,000,000 gallons of whisky worth in bond perhaps $1.50 a gallon. Much of this whisky was owned by citizens of other states, their ownership being evidenced by negotiable warehouse receipts. Shortly after the enactment of the statute two suits were brought in the District Courts of the United States for Kentucky to enjoin its enforcement. The first was brought in the Western district, by the J. & A. Freiberg Company, Incorporated, an Ohio corporation; the second in the Eastern district by the Kentucky Distilleries & Warehouse Company, a New Jersey corporation. The Attorney General of the commonwealth and the auditor of public accounts were made defendants in each. In the former, the Louisville Public Warehouse Company was also a defendant; in the latter, the commonwealth's attorney.

In the Freiberg case it was alleged that the whisky was in a general bonded warehouse,[1] that the owner wished to withdraw it for removal in bond to a general bonded

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*warehouse in Massachusetts, and that the defendant warehouseman, acting under provisions of the Kentucky statute refused to permit such transfer unless the tax in question was paid by the owner. In the Distilleries Company case the plaintiff alleged that it had in its distillery warehouses large quantities of whisky, most of which was owned by others, that requests were being made daily either to withdraw lots from bond upon paying the government tax or to have them transferred in bond to other states, and that the defendants threatened to enforce heavy penalties if any such withdrawal or transfer was permitted without making payment of the 50 cents a gallon state tax. In each case a motion for an interlocutory injunction was made and heard before three judges under section 266 of the Judicial Code (Comp. St. § 1243). The substantial questions presented in the two suits were the same. The plaintiff contended, in each, that the Kentucky statute was void under both the state and federal Constitutions; and in each case the defendants, besides asserting the validity of the act, insisted, among other things, that the suit should be dismissed for want of equity because there was an adequate remedy at law. The District Courts granted plaintiffs the motions, holding that there was no adequate remedy at law and that the statute was invalid under the Constitution of the state because it was a property tax, was not uniform in its operation, and was confiscatory. The case comes here by direct appeal under section 238 of the Judicial Code (Comp. St. § 1215). We shall consider first the validity of the tax.

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[1] Every bonded warehouseman was required to make to the state on June 1, 1920, and monthly thereafter, a report showing all the whisky in bonded storage and the number of proof gallons withdrawn or transferred. The act provided by section 3 that all bonded warehousemen "shall, at the time said reports herein provided for are made, pay to the auditor of public accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse * * * or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the commonwealth."

[1] First. The Attorney General concedes that the tax, if a property tax, is invalid; since it does not comply with the requirements of a property tax specified in section 171 of the state Constitution. It is not "uniform upon all property of the same class *292 subject to taxation,"[2] and though *called an "annual" tax was not intended to be such.[3] He contends, however, that the tax is, as stated in the title of the act, a license tax upon "the business of manufacturing" distilled spirits and upon "the business of owning and storing such spirits in bonded warehouses." Section 181 of the state Constitution authorizes license or occupation taxes, and statutes imposing such taxes measured by the amount of the product have been repeatedly sustained by its highest court. Raydure v. Board of Supervisors of Estill County, 183 Ky. 84, 209 S. W. 19; Strater Bros. Tobacco Co. v. Commonwealth, 117 Ky. 604, 78 S. W. 871. Here we are concerned only with the taxes which are alleged to be on 'the business of owning and storing such spirits in bonded warehouses." The question is whether as to such this 50 cents a gallon tax is an occupation tax or is a property tax. The question is one of local law, so that a decision of it by the highest court of the state would be accepted by us as conclusive. But the validity of the statute does not appear to have been passed upon by any Kentucky court. We are, therefore, called upon, as were the District Courts, to determine this question of state law.

[2, 3] The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the *293 *ordinary incidents of an occupation tax. Unlike the tax of 1¼ cents a gallon upon rectifiers sustained in Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883, and the tax of 2 cents a gallon upon distillers and warehousemen sustained in Green, Auditor, v. Taylor, Jr., & Sons, 184 Ky. 739, 212 S. W. 925, this tax is not upon the business or occupation of the warehouseman. A particular lot of whisky may pass through a dozen bonded warehouses without one of them being obliged to pay the tax. For the only warehouseman required to do so, is he who has the whisky on storage at the time of its removal from bond (government) tax paid or when it is transferred in bond to another state. The tax is made primarily payable by the warehouseman and to secure its payment the state is given a lien upon the warehouse and the whisky therein. But the warehouseman is a collection agency merely empowered to get reimbursement through subrogation to the state's lien on the whisky of others which ultimately bears the burden of the tax. Nor is the alleged business of merely owning and storing whisky in bond made taxable. So long as the whisky is stored in bond within the state it is free of the tax. One may own and store the whisky for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the state, the whisky is sold to another, or if, while so owned, it is destroyed or forfeited to the government. Likewise the tax is not one imposed upon the business of owning, storing and removing whisky from bond. For the tax would become payable on account of whisky removed, although there had not been storage for any appreciable time; thus the tax would be payable on whisky if it had been removed from the warehouse immediately after the approval of the act. Nor is the tax one on the business of removing liquor owned. For the tax is payable in respect to any lot of whisky removed; and *294 a single transaction does not con*stitute engaging in the business, be it that of buying and selling whisky or in the business of otherwise using it.[4] In fact the tax is one imposed upon each lot of whisky at the time it is removed from bond within the state. The tax might be said to be upon the act

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[2] If the tax in question were a property tax there would be double taxation of this property and the uniformity clause would be violated, because the whisky has never been put into a separate class; and under another statute all whisky stored in bonded warehouses was required to be assessed by the State Tax Commission at its fair cash value; and taxes at the rate of 40 cents per $100 of value were payable thereon. Ky. Stat. § 4019, as amended March 5, 1918 (Ky. St. Supp. 1918, § 4019). Compare Campbell County v. City of Newport, 174 Ky. 712, 723, 193 S. W. 1, L. R. A. 1917D, 791. Raydure v. Board of Supervisors, 183 Ky. 84, 97, 209 S. W. 19.

[3] It was admitted that it would be clearly void as being confiscatory unless it was assumed that it was to be levied only once—namely, when the whisky is withdrawn from bond or when it is transferred in bond to another state. Compare Sallsbury v. Equitable Purchasing Co., 177 Ky. 348, 351, 353, 197 S. W. 813, L. R. A. 1918A, 1114.

[4] That an isolated transaction would not under the law of Kentucky constitute engaging in a business, see Hays v. Commonwealth, 107 Ky. 655, 658, 55 S. W. 425; Evers v. City of Mayfield, 120 Ky. 74, 77, 85 S. W. 697; Louisville Lozier Co. v. City of Louisville, 159 Ky. 178, 180, 166 S. W. 767.

of removal from the bonded warehouse within the state. But, as stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable; i. e., consumption, sale or keeping for future consumption or sale. * * * The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax the property. Compare Thompson, Auditor, v. Kreutzer, 112 Miss. 165, 72 South. 891; Thompson, Auditor, v. McLeod, 112 Miss. 383, 73 South. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674. It cannot be made an occupation or license tax by calling it so. See Flint v. Stone Tracy Co., 220 U. S. 107, 148–150, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; United States v. Emery, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825. The language of the emergency clause in the act discloses that the legislature considered that it was, in fact, taxing the whisky.[5]

As we hold the tax to be one on property, and it is conceded that, if it be such, it is invalid under the state Constitution, we have no
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occasion to consider whether *it would be also invalid under the state Constitution as a license or excise tax, because confiscatory (compare Owen County v. F. & A. Cox Co., 132 Ky. 738, 743, 117 S. W. 296, 21 L. R. A. [N. S.] 83; City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315, 26 L. R. A. [N. S.] 582; Salsbury v. Equitable Purchasing Co., 177 Ky. 348, 351, 354, 197 S. W. 813, L. R. A. 1918A, 1114), or for other reasons. Nor need we consider whether it is not also obnoxious to the federal Constitution as imposing a burden upon interstate commerce. Compare Heyman v. Hays, 236 U. S. 178, 35 Sup. Ct. 403, 59 L. Ed. 527.

[4-6] Second. The Attorney General insists that these bills in equity should have been dismissed because each plaintiff had a plain, adequate and complete remedy at law. The contention rests upon section 162 of the Kentucky Statutes, which declares that:

> "When it shall appear to the auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same."

Greene, Auditor, v. Taylor, Jr., & Sons, 184 Ky. 739, 212 S. W. 925, is cited to show that, if the auditor fails in this duty, a writ of mandamus will issue to compel performance. The plaintiffs, it is said, should have paid the tax under protest and have sued at law to recover the amounts so paid. But when these suits were brought (April and May, 1920) the decisions of the highest court of the state left it at least doubtful whether money so paid could have been recoverd at law by the taxpayer, among other reasons, because the money would not have been paid under compulsion of distraint or of a right of distraint or under a mistake of law or of fact.[6] It was not until November 16, 1920, which was
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after these appeals had been entered in *this court, that Craig v. Security Producing & Refining Co., 189 Ky. 565, 568, 225 S. W. 729, settled that money paid under such circumstances could be recovered. The Court of Appeals of Kentucky recognized the doubt arising from its earlier decisions and in order to remove the doubt found it necessary to overrule several of its recent opinions "so far as they conflict with the construction herein given section 162."

It is well settled that "if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." Davis v. Wakelee, 156 U. S. 680, 688, 15 Sup. Ct. 555, 558 (39 L. Ed. 578). But, whatever remedies section 162 is now regarded as conferring, it is clear that at the time this suit was brought they were not regarded in Kentucky as sufficiently adequate to oust the jurisdiction of equity to enjoin the illegal collection of taxes. Gates v. Barrett, 79 Ky. 295; Norman v. Boaz, 85 Ky. 557, 560, 4 S. W. 316; Negley v. Henderson Bridge Co., 107 Ky. 414, 54 S. W. 171; Louisville Trust Co. v. Stone, 107 Fed. 305, 309, 46 C. C. A. 299. And if the equitable remedy was available in the state courts it was not lost by suing in the federal court. Davis v. Gray, 16 Wall. 203, 221, 21 L. Ed. 447; Cowley v. Northern Pacific Ry. Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263. Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available. Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074; Busch v. Jones, 184 U. S. 598, 22 Sup. Ct. 511, 46 L. Ed. 707. We have no occasion, therefore, to consider other reasons urged why the legal remedy, if any, would have been inadequate.

[7] Third. The Attorney General moved that these suits be abated, relying upon the amendment to section 266 of the Judicial Code by Act of March 4, 1913, c. 160, 37 Stat. 1013 (Comp. St. § 1243), which declares that if before the final hearing of an application to restrain the enforcement of a statute or an order made by an administrative board or commission—

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[5] "And whereas the liquor which they are handling and in which they are dealing is in large quantities being removed from the bonded warehouses and disposed of, without the state securing an adequate license tax thereon an emergency is hereby declared to exist."

[6] Compare Louisville City Nat. Bank v. Coulter, 112 Ky. 577, 584, 66 S. W. 427; Couty v. Bosworth, 160 Ky. 312, 169 S. W. 742; Louisville Gas Co. v. Bosworth, 169 Ky. 824, 185 S. W. 125; and the first opinion in Craig v. Security Producing & Refining Co., rendered March 9, 1920.

> "a suit shall have been brought in a court of the state having jurisdiction thereof under the *297 laws of such state, *to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state."

The suit pending in the state court was this: A liquor dealer who owned whisky in a distillery warehouse had, prior to the enactment of the statute here in question, caused it to be bottled in bond and had paid thereon the 2-cent a gallon state tax imposed under the law of 1917. Acts Sp. Sess. Ky. 1917, c. 5, § 1. He claimed the right to withdraw the whisky from bond without payment of the 50-cent a gallon tax; and brought suit in a county court to enjoin the warehouseman from preventing his doing so. The latter set up this 1920 act. Thereupon the plaintiff by amended petition joined the Attorney General and the auditor as codefendants and prayed that they be enjoined from compelling the plaintiff or the warehouseman to pay the 50-cent a gallon tax on the plaintiff's whisky. A restraining order to that effect issued.

Whether this suit in the county court was of such a character as to entitle the state officials to stay the proceedings in the federal court we do not decide. Strictly speaking it was not "brought * * * to enforce" the statute in question; but it is, at least, arguable that it might have been accepted by the state officials as a means to that end, and so have fulfilled in substance the statutory requirement. See House Report No. 1584, 62d Cong. 3d Sess. But whether this is true or not, it was not "accompanied by a stay in such state court of proceedings under such statute" within the meaning of the Judicial Code. The stay contemplated by Congress is a general one, which would protect, among others, those who had already sought protection in the federal court. The restraining order[7] issued in the purely private litigation between third parties in the county court left the plaintiffs in the suits before us subject to all the danger of irreparable injury against which they had sought protection in the federal courts.

Affirmed.

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[7] "You are hereby enjoined from requiring from the plaintiff or his agents or distiller in charge payment of the 50-cent per gallon tax on his whiskies described in the petition * * * until further orders of this court."

(255 U. S. 129)

HARTFORD LIFE INS. CO. v. BLINCOE.

(Argued Jan. 20, 1921. Decided Feb. 28, 1921.)

No. 161.

1. **Appeal and error 🔑1195(1)—Contentions not passed on do not become law of the case.**

The rules governing the effect of a judgment as a bar or estoppel against the prosecution of a second action on the same claim or demand do not apply in determining whether a decision on the writ of error was the law of the case as to a particular issue, and the decision does not establish the law of the case as to a contention presented, but not passed on by the court.

2. **Appeal and error 🔑1195(1)—Effect of tax included in insurance assessment held not determined on writ of error.**

An opinion by the United States Supreme Court on writ of error to a state Supreme Court, reversing a judgment against a life insurance company because the state Supreme Court had not given full credit to a decision of the court of another state sustaining the authority and method by which the insurance company had levied an assessment which the state court held void, did not establish the law of the case as sustaining the assessment against the claim it was void, because including therein a state tax for which the insurance company was not liable, where that contention was not noticed by the United States Supreme Court.

3. **Courts 🔑394(18)—Supreme Court cannot determine size of state tax or applicability to defendant.**

On writ of error to a judgment of the state Supreme Court, holding an assessment by a life insurance company void because it included therein a state tax which the insurance company was not required to pay, the questions of the size of the tax and the liability of the insurance company are state questions, which cannot be reviewed.

4. **Courts 🔑394(1)—State penalty on insurance company for vexatious delay in payment is state question.**

Whether the penalty imposed on an insurance company by Rev. St. Mo. 1909, § 7068, for vexatious refusal to pay a policy, should be imposed on the company in a case where all questions on the first writ of error to the state Supreme Court were decided in its favor, is a question for the state courts to determine, and not open to review on second writ of error.

5. **Constitutional law 🔑303—Insurance 🔑602—State statute, imposing penalty for vexatious delay in paying loss, held valid.**

Rev. St. Mo., 1909, § 7068, authorizing the recovery of damages and insurance fees from an insurance company which has vexatiously refused to pay a loss under a policy, does not, even when construed to apply to delay in payment pending a suit in which all questions on the first writ of error from the state court were decided in favor of the insurance company, deprive the company of its property, in violation of Const. U. S. Amend. 14.

Mr. Justice Holmes, Mr. Justice Van Devanter, and Mr. Justice McReynolds, dissenting.

In Error to the Supreme Court of the State of Missouri.

Action by Rosa Barber against the Hartford Life Insurance Company, in which Cecilia Blincoe, as administratrix, was substituted as plaintiff after the death of the original plaintiff. Judgment for plaintiff was affirmed by the Supreme Court of Missouri (279 Mo. 318, 214 S. W. 207), and defendant brings error. Affirmed.

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*Messrs. Frederick W. Lehmann and James C. Jones, both of St. Louis, Mo., for plaintiff in error.

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*Mr. Charles E. Morrow, of St. Louis, Mo., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

This is the second writ of error in this case. The opinion upon the first writ is reported in 245 U. S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208. The suit here is, as it was there, upon a certificate of qualified life insurance, issued to Frank Barber and payable at his death to his wife, the plaintiff, who has since died, and her administratrix has been substituted as defendant in error.

The defense here is, as it was there, that Barber failed to pay the mortuary assessment levied January 29, 1910, known as quarterly call No. 126, and that the failure voided the policy by its terms.

In that case Mrs. Barber recovered judgment, which we reversed on the ground that in rendering it the state court disregarded a judgment of a Connecticut court which had jurisdiction of the subject-matter and the parties, including Barber.

Upon the return of the case to the state *134 court a new *trial was had, that resulted again in a verdict and judgment for Mrs. Barber. They were affirmed by the Supreme Court of the state. Barber v. Hartford Life Ins. Co., 279 Mo. 318, 214 S. W. 207.

To that affirmance this writ of error is directed, and the question presented is: Did the Supreme Court proceed in consonance with our decision? The extent of our decision is therefore necessary to consider, and what it directed. The determination is in the issue that was presented and passed upon.

By reference to the report of the case (245 U. S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208) it will be seen that the Supreme Court rested the judgment reviewed on the invalidity of the assessment and that the nonpayment of the latter did not, upon two grounds, work a forfeiture of the insurance: (1) Under the condition of the funds of the company the assessment was for a larger amount than was necessary to pay death losses; (2) the charter of the company required all its affairs to be managed and controlled by a board of not less than seven directors, and that the assessment was not levied by the board. These rulings we held to be "in the teeth of the Connecticut adjudication, which held that it was proper and reasonable for the company to hold and even collect in advance, in order to enable it to pay losses properly." It was hence decided that the trial court in rendering judgment against the Hartford Company, and the Supreme Court in affirming the judgment, did not give "full faith and credit to the Connecticut record." The reasons for the conclusion we need not repeat.

With this ruling the Supreme Court was confronted upon its reconsideration of the case and the freedom of decision that remained to it, and resolved that we had left untouched any consideration of the elements constituting the assessment, and that it was at liberty to decide, and decided, that a tax, asserted by the company to have been im- *135 posed by the laws of Missouri, had been *unlawfully included in the assessment and that, therefore, the assessment was void and its nonpayment did not work a forfeiture of Barber's insurance. To the contention of the company that such holding was precluded by our opinion, it was replied that the matter presented purely a question arising under the laws of the state and that this court "did not intend by its judgment to adjudicate to the contrary."

The decision of the court that the Hartford Company was not subject to the tax that it had included in its assessment was not new. It was a repetition of the ruling made in Northwestern Masonic Aid Association v. Waddill, 138 Mo. 628, 40 S. W. 648, in 1897, and should have been known to the Hartford Life Insurance Company at the time it made the assessment and mortuary call. The ruling has been again repeated in Young v. Hartford Co., 277 Mo. 694, 211 S. W. 1, and upon the authority of those cases the court decided that the tax was not applicable to companies doing business on the assessment plan, and that on that plan the Hartford Company was doing business.

The Hartford Company contests the latter ruling, and as dependent upon it, the other ruling, that is, that the company was not subject to the tax, and asserts besides that the effect of the inclusion of the tax in the assessment was presented to this court on the former writ of error and whether it was authorized by the Connecticut decree, and that the answers were in the affirmative; in other words, passed upon the power to make and the elements that made the assessment. Counsel say:

> "This court could not have held that this assessment was authorized by the Connecticut decree and at the same time hold that it was void because it included the 15 cents tax."

To sustain this view of the case the opinion is quoted as follows:

> "It is obvious from the evidence that this assessment was levied in the usual way adopted *136 by *the company and tacitly sanctioned by the Connecticut judgment."

Counsel, however, admits that the question of the inclusion of the tax was not discussed, but insists that "the question was in the record, was necessarily involved, and was presented," and invokes the presumption that whatever was within the issue was decided; in other words, that the case was conclusive, not only of all that was decided, but of all that might have been decided.

[1, 2] From our statement of the issues it is manifest that the quotation from the opinion has other explanation than counsel's, and we need not dwell upon the presumption invoked or the extent of its application in a proper case. The question of the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, or its effect upon a particular issue or question in some other case is not here involved. The most that can be said of any question that was decided is that it became the law of the case and as such binding on the Supreme Court of the state, and to what extent binding is explained in Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152. Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. The element of taxes in the assessment was not considered by the Supreme Court and in this court the Connecticut judgment and its effect were the prominent and determining factors. The question of the inclusion of the tax was not discussed or even referred to. The only question considered was the powers given to the directors of the company by the Connecticut charter and the effect that was to be assigned to the Connecticut judgment as that of a court having jurisdiction to decide what powers the charter conferred or required. It is hardly necessary to say that the tax *137 law of Missouri was no part of the *charter. It was a condition the company encountered and became subject to in Missouri.

It was urged, it is true, in the brief of counsel that the assessment "was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri." No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. If it made any impression at all it was obviously as a state question dependent upon the state statutes upon which we would naturally not anticipate the state courts, the case necessarily going back to them.

[3] Nor may we judge of the action of the Supreme Court of the state upon the tax because of its size, nor yield to the contention of the company that it, the company, had not accepted the assessment plan of insurance, but was doing business on the premium plan, and therefore subject to the tax which it had included in the assessment. These are state questions and are not within our power to review.

It is further contended by the Hartford Company that the Supreme Court permitted the recovery of damages and attorney's fees under the provisions of a statute of the state, although there was no evidence in support thereof, except the delay in payment of the claim for insurance, notwithstanding, it is further said, the company "had prevailed on every issue that had theretofore been presented," and that by this action the company was deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

[4, 5] In support of its contention the company cites section 7068 of the Revised Statutes of Missouri 1909, which, it is said, authorizes such recovery only "if it appear from the evidence that such company [insurance company] has vexatiously refused to pay" loss under a policy, and no evidence was offered on either trial to show the existence of the condition prescribed by the stat- *138 ute. The immediate *answer to the contention is that what the statute prescribed was for the courts of the state to determine and their construction is not open to our review though we might consider its application to the circumstances of the case to be rather hard. And it would, we think, be extreme to hold that the statute or its construction is a violation of the Fourteenth Amendment.

Judgment affirmed.

Mr. Justice HOLMES, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS dissent.

(255 U. S. 124)

POSTAL TELEGRAPH-CABLE CO. v. CITY OF FREMONT.

(Submitted Jan. 18, 1921. Decided Feb. 28, 1921.)

No. 156.

1. **Commerce 🔑69—Power to impose license tax on telegraph companies must have relation to interstate business.**

The power to impose a license tax on a telegraph company for the right to do business within the municipalities of a state has limitations, and must be exercised with due relation to the company's interstate business.

2. **Commerce 🔑69—Loss on intrastate business not determinative of invalidity of license tax.**

The simple assertion of a loss in a telegraph company's intrastate business without consideration of the cause or condition of it does not establish the invalidity of a license tax imposed on such business for the privilege ot doing business in a municipality.

3. **Commerce 🔑69—License tax not invalid because of amount.**

A license tax of $60 a year, imposed by a city of 8,000 inhabitants on the intrastate business of a telegraph company, was not rendered invalid by the amount ot the tax.

4. **Licenses 🔑32(2)—Allegation that license tax was paid for years through inadvertence held not a sufficient excuse.**

Where a telegraph company, whose franchise to use the streets of a city subjected it to further regulation, licensing, and taxation, paid a license tax from 1903 to 1914, an allegation, in a suit to collect the tax for subsequent years, that the tax was paid through mistake and inadvertence of its clerical force, is not a sufficient explanation, without more.

5. **Telegraphs and telephones 🔑30 — Company, claiming loss on intrastate business, must ask increase of rates before complaining of license tax.**

A telegraph company cannot complain of a license tax imposed on its intrastate business by a Nebraska municipality on the ground that such business is conducted at a loss, and that Rev. St. Neb. 1913, § 7408, compels it to continue such intrastate business, where it has not sought relief under section 7409 by applying to the State Railroad Commission for an increase in its intrastate rates.

In Error to the Supreme Court of the State of Nebraska.

Action by the City of Fremont against the Postal Telegraph-Cable Company. A judgment for plaintiff was affirmed by the Supreme Court of Nebraska (103 Neb. 476, 172 N. W. 525), and defendant brings error. Affirmed.

Mr. John N. Sebrell, Jr., of Norfolk, Va., for plaintiff in error.

Mr. R. E. Evans, of Dakota City, Neb., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

The City of Fremont is a city of Nebraska of the first class, having more than 5,000 and less than 25,000 inhabitants. By an ordinance duly enacted in 1903 and re-enacted in 1907, there was levied a license tax upon businesses and occupations within the city including telegraph offices. Upon these offices it levied a tax of $60.00 per year on the

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business and occupation of sending *messages from the city to any place in the state, and receiving messages transmitted from any place in the state, and receiving messages transmitted from any place in the state to the city, except messages received from or transmitted to any department, agency or agent of the United States, and except messages which were interstate commerce.

Plaintiff in error, herein called the Postal Company, is a corporation engaged in such business within the city, it having been in December, 1881, permitted by the constituted authorities of the city, in the manner provided by its ordinance to occupy and use the streets of the city for that purpose, the ordinance providing that it was "subject to such regulations as have been or may be provided by ordinance," and that nothing in the article granting such consent to the use and occupation of the streets should "be construed to prevent said city from further regulating, licensing or taxing any person, company or corporation owning, using or operating any telephone or telegraph lines within the corporate limits of said city." The Postal Company in accordance with the ordinance paid a license tax of $60.00 a year for the years 1903 to 1914, each inclusive, but did not pay for the years 1915 and 1916, and this action was brought for the recovery of the same with interest at 7 per cent.

The defenses of the Postal Company set up in its answer are that it is compelled by the charter of its organization to do intrastate as well as interstate telegraphing, that it paid the license tax for the years alleged inadvertently and without recognition of its legality; that it has accepted the terms of the Post Road Act of July 24, 1866 (Comp. St. § 10072–10077), and is entitled to its benefits; that the tax is confiscatory and prohibitive and deprives the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In specification of this defense it is alleged that the receipts of

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the company for 1914 on its *intrastate business were only $108.28, and for the year 1915, $83.96, and that the expenses properly chargeable against these years respectively, exclusive of the tax, were $185.56 and $154.26, and that its loss on intrastate business would have to be made up from interstate business; that the city is under no expense by reason of the poles and wires of the company being in the city, and that $60.00 a year is in excess of a rental charge upon them, and that the streets are post roads within the meaning of the Post Road Act of 1866. In further defense the answer alleges that the tax is one on interstate commerce; that it deprives the company of the equal protection of the laws and impairs the obligation of a contract, both in violation of the Constitution of the United States.

The case was tried to a jury, which, after evidence taken, was instructed by the court to return a verdict for the city in the sum of $135.00.

A motion for new trial was denied, and judgment was rendered upon the verdict. It was affirmed by the Supreme Court of the state (103 Neb. 476, 172 N. W. 525), the Supreme Court deciding: (1) The tax was "not a mere license or regulation measure, but one designed for revenue purposes," and that its extent was "a matter for the judgment and discretion of the municipal government, subject only to the restriction that it must not be prohibitory"—citing 2 Cooley on Taxation (3d Ed.) 1139, 1440. (2) The tax was not prohibitive; that proof of loss for two years without showing what volume of business was available in the municipality, or what portion was done by the company or what its facilities were for handling the business, was not sufficient to show that a tax of $60.00 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8000 inhabitants was unreasonable. (3) In imposing an occupation tax for revenue purposes a municipality acts as the agent of the state, and where a tax is imposed upon a telegraph company doing an in*trastate and an interstate business and the revenue derived from its intrastate business as a whole becomes insufficient and the tax may become a burden on its interstate business, "section 7409, Rev. St. 1913, provides a remedy."

The only contention that the Postal Company makes here is that the tax "is in effect an imposition upon its interstate business." It has this effect, is the assertion, because its "intrastate business at Fremont is insufficient to pay the tax which if compelled, must be paid from the company's interstate business," because it is required to do an intrastate business by section 7408 of the state statutes, and its charges are prescribed by the section. For the contention and its supporting assertions the company relies on Postal Telegraph-Cable Co. v. City of Richmond, 249 U. S. 252, 39 Sup. Ct. 265, 63 L. Ed. 590.

[1-4] We cannot assign to that case the determining force that counsel attribute to it. The case clearly declares that a license tax may be lawfully imposed on a telegraph company for the right to do business within the borders of the municipalities of a state. The power, of course, has its limitations and must be exercised with due relation to the company's interstate business. That relation is always to be considered, but it is not disposed of by the simple assertion of a loss. The cause of it or the condition of it is to be considered. In this case the tax is $60.00 a year. It certainly cannot be said that it is repellant from its amount, and there is no pretense that its imposition "is a disguised attempt to tax interstate commerce." The Postal Company when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality or complain of its detrimental operation. Indeed, for the privilege of entering the city it subjected itself to further regulation, licensing and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the *tax "through the mistake and inadvertence of" its "clerical force" we are not disposed to accept, without more, as an explanation.

[5] The Supreme Court expressed the view that mere proof of loss for two years, which may have been exceptional, determined nothing in the absence of a showing what business was available to the company or what facilities it had or used, and also held that, the city being an agent of the state, any deficit arising from the tax imposed on the intrastate business of the company can be prevented from becoming a burden upon the company's interstate business by an application to the State Railway Commission under the provisions of section 7409 for an increase of its intrastate rates. And the suggestion is pertinent. The company, as we have seen, cites section 7408 as a compulsion upon it to engage in intrastate business and at designated rates. From the rigor of the requirement section 7409 provides a mode of relief, and until it is denied the company cannot complain under the circumstances presented by this record. In other words, if section 7408 is imperative upon the company to continue intrastate business, section 7409 affords a means of obtaining relief from burdensome obedience. The sections are counterparts. If submission to section 7408 results in insufficient revenue and a burden upon interstate commerce it is made the duty of the Railway Commission by section 7409 upon complaint of the Postal Company to raise the intrastate rate "fixed" in section 7408. No attempt to secure relief under section 7409 appears to have been made.

Judgment affirmed.

(255 U. S. 163)

UNITED STATES v. ROGERS et al.

(Argued Jan. 17 and 18, 1921. Decided Feb. 28, 1921.)

No. 147.

1. **United States 🔑110—Not chargeable with interest on claims in absence of statute.**

The United States cannot, in the absence of a statute to that end, be subject to the payment of interest on claims made against it.

2. **Eminent domain 🔑124 — Compensation made as of time of taking.**

When the government takes land of private owners for a public use, it owes the duty to make just compensation as of the time when the owners were deprived of their property.

3. **Eminent domain 🔑148—Allowance of 6 per cent. interest between taking and payment held proper.**

In assessing the compensation for property taken by the United States for public use, the allowance of interest on the value of the property taken at the rate of 6 per cent., which was the rate prevailing in the state, from the date of the taking till the deposit of the money in court, was a proper allowance as part of the compensation, even though Act Aug. 1, 1888, § 2 (Comp. St. § 6910), providing that the practice in condemnation cases shall conform to the practice in courts of the state where the land is situated, does not make the state rule of interest applicable to condemnation by the United States.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by the United States against William E. Rogers and others to condemn lands of defendants for reclamation purposes. Judgment of condemnation requiring the deposit of the compensation awarded by commissioners with interest was affirmed by the Circuit Court of Appeals (257 Fed. 397, 168 C. C. A. 437), and the United States brings error. Affirmed.

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*Mr. Assistant Attorney General Garnett, for the United States.

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*Mr. George S. Downer, of Albuquerque, N. M., for defendants in error.

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*Mr. Justice DAY delivered the opinion of the Court.

The United States brought an action January 18, 1915, in the District Court of the United States for New Mexico, to condemn lands of the defendants in error for reclamation purposes. 32 Stat. 388 (Comp. St. §§ 4700–4708). Condemnation proceedings to acquire real estate for government uses and public purposes under judicial process are regulated by the act of August 1, 1888. 25 Stat. 357 (Comp. St. §§ 6909, 6910).

Section 2 of the act provides that the practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of the act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record in the state within which such Circuit or District Courts are held.

The petition averred the necessity of appropriating the lands in question; that the Secretary of the Interior had determined to acquire the defendants' real estate; that at the date of the completion of the work lands of the defendants were flooded and thereby appropriated by the United States under the authority of the acts of Congress; that the owners received no compensation; that necessary funds were available to pay any damages which might be awarded defendants. The petition prayed that the court appoint commissioners to assess the damage which the owners had sustained in consequence of the taking and appropriation of their lands, and that upon payment of the amount asessed the lands be decreed to be the property of the United States from the date of the appropriation thereof.

The award of the commissioners was filed February 3, 1917, and an order was entered July 27, 1917, directing that the sums awarded be deposited and distributed for the benefit of the owners. Subsequently the owners made a motion for a supplemental order requiring *168 the *United States to deposit sums equal to 6 per cent. interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding the same. The court made an order requiring the deposit of the additional sum, to which order the United States excepted, and prosecuted a writ of error from the Circuit Court of Appeals of the Eighth Circuit, where the judgment of the District Court was affirmed. 257 Fed. 397, 168 C. C. A. 437.

It appears that the allowance of interest was from the time of the actual taking of the land to the time deposit was made in payment for the same.

The questions upon which the case was taken to the Circuit Court of Appeals appear from the assignments of error, and are: (1) That the District Court erred in awarding interest against the United States from April 12, 1912, to date of deposit of the awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of final judgment; (2) that the District Court erred in awarding interest against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that interest cannot properly be allowed in a condemnation case against the United States for any period prior to date of the order of the court placing the United States in possession of the lands condemned;

(3) that the District Court erred in awarding interest at the rate of 6 per cent. per annum against the United States from April 19, 1912, to date of deposit of awards in court, for the reason that there is no authority of law for allowing interest at said rate on judgments against the United States.

As we are reviewing the judgment of the Circuit Court of Appeals, the assignments of error in that court are the ones open here, and it is evident from what we have said that the question in substance comes to this: Was there error in awarding the owners interest

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on the value *of their lands appropriated from the time of actual taking of the same until compensation was made?

[1, 2] It is unquestionably true that the United States upon claims made against it cannot, in the absence of a statute to that end, be subjected to the payment of interest. Angarica v. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; United States v. North Carolina, 136 U. S. 211, 216, 10 Sup. Ct. 920, 34 L. Ed. 336, cited and approved in National Volunteer Home v. Parrish, 229 U. S. 494, 496, 33 Sup. Ct. 944, 57 L. Ed. 1296. In the present case the landowners did not sue upon a claim against the government, as was the fact in United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935. The government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property. Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463.

[3] In fixing the compensation the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the Circuit Court of Appeals applying the statutes of Minnesota to lands appropriated in that state. United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81.

The government urges that the Conformity Act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which

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the owner of the land is entitled. The *fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for, the justice and propriety of its adoption. United States v. Sargent, supra.

We find no error in the judgment of the Circuit Court of Appeals, and the same is

Affirmed.

(255 U. S. 170)

UNITED STATES v. HIGHSMITH.

(Argued Jan. 18, 1921. Decided Feb. 28, 1921.)

No. 148.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Condemnation proceedings by the United States against Margie L. Highsmith. A judgment of the district court directing the payment of interest on the value of the land as found by the jury was affirmed by the Circuit Court of Appeals (257 Fed. 401, 168 C. C. A. 441), and the United States brings error. Affirmed.

Mr. Assistant Attorney General Garnett, for the United States.

Mr. George S. Downer, of Albuquerque, N. M., for defendant in error.

Mr. Justice DAY delivered the opinion of the Court.

This case is like United States v. Rogers (No. 147) 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. —, just decided, and was argued and submitted at the same time.

In this instance the government and the landowner appealed from the award of the commissioners, and the case was tried to a jury. Jurors were instructed that the allowance of interest was a matter of law, and in a

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form *of verdict given to them interest at 6 per cent. was to be added from April 19, 1912, the date of appropriation.

It appears that by agreement a separate order requiring the deposit of interest was entered in order to allow a writ of error upon that point, and in connection with the above form of verdict the jurors were instructed to assess compensation as of the value of the land on April 19, 1912, and not to add interest from that time to the date of the verdict. Afterwards a final judgment was entered in the District Court requiring a deposit of the amount of the verdict, and a separate order was made directing payment of interest from April 19, 1912. A writ of error was prosecuted from the Circuit Court of Appeals, where the judgment of the District Court was affirmed. 257 Fed. 401, 168 C. C. A. 441.

The Circuit Court of Appeals recited the facts of the case, and held that it was ruled by United States v. Rogers et al. (No. 147) 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. —, just decided. We agree with this conclusion, and the judgment of the Circuit Court of Appeals is

Affirmed.

(255 U. S. 317)

UNION PACIFIC R. CO. v. BURKE.

(Argued Jan. 27, 1921. Decided Feb. 28, 1921.)

No. 183.

1. **Carriers 🔑158(3)—Shipper accepting lower rate for stated valuation is estopped to claim greater damages.**

The rule that, if a common carrier gives to a shipper the choice of two rates, the lower of which is conditioned on a stipulated valuation of the property in case of loss even by the carrier's negligence, and the shipper understandingly and freely chooses the lower rate and names his valuation, he cannot thereafter recover more than the stated value, is based on estoppel.

2. **Carriers 🔑158(3)—Cannot limit liability where only one rate is offered to shipper.**

A carrier is not permitted to limit its liability for loss occasioned by its negligence where only one rate is offered to the shipper, so that he has no choice which can be made the basis of an estoppel, and therefore the provision of a bill of lading for ocean and land shipment limiting the value of the goods, even if it be construed to have been carried into the uniform bill of lading for the land shipment, does not limit the land carrier's liability for loss resulting from its negligence, where its rate schedules stated only one rate for those goods.

On Writ of Certiorari to the Supreme Court of the State of New York.

Action by James J. E. Burke against the Union Pacific Railroad Company. A judgment for the plaintiff for only the amount admitted by defendant to be due, rendered by the Appellate Division of the New York Supreme Court (178 App. Div. 783, 166 N. Y. Supp. 100) was reversed by the Court of Appeals of New York (226 N. Y. 534, 124 N. E. 119), and defendant brings certiorari. Judgment entered on order of the Court of Appeals affirmed.

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*Mr. Oscar R. Houston, of New York City, for petitioner.

Messrs. Arthur W. Clement and Wilson E. Tipple, both of New York City, for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

On March 10, 1915, S. Ontra & Bro. delivered to the Pacific Mail Steamship Company at Yokohama, Japan, 56 cases of "drawn work goods and renaissance," consigned to their own order at New York, and received a bill of lading for ocean transportation to San Francisco and thence by the Southern Pacific Company and its connections, by rail, to destination. The property was delivered to the Southern Pacific Company and without new billing was carried to a junction with the line of the petitioner, the Union Pacific Railroad Company, and while in its custody was totally destroyed in a collision. The respondent, successor in interest to the consignor, claimed in this suit the right to recover the fair invoice value of the goods, $17,449.01, and the petitioner conceded his right to recover, but only to the amount of the agreed valuation of $100 per package, $5,600, to which it contended he was limited by the bill of lading. All of the facts are stipulated or proved by undisputed evidence.

The Appellate Division First Department, New York Supreme Court, rendered judgment in favor of respondent for $5,600, with interest and costs, but on appeal to the Court of Appeals of that state the judgment of the Appellate Division was reversed, and an order was entered that *a judgment should be rendered by the Supreme Court in favor of respondent for $17,449.01, with interest and costs. The case is brought here on certiorari.

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On the face of the bill of lading received at Yokohama was the notation:

> "Weight 26,404 lbs.; ocean weight rate, 50c; freight $132.02. Rail, minimum carload weight 30,000 lbs., wght rate $1.25. Freight $375.00."

(Thus the ocean and rail rates are separately stated, and the latter is $1.25 per 100 pounds minimum carload.)

On the back of the bill of lading were printed 31 conditions, the thirteenth of which contained the provision that—

> "It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100 per package, * * * and the liability of the companies therefor in case of the total loss of all or any of the said goods from any cause shall not exceed $100 per package."

The petitioner was an interstate common carrier by rail at the time of the shipment involved, and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic. Southern Railway v. Prescott, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836. The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules. 34 Stat. 587, § 6 (Comp. St. §§ 8569, 8597).

In these schedules was included a rule, designated as rule 9A, which reads:

> "Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'uniform bill of lading,' 'straight' or 'order' as shown on pages 87 to 90, inclusive."

For the purposes of this case, only, it is *320 admitted, and *accepted by this court, that this rule 9A permitted and required that the property should be treated as moving east of San Francisco under the uniform bill of lading, although, in fact, no other than the Yokohama bill of lading was issued. This uniform bill of lading contained, among other conditions, the following:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

Upon the facts thus stated the petitioner contends that the agreed valuation of $100 per package or case in the Yokohama bill of lading is necessarily imported into the uniform bill of lading, becomes the valuation "agreed upon" within the terms and conditions quoted from that bill, and limits the respondent's recovery to that amount, $5,600, regardless of the value of the property and of the fact that it was lost by the carrier's negligence.

To this contention it is replied by the respondent: That it is admitted by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokohama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect.

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[1] *In many cases, from the decision in Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, decided in 1884, to Boston & Maine Railroad v. Piper, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, decided in 1918, it has been declared to be the settled federal law that, if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.

As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained—but the rule and the effect of it are clearly established.

[2] The petitioner admits all this, but contends that it has never been held by this court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority Reid v. American Express Co., 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156.

With this contention we cannot agree.

This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338, 5 Sup. Ct. 151, 28 L. Ed. 717, and 246 U. S. 439, 444, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, supra), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where "the rate was tied to the release." Thus in the Hart Case, 112 U. S. 343, 5 Sup. Ct. 157, 28 L. Ed. 717, it is said:

> "The distinct ground of our decision in the case at bar is that, where a contract of the *322 kind, signed by the shipper, is *fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

And in the Piper Case it is said (246 U. S. 444, 38 Sup. Ct. 355, 62 L. Ed. 820, Ann. Cas. 1918E, 469):

> "In the previous decisions of this court upon that subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service."

The Reid Case, supra, does not conflict with these decisions, for in that case the bill of lading containing the undervaluation, which was there sustained, expressly recited that the freight was adjusted on the basis of the agreed value, and that the carrier's liability should not exceed that sum "unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on be paid." The bill of lading was for ocean carriage only, London to New York, to which, of course, the Interstate Commerce Act was not applicable (36 Stat. 544, § 1 [Comp. St. § 8563]; Armour Packing Co. v. United States, 209 U. S. 56, 78, 28 Sup. Ct. 428, 52 L. Ed. 681; Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. et al., 13 Interst. Com. Com'n R. 266) and the carrier, therefore, was in a position to tender to, and, by the quoted provision of the bill, did tender to, the shipper the choice of paying a higher rate and being subject to less restricted recovery in case of loss. The case was plainly within the scope of the prior decisions of this court upon the subject.

Thus this valuation rule, where choice is *323 given to and ac*cepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception. Having but one applicable published rate east of San Francisco, the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the uniform bill of lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made only with the ignorant, the unwary, or with persons deliberately deceived. It results that the judgment of the Supreme Court of the state of New York, entered upon the order of the Court of Appeals of that state, must be

Affirmed.

(255 U. S. 171)

DETROIT UNITED RY. v. CITY OF DETROIT et al.

(Argued Jan. 5 and 6, 1921. Decided Feb. 28, 1921.)

No. 492.

1. Constitutional law 🔑134, 292—Requirement for removal of tracks after expiration of franchise not unconstitutional.

Where a street railway company has enjoyed the full term of its franchise granted for a definite period, the city may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets without impairing any contractual obligations or depriving the street railway company of its property without due process of law.

2. Street railroads 🔑28(2)—Day to day operation agreements held not to create property rights.

Day to day arrangements by which continued operation of a street railway was permitted, notwithstanding the expiration of the franchise rights, but which expressly provided that the permits thereby granted might be revoked, and that action thereunder should not waive the rights of either party, give the railway company no property rights in the streets of the city.

3. Street railroads 🔑28(2)—Operation under ordinance held not to have extended rights of company.

An ordinance permitting a street railway company to operate after the expiration of its franchise, but expressly providing that it might be amended or repealed, and that unless amended or repealed it should remain in force for one year, does not give the company rights in the streets after the expiration of its franchise, though it did entitle the company to reasonable compensation while it was operating under the ordinance.

4. Street railroads 🔑28(2)—Decree fixing fares held not to have extended franchise.

A decree in a suit brought in a state court by a city, which provided a temporary arrangement for the operation of cars and fixed the rates of fares, but which expressly stated that it should not affect the fundamental rights of the parties to the streets, does not give the street railroad any property rights in the street after the expiration of its franchise.

5. Street railroads 🔑28(2)—Constitutional requirement for election prevents estoppel to deny franchise.

Under Const. Mich. art. 8, § 25, as revised in 1908, forbidding grant of franchise unless approved by three-fifths of the electors, the street railway company cannot acquire any rights after the expiration of its franchise by estoppel which might arise if the franchise were in the power of the city to grant.

6. Street railroads 🔑13—Act of city held not to invalidate ordinance for municipal railway.

An ordinance authorizing the construction of a municipal street railroad, which was duly adopted, is not rendered invalid by an offer to buy the property of the existing street railroad company at less than its fair valuation.

7. Municipal corporations 🔑63(1)—Motives of officers or voters cannot be judicially investigated.

The motives of the officers and electors of a city in adopting an ordinance to construct a municipal street railroad system after the expiration of the franchise of the existing street railway company are not proper subjects of judicial inquiry, so long as the submission of the question to the people conforms to the requirements of the law.

8. Municipal corporations 🔑279—Misinformation to voters held not to have invalidated ordinance election.

Alleged misinformation by city officials to the electors, preceding a vote on an ordinance for the construction of a municipal street railroad system, did not invalidate the election, because the voters were misled into believing its purpose was to acquire the existing property at a stated valuation less than its true value, where the submission was made in due form, the ordinance did not provide for the acquisition of the property at the alleged valuation, and no complaint was made of it before the election, especially in view of the provision of the city charter that no purchase could be made, except by contract approved by the electors.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit for injunction by the Detroit United Railway against the City of Detroit and others. From a decree dismissing the bill, the plaintiff appeals directly to the Supreme Court. Affirmed.

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*Messrs. Charles E. Hughes, of New York, City, and Elliott G. Stevenson, of Detroit, Mich., for appellant.

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*Messrs. Clarence E. Wilcox and Alfred Lucking, both of Detroit, Mich., for appellees.

Mr. Justice DAY delivered the opinion of the Court.

The appellant, plaintiff below, sets forth in its bill that it is the owner of a system of street railways in the city of Detroit, and suburban lines running from said city. The suit was brought in the District Court, to enjoin the city of Detroit and the other defendants, municipal officials, from acquiring or constructing a system of street railways, which had been provided for by an ordinance of the city, with an issue of $15,000,000 of its bonds for that purpose and approved by the requisite majority at a municipal election.

The grounds of relief, briefly stated, are: That establishment of the system and the issue of the bonds should be enjoined at the instance of the plaintiff because the ordinance was not legally adopted by the voters of the city of Detroit and, if carried into effect, as proposed, and by the methods which brought about its adoption, a deprivation of plaintiff's property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States would result.

The District Court maintained the jurisdiction upon the federal ground alleged, and dismissed the bill upon motion in the nature of a demurrer. The case is brought to this court by direct appeal because of the constitutional question involved.

The bill is very voluminous and abounds in argumentative statements attacking the passage of the ordinance, and the good faith of the officials concerned in bringing about its enactment. Among the streets, proposed to be occupied by the city, are those upon which it is alleged the trackage and property rights *174 of the complainants are *sought to be acquired, and upon which the franchise grants of the street railway company have expired.

[1] This court in Detroit United Railways v. City of Detroit, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056, affirming the judgment of the Supreme Court of Michigan in the same case, Detroit v. Detroit United Ry., 172 Mich. 136, 137 N. W. 645, held that where a street railway company, operating in the streets of the city under a franchise granted for a definite period, has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the federal Constitution or depriving the street railway company of its property without due process of law. We see no occasion to depart from the principles announced in that case. The decree is in the record and, so far as anything appears, is still in full force and effect. If the courts of Michigan shall see fit to carry it into execution we find nothing in the federal Constitution which would make its enforcement a deprivation of due process of law.

[2] The railway company claims to have acquired property rights in the streets of the city, upon which its franchises have expired, by reason of matters set out in the bill and supported in the argument submitted by the appellant. Reference is made to certain so-called day to day arrangements, by which continued operation was permitted notwithstanding the expiration of franchise rights. But an examination shows that construction and operation under such agreements gave the railway company no extended franchises in the streets, because it was expressly provided that the permits granted might be revoked, and that action under the day to day agreement should not waive the rights of either party.

[3] Rights to remain in the streets are also claimed under the so-called Kronk Ordinance, which was before this court in Detroit United Railways v. Detroit, 248 U. S. *175 429, 39 Sup. Ct. 151, 63 L. Ed. 341, * in which this court, while reaffirming the principles laid down in Detroit United Railway Co. v. Detroit, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056, supra, found that the city had not up to that time availed itself of the right to compel the removal of the tracks in streets where the company had no franchise, but had passed an ordinance looking to the continued operation by the company of the street railway system for a limited period, and that while it acted under this ordinance there was the equivalent of a grant to operate during the life of the ordinance, entitling the company to a fair return; that the ordinance by its express terms provided for

its amendment or repeal, and that, unless amended or repealed, it should remain in force for the period of one year. We do not perceive how that ordinance can now give rights to the company in the streets where the franchises have expired.

[4] The chancery suit brought in the Wayne county circuit court in the name of the city of Detroit, in which a decree was granted, is also set up. An examination of that decree, which is attached to the bill, satisfies us that it was intended only to provide a temporary arrangement by which cars might be operated on the street railway system of the complainant. It is expressly stated in the decree that it shall not affect any fundamental rights of the parties in and to the streets of the city of Detroit as they at that time existed; the intention being to provide for the rate of fare at which cars should be operated; the decree being considered only a temporary solution of the problem before the court.

[5] Allegations are made which are supposed to have the effect of estopping the city of Detroit from denying the franchise rights of the plaintiff in the streets of the city because of expenditures of large sums of money with the knowledge and acquiescence of the city authorities and the people of the city since the franchises have expired.

Under the Constitution of Michigan, art. 8, *176 § 25 (as *revised 1908), it is provided that no city or village shall grant any public utility franchise, which is not subject to revocation at the will of the city or village, unless such proposition shall first have the affirmative vote of three-fifths of the electors. This phase of the case is covered in principle by our decision in Denver v. New York Trust Co., 229 U. S. 129, 33 Sup. Ct. 665, 57 L. Ed. 1101, in which a similar provision of the Colorado Constitution was under consideration, and wherein this court, in speaking of the provision of the Constitution of the state of Colorado, said:

> "Besides, article 20, § 4, of the state Constitution then in force provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and article 9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to made an election to purchase or renew, the attempt would have gone for nothing."

The provision of the Constitution of Michigan, in force when the ordinance here in controversy was passed, necessarily prevents acquiring rights by estoppel which might arise were the franchise within the power of the city to grant. In Denver Water Co. v. Denver, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, the provision of the Colorado Constitution was not considered. Nor in Detroit United Ry. v. Detroit, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341, was reference made to the like provision of the Michigan Constitution now relied upon.

[6] The charge is made at length in the bill that the city officials, by means of the proceedings complained of, are engaged in a scheme designed to compel the company to part with its property at a sum much less than its fair value, or to cease to operate in the streets and to remove its property therefrom. In this connection it is charged that the real purpose is to compel the sale of the property of the street railway company at $40,000 per mile of track, which is far less *177 than its actual value. The giving *effect to this scheme, it is averred, would work a deprivation of constitutional rights of the complainant in violation of the Fourteenth Amendment. But, if the city has the right to acquire the property on the best terms it can make with the company in view of the expiration of the franchises, an attempt to carry out such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. It was so ruled in Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101, supra. In that case this court, in speaking of an alleged attempt of the city to acquire the company's plant after the expiration of its franchise for much less than its fair value, among other things, said:

> "Whether $7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard of its own interests. That the city, mindful of its interests, offered $7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter."

Furthermore, it appears that under the charter of the city of Detroit, notwithstanding the alleged attempt to procure the property of the complainant at much less than its value, no such purpose could be effected by purchase without approval of the electors of the city. Section 8 of the charter provides:

> "Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths *178 of the electors *voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote."

No such contract has thus far been made, and there is nothing in the ordinance attacked which undertakes to acquire the property of the complainant without compliance with this charter provision.

[7] The bill abounds in allegations that voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular, and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law. The principle has been declared by this court. Angle v. Ry. Co., 151 U. S. 1, 18, 14 Sup. Ct. 240, 38 L. Ed. 55; Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 28 L. Ed. 1145. This feature of the bill is an attempt to inquire in a collateral way into the validity of an election which was held without steps being taken to enjoin, and which was vigorously contested to a final result.

The charter of the city of Detroit gave ample power to the city to acquire, construct, own, maintain and operate a street railway system on the streets of the city within a distance of ten miles from any portion of its corporate limits that the public convenience may require. Section 1, c. 13, Charter of Detroit, 1918. Section 6 of the charter makes it the duty of the board of street railway commissioners to promptly proceed to purchase, acquire and construct, and to own and operate a system of street railways in or for the city,

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and as soon as practicable *to make the system exclusive. Section 7 gives the board power to purchase, or lease, or by appropriate proceedings to acquire, any part of the existing street railway property in the city, and to make the necessary purchases for that purpose. Section 9 gives authority to issue bonds of the city.

Under the authority of the charter the ordinance in question was passed. It directs the board of street railway commissioners to acquire, own, maintain and operate a street railway system. It requires that the proposition to acquire, own, maintain the system and to issue bonds shall be submitted to a vote at a special election. It is contended, however, that the proposal submitted did not conform to the requirements of the ordinance.

We agree with the District Court that the form of submission of the question was in substantial compliance with the law.

[8] As to allegations of fraudulent and improper conduct of the common council in giving the electors information in advance of the election which misled them, the contention is that a sample ballot sent out to the electors did not definitely show the purpose to construct street railway lines where trackage already existed, and that the voters of the city were misled into believing that there was an intention not to construct the street railway lines where the same already existed, but to purchase at an estimated cost of $40,000 per mile. But we are of opinion that this so-called official information, no complaint being made of it before the election, cannot vitiate the election when the same was had upon a submission, within the authority of the city under its charter, and the ordinance passed in the form shown. Moreover, as we have already pointed out, this ordinance does not provide for acquisition at $40,000 per mile; nor can any purchase be made except by contract approved

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by the electors *as provided by section 8 of the charter. Other considerations are urged based upon lack of authority in the city which we have examined and deem it unnecessary to discuss.

We find nothing in the allegations of this bill establishing that the city of Detroit in proceeding by its officials in the manner alleged, has done things which are subversive of the rights of the city to establish its own municipal system of street railways and to issue bonds for that purpose or which would amount to deprivation of rights secured to the plaintiff by the Fourteenth Amendment to the federal Constitution.

It follows that the decree of the District Court dismissing the bill must be

Affirmed.

(255 U. S. 273)

In re CHICAGO, R. I. & P. RY. CO.

(Argued Dec. 13, 1920. Decided Feb. 28, 1921.)

No. 24.

1. Prohibition ⟹3(1) — Issued, if court is clearly without jurisdiction over objecting party, who has no other remedy.

Prohibition will issue if the lower court is clearly without jurisdiction over petitioner, who, at the outset, objected to the jurisdiction, had preserved his rights by appropriate procedure, and had no other remedy, but will ordinarily be denied, if the jurisdiction of the lower court is doubtful, depends on a finding of fact from evidence not in record, or if the petitioner has an adequate remedy by appeal or otherwise.

2. Prohibition ⟹5(3)—Where return showed doubt as to jurisdiction, dependent on evidence, writ would not issue.

The return to a writ of prohibition, which showed that the lower court assumed jurisdiction over petitioner, who was a nonresident of the district, because it held, under evidence which was not preserved in the record, that

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes petitioner had entered a general appearance in a trustee's suit to foreclose bonds owned by petitioner, and thereby subjected itself to the court's jurisdiction by cross-bill to cancel for fraud the bonds held by petitioner, shows that the lower court's jurisdiction was doubtful and dependent on evidence, so that the writ of prohibition will be denied.

3. Courts 🔑276—Immunity from suit out of district can be waived by general appearance.

The immunity from suit in the United States court in a district in which the party does not reside, conferred by Judicial Code § 51 (Comp. St. § 1033), is one which can be waived, and ordinarily a general appearance operates as a waiver.

4. Prohibition 🔑3(3)—District Court has jurisdiction to determine appearance, reviewable by appeal.

The District Court has jurisdiction to determine in the first instance whether a nonresident of the district had entered a general appearance, and whether a cross-bill against such nonresident was germane to the original relief, which determination, if erroneous, could be reviewed on appeal, if the nonresident properly preserved its rights, and therefore prohibition will not be issued to prevent the District Court from proceeding against the nonresident under the cross-bill.

On Petition for Writ of Prohibition and/or Writ of Mandamus.

Original petition by the Chicago, Rock Island & Pacific Railway Company for a writ of prohibition or writ of mandamus, directed to the United States District Court for the Western Division of the Northern District of Ohio. Rule discharged, and petition dismissed.

See, also, 40 Sup. Ct. 584.

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*Messrs. Lawrence Maxwell and William L. Day, both of Cleveland, Ohio, for petitioner.

Messrs. George D. Welles, of Toledo, Ohio, and Thurlow M. Gordon, of New York City, for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Chicago, Rock Island & Pacific Railway Company, commonly called the Rock Island, filed in this court a petition in which it alleged that the District Court of the United States for the Northern District of Ohio, Western Division, was undertaking to proceed against it personally in a suit therein pending; that the Rock Island had not voluntarily become a party to the suit, had not been served with process, and could not, under *275 section 51 of the Judicial *Code (Comp. St. § 1033), be made a party without its consent, since it was organized under the laws of Illinois and Iowa, and was not a citizen or resident of Ohio; and it prayed for a writ of prohibition, or in the alternative a writ of mandamus, to prevent the court from proceeding further against it. The suit in which it is sought to proceed personally against the Rock Island is one brought by an Indiana stockholder of the Toledo, St. Louis & Western Railroad Company, an Ohio corporation, for the appointment of a receiver for that corporation. The particular proceeding by which the personal liability is asserted is a cross-bill which was filed by the Toledo Company against the Rock Island after the appointment of the receiver, and after the Rock Island had appeared before a special master for the purpose of protecting its interests in an issue of the Toledo Company's bonds. A rule was granted, and the case is now before us on the petition and return. The main questions argued here were whether upon the facts there stated the Rock Island had become a party to the suit and subjected itself generally to the jurisdiction of the court; and, if it had not, whether the case is one which entitles the petitioner to either of the extraordinary remedies applied for.

[1] There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. Ex parte Rice, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198. If, however, the jurisdiction of the lower court is doubtful (In re Muir, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. —, decided by this court January 17, 1921), or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record (In re Cooper, 143 U. S. 472, 506, 509, 12 Sup. Ct. 453, 36 L. Ed. 232, or if the complaining party has an adequate remedy by appeal or *276 otherwise (Ex parte Tiffany, 252 U. S. *32, 37, 40 Sup. Ct. 239, 64 L. Ed. 443; Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. [N. S.] 392), the writ will ordinarily be denied. Tested by this rule, the case presented by the petition and the return does not entitle the Rock Island to this extraordinary remedy.

The original bill filed against the Toledo Company in the Northern District of Ohio, Western Division, alleged, among other things, that it had defaulted on an issue of $11,527,000 collateral trust gold bonds, secured by stock of the Chicago & Alton Railroad Company held by the Central Trust Company of New York, as trustee for the bondholders. These bonds were divided into two classes having somewhat different rights and interests. A single bondholders' committee was formed to protect both classes of bonds. Of the A bonds $6,480,000 were outstanding, and of these $5,248,000 were deposited with the committee,—$400,000 of them by the Rock Island. Of the B bonds $5,047,000 were outstanding, all of which were deposited with the committee by the Rock Island. The special master was directed to ascertain and report the amount, character, lien and priority of all claims, and creditors were notified to present before him their respective claims duly verified, or to file bills of intervention. The bondholders' committee then filed a petition, praying that the suit be dismissed as collusive, and, in the alternative, that judgment be rendered for the committee in the amount of the face value of the bonds held by it, aggregating $10,295,000 and accrued interest. To that petition an answer in the nature of a cross-bill was filed by the plaintiff, who prayed that the committee's petition be held to be an intervention, that the receiver be directed to defend against the bonds held by the committee, and that these bonds be ordered surrendered if found to be invalid. By leave of court, the committee withdrew its petition, and sought its relief by a dependent bill. An order was thereupon entered, making the committee a party defendant to the original bill, with leave to *277 answer and file a *cross-bill. This it did; and the Central Trust Company also filed a cross-bill to foreclose the lien on the Chicago & Alton stock held as security for the collateral trust bonds. An order was then made referring the case, on the issues raised by the several pleadings, to the special master to take testimony and report.

At the beginning of the taking of testimony before the special master the appearances of counsel were formally noted by the master, among others, as follows:

> "Lawrence Maxwell, Esq., and J. P. Cotton, Esq., appearing for the bondholders' committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company, and Mr. Cotton representing the A bonds."

Thereafter the Toledo Company filed an answer and cross-bill, in which it claimed, among other things, that the whole issue of the collateral trust bonds was void on account of fraud practiced by the Rock Island; that the Rock Island was liable for all amounts theretofore paid by the Toledo Company on the bonds in excess of dividends received on the Chicago & Alton stock; and that it was liable also for all amounts which the Toledo Company might be required to pay thereafter on account of any of the series A bonds which the court should hold to be valid obligations because they had passed into the hands of innocent holders. The cross-bill of the Toledo Company prayed that the necessary accounting be had, that the Rock Island be declared to be a party, that it be required to answer, and that in default of answer a decree be entered against it pro confesso. An order was entered in accordance with the prayer of the bill and notice thereof was served on Mr. Maxwell as its solicitor. His name had not appeared as counsel on any pleading filed by the committee.

The Rock Island then filed a motion which stated:

> "Appearing solely for the purpose of the motion, and not intending to submit itself to *278 the jurisdiction of this court *as a party to this suit, moves the court to set aside its finding in the order entered herein March 11, 1918, that the Chicago, Rock Island & Pacific Railway Company has heretofore entered its appearance as a party to this suit and its order, * * * on the ground that the court was without jurisdiction to make said order, or over the defendant as a party to the cross-bill."

This motion was overruled and an order was entered requiring answer within 20 days. Thereupon a further motion was made by the Rock Island, in which, renewing its claim that it had not entered its appearance, and asserting that the court was without jurisdiction over it as a defendant to the Toledo Company's cross-bill—

> "or at all, especially in respect of the pretended cause of action therein set forth for the recovery of moneys from it, moves to dismiss so much of said cross-bill as seeks to recover moneys from the Chicago, Rock Island & Pacific Railway Company upon the ground that it is not suable in this suit in this district upon said pretended cause of action, not being an inhabitant of the district or of the state of Ohio, and neither it nor the cross-complainant being a resident of the district or state."

This motion also was overruled, and thereupon this petition for a writ of prohibition or of mandamus was filed.

The return of the District Court stated that the Toledo Company's answer had alleged that the Rock Island had intervened in its own right and had become a party to the cause, that at the hearing upon such answer evidence was introduced, and that service thereof was admitted by its solicitor as such. The return further recited:

> "The evidence upon which the court acted in making the findings and orders of which complaint is made in said petition is not set out in said petition. Respondent denies the statement in the brief for petitioner that 'the only basis for the claim that the District Court has *279 *jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the bondholders' committee.' The original entry of appearance by Mr. Maxwell quoted in the petition and in the brief is only one item out of a large number of items of evidence considered by the court on this point.
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> "No steps were taken by petitioner to pre-

serve and have certified a record of the evidence submitted on the hearings of said motions, or to obtain a review of the orders complained of by appeal or error proceedings."

[2-4] It is argued on these facts that the District Court did not acquire jurisdiction to enforce the personal liability of the Rock Island asserted in the cross-bill of the Toledo Company; but, applying the rule stated above, that question should not be decided in this proceeding. The most that can be said against the District Court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record. The immunity of the Rock Island from suit in the Northern District of Ohio, conferred by section 51 of the Judicial Code could be waived (In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164), and ordinarily a general appearance operates as a waiver (Gracie v. Palmer, 8 Wheat. 699, 5 L. Ed. 719). The District Court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. Jones v. Andrews, 10 Wall. 327, 19 L. Ed. 935. It had jurisdiction also to determine whether the relief sought in the Toledo Company's cross-bill was in its nature germane to the proceedings theretofore instituted in the suit by the bondholders' committee or by the Central Trust Company, so that the rights asserted in the cross-bill could be properly litigated in that suit. Chicago, etc., Ry. Co. v. Chicago Bank, 134 U. S. 276, 287, 10 Sup. Ct. 550, 33 L. Ed. 900. And, finally, it had jurisdiction to determine whether the
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fact that such earlier proceeding had been *instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross-bill, as fully as if the earlier action had been taken in its name as well as on its behalf. Compare, also, Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814; Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171; In re Pollitz, 206 U. S. 323, 27 Sup. Ct. 729, 51 L. Ed. 1081. If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions, it will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review. The same considerations lead to a denial also of the writ of mandamus. Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217.

Rule discharged, and petition dismissed.

Mr. Justice DAY took no part in the consideration or the decision of this case.

(255 U. S. 280)

ARMOUR & CO. et al. v. CITY OF DALLAS et al.

(Argued Jan. 18, 1921. Decided Feb. 28, 1921.)

No. 149.

1. Railroads 🔑54—Action for damages adequate remedy to abutting property owner for removal of railroad tracks.

An owner of property abutting on a street on which railway tracks were located, and who had switching connections with those tracks, has an adequate remedy at law by the recovery of damages for injury to his property caused by the removal of the tracks from that street, so that a bill to enjoin the removal of the tracks was properly dismissed.

2. Courts 🔑493(3)—Injunction properly denied, where state court had issued temporary order on same ground.

A bill by plaintiff, in its capacity of taxpayer, to restrain the execution of a contract between a city and railroad companies for the removal of railroad tracks from a street in the city, on the ground that the contract was not countersigned and the expense thereof not charged to the proper appropriation as required by the charter, was properly dismissed, where it appeared that plaintiffs had brought a suit on the same ground in a state court, had obtained therein a temporary injunction, and that the suit was then pending in the state Court of Civil Appeals, without any showing that the temporary injunction was not still in force.

Appeal from the District Court of the United States for the Northern District of Texas.

Suit for injunction by Armour & Co. and Armour & Co. of Texas against the City of Dallas and others. From a decree dismissing the bill, complainants appeal directly to the Supreme Court. Affirmed.

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*Mr. Francis Marion Etheridge, of Dallas, Tex., for appellants.

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*Messrs. Thomas J. Freeman, of New Orleans, La., and James J. Collins, of Dallas, Tex., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1872 the Texas & Pacific Railway Company built its single track main line to the west on a street in the village of Dallas, then as now called Pacific avenue. In 1890 the city granted to the company a 50-year franchise to double-track its railroad on that street. In the latter year the population of Dallas was 35,057; now it is 158,976;[1] and
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the existence and operation of the rail*road on the avenue has become a serious menace to life and limb, a great inconvenience to the whole people, burdensome to the railway,

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[1] 12th Census, vol. 1, p. 430; U. S. Census Bureau, Population of Cities Having 25,000 Inhabitants or More, 1920.

and an injury to neighboring property. North of the avenue lie largely the residential sections of the city; adjacent and to the south, largely business sections. A part of the avenue is in the heart of the city. There six of the leading business streets—great thoroughfares—cross it; and on two of them street cars cross the railroad at grade. Two other much traveled streets are parallel. One of these, which is only two hundred feet distant, is the principal business street of the city. The number of trains operated daily over the avenue had risen in 1918 to more than one hundred; and there were, in addition, switching operations to many neighboring industries. Trains are now longer—some of them consisting of 80 freight cars; and they occasion serious interruption to street traffic. The necessary use of larger engines, due partly to a heavy grade, results in much noise, smoke and cinders. Regulations concerning operation of trains imposed by the city in the interests of safety were necessarily severe; and had proved expensive and embarrassing to the railway. Still further safeguards and restrictions upon operation appeared to be necessary. Plans were proposed for putting the tracks in subways, for elevating them and for eliminating the grade crossings; all of which the city confessedly had power to require of the railway. But none of these projects appeared to offer a satisfactory solution of the problem. Finally a plan was worked out for the removal of the tracks from this part of the avenue for a distance of nearly a mile and for diverting the trains to the line of another railroad with which it was proposed to make connections. This involved establishing a wholesale trade district elsewhere.

This plan proved acceptable to the railway, its receiver, the city and most of the real estate owners affected. In order to carry *284 out the plan the Wholesale District Track*age Company was organized; and this corporation, the city, the railway and its receiver entered into a contract under which the improvement was to be made. Then Armour & Co., owner of a plant served by a switch track connecting with the main line on the avenue, and its lessee, brought this suit in the District Court of the United States for the Northern District of Texas against all the parties to the contract seeking to enjoin its performance and specifically the removal from Pacific avenue of the tracks which connected with their switch track. Jurisdiction of the federal court was invoked on the ground that the action proposed would deprive plaintiffs of their property without due process of law and impair the obligation of their contracts in violation of the federal Constitution. After full hearing on the merits a decree was entered dismissing the bill with costs. The case comes here by direct appeal under section 238 of the Judicial Code (Comp. St. § 1215).

First. The basis of the plaintiffs' principal claim is this: In 1912 Armour & Co., being desirous of erecting a plant in Dallas, made a contract for the purchase of a lot on the avenue, the purchase to be conditioned upon the railway securing from the city a franchise to lay a switch connecting the lot with its main track on the avenue and upon Armour & Co. then securing from the railway an agreement to build and maintain the switch. Upon satisfying itself through negotiation with officials of the city and of the railway that these conditions would be complied with, Armour & Co. completed the purchase of the lot. The city then passed an ordinance granting such a franchise to the railway for the period of 20 years, conditioned, among other things, upon Armour & Co. dedicating about 90 square feet of their land to the public to round the two corners of their lot. The small parcels were dedicated; the plant was erected; the switch was built by the railway; and over the switch Armour & Co.'s lessee customarily re- *285 ceives *about 600 cars of freight a year. The plaintiffs contend that the switch franchise, granted by the city to the railway, was entered into for Armour & Co.'s benefit; that it was, in effect, a contract with them; that the city and the railway are powerless under the federal Constitution to abrogate that contract, either directly by surrendering the switch franchise or indirectly by removing the main track with which the switch connects; and that the plaintiffs are entitled to an injunction, because the plant, which cost nearly $80,000 to build, would lose most of its value if deprived of its rail connection.

To this claim several answers are made: (1) That the city did not make any contract with Armour & Co. and under its charter would have been without power to do so; (2) that the railway did not make any contract with Armour & Co. to maintain the side track and that it had been authorized to remove the tracks from Pacific avenue by the Railroad Commission, under appropriate legislation, on the ground that it would "serve the public interests by promoting the public safety and convenience"; (3) that the plaintiffs have already sought and been denied, as against the railway and its receivers, the same relief here applied for; having intervened for that purpose in the original suit brought for appointment of the receiver in the District Court of the United States for the Western District of Louisiana; that the decree of the District Court therein dismissing its petition asking the same relief had been affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, Armour & Co. v. Texas & Pacific Railway Co., 258 Fed. 185, 169 C. C. A. 253; and that this court had denied Armour & Co.'s petition for writ of certiorari, 251 U. S. 551, 40 Sup. Ct. 56, 64 L. Ed. 410; (4) that even if the franchise had purported to grant an absolute right to maintain the tracks on Pacific avenue it would have been subject to the fair exercise by the state, through the municipality as its agent, of the police power to promote the public safety; *286 and that, under *the circumstances, removal of the tracks was essential for this purpose since the tracks could not appropriately be placed under ground or be elevated. See Denver & Rio Grande Railroad Co. v. Denver, 250 U. S. 241, 244, 39 Sup. Ct. 450, 63 L. Ed. 958; Erie Railroad Co. v. Board of Public Utility Commissioners et al., 254 U. S. 394, 41 Sup. Ct. 169, 65 L. Ed. —, decided by this court January 3, 1921; (5) that the franchise for the switch was not absolute; that power of revocation had been expressly reserved by clauses in the ordinance which made the franchise subject to the city's charter powers and provided "that in the event the said railway company shall be required to abandon, to elevate or to place in subways said main tracks on Pacific avenue, the franchise should be subject thereto," and that the railway was so required; (6) that, even if plaintiffs had the legal right which they assert, they were not entitled to relief in equity by injunction, since an action at law would afford an adequate remedy and an injunction would interfere with a paramount public interest.

[1] It was on the last of these grounds that the Circuit Court of Appeals in Armour & Co. v. Texas & Pacific Railway Co. et al., 258 Fed. 185, 169 C. C. A. 253, unanimously affirmed the decree dismissing the intervening petition. Among the judges sitting upon appeal in that case was the Circuit Judge who entered the decree in this case here under review. He does not appear to have written an opinion in this case but presumably he dismissed this bill also on that ground. For it is clear that the case is not one for equitable relief. If the plaintiffs as abutting property owners have any legal right which is interfered with, an action at law for damages will afford them a full and complete remedy. See Texas & Pacific Ry. Co. v. Marshall, 136 U. S. 393, 405, 10 Sup. Ct. 846, 34 L. Ed. 385; Beasley v. Texas & Pacific Ry. Co., 191 U. S. 492, 496, 497, 24 Sup. Ct. 164, 48 L. Ed. 274. We have no occasion, therefore, to consider any of the other reasons urged for affirming the decree.

[2] Second. Plaintiffs urge, apparently as taxpayers, this additional ground for relief: *287 They allege that the contract *entered into by the city is void and that its performance should be enjoined; because the contract therefor was not countersigned by the auditor and the expense thereof was not charged to the proper appropriation as required by the city's charter. It was agreed that the plaintiffs had brought a suit on this ground in a state court on behalf of themselves and of other taxpayers of Dallas against the city and others, that it had obtained upon an ex parte hearing a temporary injunction restraining the city from carrying out the contract, that this suit was pending on appeal before the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas when this case was heard below, and that the temporary injunction, so far as appears, is still in force. The District Court was clearly right, under the circumstances, in refusing to grant an injunction on this ground.

Affirmed.

(255 U. S. 239)

STOEHR v. WALLACE et al.

(Argued Jan. 4 and 5, 1921. Decided Feb. 28, 1921.)

No. 546.

1. War 🔑12—Trading with the Enemy Act is a war measure, authorized by power to make war and regulate captures.

Trading with the Enemy Act Oct. 6, 1917, (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j), as originally enacted, and as amended by Act March 28, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ff), Act Nov. 4, 1918 (Comp. St. Ann. Supp. 1919, § 3115½d), Act July 11, 1919, and Act June 5, 1920, is strictly a war measure, and finds its sanction in Const. art. 1, § 8, cl. 11, empowering Congress to declare war and make rules concerning captures on land and water.

2. War 🔑12—President may act through Alien Property Custodian in determining that property is enemy-owned.

Under Trading with the Enemy Act, § 7c, as amended by Act Nov. 4, 1918 (Comp. St. Ann. Supp. 1919, § 3115½d), providing for the seizure of property which the President, after investigation, shall determine to be enemy-owned, a personal determination by the President is not required, and he may act through the Alien Property Custodian, in view of section 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c), authorizing him to exercise any of the powers conferred by that act through such officer or officers as he shall direct.

3. War 🔑12—Congress may provide for seizure of property believed to be enemy-owned without prior judicial determination.

Congress, in time of war, may authorize and provide for the seizure and sequestration, through executive channels, of property believed to be enemy-owned, without any previous judicial determination of such enemy ownership, if adequate provision is made for a return in case of mistake.

4. Constitutional law 🔑318—Trading with the Enemy Act does not deny due process to claimants of property not enemies.

Trading With the Enemy Act, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), and section 12, as amended by Act

March 28, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ff), providing that one not an enemy or ally of enemy, claiming money or property sequestered, may give notice and sue in equity, and that the property is to be retained to abide the final decree, make adequate provision, consistent with due process of law, for the return of property mistakenly sequestered.

5. **War 🔑12—Shares of stock transferred to Alien Property Custodian should be retransferred when ordered returned to a claimant.**

A transfer of shares of stock seized by the Alien Property Custodian to his name is but an incident of an effective seizure, and, if a return of the shares to a claimant not an enemy is ordered, a retransfer follows as of course.

6. **War 🔑12—Sale of stock by German corporation to New York corporation held not to change beneficial ownership, so as to prevent seizure.**

Evidence *held* to show that an executory sale of stock in a New Jersey corporation, by a German corporation to a New York corporation, organized by persons interested in the German corporation after war became imminent, was not intended to affect the German corporation's beneficial ownership, so as to prevent seizure by the Alien Property Custodian, but was made to avoid inconveniences which otherwise might ensue from a state of war.

7. **War 🔑12—Treaty with Prussia held to have no application to seizure of property of German corporation.**

Articles 23 and 24, of the Treaty with Prussia, relative to the rights of merchants of either country residing in the other, when war arises, has no application to the seizure by the Alien Property Custodian of stock in a New Jersey corporation beneficially owned by a German corporation.

8. **War 🔑12—Corporation, having no interest in stock standing in its name, cannot attack sale by Alien Property Custodian.**

A New York corporation, not owning or having any interest in shares of stock in a New Jersey corporation standing in its name, but beneficially owned by a German corporation, neither it nor one of its stockholders can criticize or attack a proposed sale of the stock by the Alien Property Custodian.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Max W. Stoehr against James N. Wallace, and others. From a decree dismissing the bill (269 Fed. 827), complainant appeals. Affirmed.

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*Mr. Louis Marshall, of New York City, for appellant.

Messrs. Solicitor General Frierson, of Chattanooga, Tenn., and George L. Ingraham and John Quinn, both of New York City, for appellees.

Mr. Justice **VAN DEVANTER** delivered the opinion of the Court.

This is a suit to establish a claim to and prevent a sale of 14,900 shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which were seized by the Alien Property Custodian under the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j) as the property of a German corporation called Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft. The plaintiff is a citizen of the United States, residing in New York, and sues in the right of Stoehr & Sons, Incorporated, a New York corporation, of which he is a stockholder; his asserted justification for so suing being that the directors of the corporation are agents of the Alien Property Custodian, and so far under his control that it would be useless to request them to bring the suit.

The grounds for relief urged in the bill are that the shares, although seized and proposed to be sold as the *241 *property of the German corporation, are in truth the property of the New York corporation; that, even if it does not own them, it has a substantial interest in them under a pre-war contract between it and the German corporation; that the shares cannot be taken from it consistently with due process of law as guaranteed by the Fifth Amendment, save through a judicial proceeding, wherein it has a right and an opportunity to be heard; that the shares were seized and are about to be sold without any such proceeding or hearing, and in violation of subsisting treaty provisions; and that the seizure as made did not conform to designated provisions of the Trading with the Enemy Act, and the sale as proposed will not be in accord with other provisions of the act.

After a full hearing the District Court overruled the objections urged against the initial seizure; found from the proofs that the German corporation was the beneficial owner, that the New York corporation had no actual interest in the shares, and that the contract between those corporations, stressed by the plaintiff, "was not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose"; and as a result of the findings the court held that neither the plaintiff nor his corporation was entitled to any relief, and accordingly dismissed the bill. The plaintiff then asked and was allowed a direct appeal to this court. His assignments of error cover all the grounds on which the seizure and proposed sale were attacked in the bill.

We shall assume, as did the District Court, that a stockholder may bring a suit such as this in the right of his corporation, where there are circumstances justifying such representative action, and that the plaintiff has shown sufficient reason for suing in that capacity. See equity rule 27, 226 U. S. Appendix, p. 8, 33 Sup. Ct. xxv.

[1] The Trading with the Enemy Act, whether taken as originally enacted, October *242 6, 1917 (40 Stat. 411, c. 106) *or as since amended, March 28, 1918 (40 Stat. 459, 460, c. 28 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ff]); November 4, 1918 (40 Stat. 1020, c. 201 [Comp. St. Ann. Supp. 1919, § 3115½a]); July 11, 1919 (41 Stat. 35, c. 6), and June 5, 1920 (41 Stat. 977, c. 241), is strictly a war measure, and finds its sanction in the constitutional provision (article 1, § 8, cl. 11) empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Brown v. United States, 8 Cranch, 110, 126, 3 L. Ed. 504; Miller v. United States, 11 Wall. 268, 305, 20 L. Ed. 135.

It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody and disposal of enemy property. By section 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c) he is in terms authorized to exercise "any" of these powers "through such officer or officers as he shall direct." By section 6 (section 3115½cc) he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. By section 7c, as amended November 4, 1918, direct provision for sequestering enemy property is made as follows:

> "If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit, of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act. * * *
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> "Whenever any such property shall consist of shares of stock or other beneficial interest *243 in any corporation, *association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.
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> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

By section 9 (section 3115½e), as twice amended, any one, "not an enemy or ally of enemy," claiming any interest, right or title in any money or other property so sequestered and held may give notice of his claim and institute a suit in equity against the Custodian or the Treasurer, as the case may be, to establish and enforce his claim; and where suit is brought the money or property is to be retained by the Custodian or in the Treasury to abide the final decree. By section 12, as amended March 28, 1918, the Custodian is *244 *clothed with "all of the powers of a common-law trustee" in respect of all enemy property coming into his hands and is given authority, subject to the President's supervision, to manage and dispose of the same, by sale or otherwise, as if he were the absolute owner, save as the power of disposal may be suspended by a suit under section 9. As respects the ultimate disposition of the property or its proceeds section 12 says:

> "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

The President, by orders of October 12, 1917, and February 26, 1918, committed to the Alien Property Custodian the executive administration of section 7c, including the power to determine after investigation whether property was enemy-owned, etc., and to require the surrender or seizure of such as he should determine was so owned. In exercising this power the Custodian after investigation determined, in substance, that the shares now in question, which then stood in the name of the New York corporation on the books of the Botany Worsted Mills, belonged to the German corporation, that it was an enemy not holding a presidential license, and that the New York corporation held the shares for its benefit; and in further exercising this power the Custodian seized the shares and required the Botany Worsted Mills to transfer them to his name on its books in accordance with the provision in section 7c before quoted.

[2] One objection urged by the plaintiff is that the seizure permitted by the act is confined to money or property "which the President after investigation shall determine" is enemy-owned, etc., and that here there was no such determination by the President, but only by the Custodian. Whether the objection would be good if it turned entirely on the words of section 7c, on which the plaintiff relies, we need *245 *not consider; for they obviously are qualified and explained by section 5 which very plainly enables the President to exercise his power under section 7c "through such officer or officers as he may direct." By the orders already noticed the President directed that this power be exercised through the Alien Property Custodian. It therefore is as if the words relied on had been "which the President, acting through the Alien Property Custodian, shall determine after investigation" is enemy-owned, etc. In short, a personal determination by the President is not required; he may act through the Custodian, and a determination by the latter is in effect the act of the President. Central Union Trust Co. v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. —; The Confiscation Cases, 20 Wall. 92, 109, 22 L. Ed. 320.

[3, 4] The plaintiff further objects that the shares, although claimed by and standing in the name of the New York corporation, which concededly was neither an enemy nor an ally of an enemy, were seized and transferred to the name of the Alien Property Custodian in virtue of a determination by an executive officer in an ex parte administrative proceeding that they belonged to an alien enemy—the gist of the objection being that the shares could not be taken from the New York corporation consistently with due process of law without first according it a hearing on its claim in a court of justice. The objection rests on erroneous assumptions and is not tenable.

That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. Central Union Trust Co. v. Garvan, supra. There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through *246 whom *he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring so promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious.

[5] That the shares were transferred to the Custodian's name does not affect the question, for, considering the nature of the property, that was but an incident of an effective seizure and, if a return of the shares were ordered, a retransfer would follow as of course.

[6] Treating this as a suit under section 9 —the plaintiff having filed a notice of claim under that section—the next question is: Has the New York corporation such an interest in the shares as entitles it, or the plaintiff in its right, to demand that they be freed from the seizure? Whether it has any interest turns on the effect to be given to the contract between it and the German corporation, under which the plaintiff insists it became the owner or acquired a substantial interest. The District Court, as we have indicated, found that the contract was not intended to affect the ownership as between the two corporations, but to serve as a cover for something else, and that after the contract the German corporation remained as it had been before, the sole beneficial owner. The facts bearing on the question are as follows:

At the beginning of the World War and during its early stages the Stoehr family, *247 consisting of a father and three *sons, were engaged in business in New York as copartners under the name of Stoehr & Sons. The father and one son were German subjects residing in Germany; one son, Hans E. Stoehr, was a German subject residing in the United States; and the remaining son, Max W. Stoehr, was a naturalized citizen of the United States residing therein. All were shareholders in the German corporation, and the father and son in Germany were among its chief officers. All were directors of the Botany Worsted Mills, and Hans E. Stoehr and Max W. Stoehr were directing and controlling its affairs, one being its treasurer and the other its secretary. It was a manufacturing concern with large holdings, had a well-established and extensive business, had been paying large dividends, and gave promise of continuing to do so. The German corporation acquired the 14,900 shares in that company long prior to the war, and in 1915, after the war became flagrant in Europe, transferred them to Hans E. Stoehr and Max W. Stoehr, to be held in trust for it as the beneficial owner. Stoehr & Sons, the copartnership, also had 5,690 shares in that company, and these, with the 14,900 constituted a majority of its stock.

Diplomatic relations between the United States and Germany were severed February 3, 1917, and, as was commonly understood, war between them was then imminent. The Stoehrs took that view and began to adjust their affairs accordingly. They caused the New York corporation to be organized, and on February 19, 1917, transferred to it the entire assets and business of their copartnership, taking in exchange all of its capital stock and putting the same in a five-year voting trust as a means of protecting and preventing a severance of their interests. On the following day, February 20, 1917, the contract relating to the 14,900 shares in the Botany Worsted Mills was made, and the shares were immediately transferred on its books to the
*248
name of the New York corporation. *In that transaction Hans E. Stoehr acted for the German corporation and the directors of the New York corporation for it—the directors being Hans E. Stoehr, Max W. Stoehr, George G. Roehlig, and Alfred de Liagre, the last two being relatives of the Stoehrs. The attorney who had advised and assisted them in transferring the copartnership assets and business also advised and assisted them in this. The shares were worth approximately $5,000,000; and yet the initial payment was only $5,000, and even that was paid by mere book entries. The full stipulated price was the book value of the shares, with good will and other intangible assets eliminated, and was payable in five future annual instalments. The stock certificates, transferred as just stated, were left in the custody of the German corporation as collateral security. If payment was not made when due, nor within 60 days after demand, the shares were to be retransferred, the $5,000 was to be retained by the German corporation, and neither corporation was to have "any further claim against the other" by reason of the contract. Possibly the stipulated price was less than the actual value; but, however this may have been, the assets and situation of the New York corporation were such that it reasonably could not have been expected to make the required payments.

After the contract the dividends accruing on the shares were not paid to the New York corporation, but were credited to it in a "special" account on the books of the Botany Worsted Mills, this being directed by Hans E. Stoehr, president of the former and treasurer of the latter.

War was declared by Congress April 6, 1917 (40 Stat. 1), and the Trading with the Enemy Act was passed October 6th following. Up to the latter date no preparation was made for making the first payment under the contract although it was to be about $1,000,000. Under the act it became the duty of every domestic corporation to report fully whether it owed any money to or held any property
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*for an enemy, and also whether any of its shares were owned by or held for an enemy. In the report of the New York corporation, signed by Max W. Stoehr, the 14,900 shares covered by the contract were not reported as held for the German corporation, nor was the stipulated price, or any part thereof, reported as owing to that corporation. But in the report of the Botany Worsted Mills, signed by Thomas Prehn, it was said that that company had "reason to believe" that the German corporation had an interest in the shares. This led to an insistent call for full information, and resulted in some correspondence and several conferences at the Alien Property Custodian's office, in all of which Herbert Heyn represented the New York corporation and the Botany Worsted Mills—he being the attorney who had advised and assisted the Stoehrs in adjusting their copartnership affairs and in making the contract. February 5, 1918, while Heyn was attending one of the conferences, Hans E. Stoehr, as president of the New York corporation and treasurer of the Botany Worsted Mills, sent to him, for use at the conference, a list of the latter company's stockholders, in which the German corporation was described as having 14,900 shares and the New York corporation as having only 5,685. In an accompanying letter he said, "The majority of the stock of the Botany Worsted Mills * * * is held by parties who are alien enemies"—a statement which was true if the 14,900 shares belonged to the German corporation, and not true if they belonged to the New York corporation. Four days later Heyn, with the approval in writing of Hans E. Stoehr as such president and treasurer, wrote to the Alien Property Custodian, saying of the purpose with which the New York corporation was formed:

> "The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that, if there was a declaration of war between the United States and Germany, the partnership [of Stoehr & Sons]
> *250
> would probably have to cease, *being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother; the results of such dissolution being of course obviously unfortunate and conceivably disastrous"

—and saying of the 14,900 shares:

> "Regarding the contract for the purchase of said 14,900 shares of Stoehr & Sons, Incorporated, from Stoehr & Co., of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost.

This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Incorporated, the New York corporation. * * * While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests."

Max W. Stoehr, the plaintiff, was a director and the secretary of the New York corporation from the time it was organized until October 14, 1918. He participated in making the contract relating to the 14,900 shares and signed it as secretary. The shares were seized in April, 1918, and he knew of the seizure. The other directors at that time were new. He regularly attended their meetings, but did not suggest to them that the corporation had an interest in the shares. At a meeting in August, 1918, an attorney who had been looking into the contract made an oral report, in the course of which he called in question the purpose with which the contract was made and said it "would not hold water." Max W. Stoehr, although present, said nothing in support of the contract. Not *251 until he *ceased to be an officer of the corporation did he manifest any opposition to the seizure. His only explanation of his silence while he remained a director is that he feared he would lose that position if he took any other course.

The District Court, after reviewing the proofs at length, concluded that the contract was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not to pass it to the New York corporation. We reach the same conclusion. On no other theory can the acts of those who were concerned be explained or their declarations reconciled. The mere recitation of the facts makes this so plain that we refrain from any special discussion of them.

[7] The treaty provisions relied on (articles 23 and 24, 8 Stat. 174) relate only to the rights of merchants of either country "residing in the other" when war arises, and therefore are without present application.

[8] Of the objections specially directed against the proposed sale, it is enough to observe that as the New York corporation does not own or have any interest in the shares it is not in a position to criticize or attack the sale; and of course a stockholder suing in its right is in no better position.

Decree affirmed.

(255 U. S. 81)

UNITED STATES v. L. COHEN GROCERY CO.

(Argued Oct. 18, 19 and 20, 1920. Decided Feb. 28, 1921.)

No. 324.

1. War 🔑4 — Food Control Act applies to charging of unreasonable prices on sale of necessaries.

Act Oct. 22, 1919, tit. 1, § 2, re-enacting Lever Act, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), and making it unlawful for any person willfully to make any unjust or unreasonable rate or charge in handling or dealing in or with necessaries, embraces the charging of unjust or unreasonable prices on a sale of necessaries.

2. War 🔑4 — Penalty contained in amended Food Control Act applies, though no penalty imposed by original act.

The penalty imposed by Act Oct. 22, 1919, tit. 1, § 2, for violations of that section, apply to the making of any unjust or unreasonable rate or charge in dealing in necessaries, though Lever Act, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as originally enacted, contained no penalty.

3. Criminal law 🔑13—Right to be informed of nature and cause of accusation not suspended or changed.

The limitation on the power of Congress contained in Const. Amends. 5, 6, so far as they prohibit the delegation of legislative powers to courts and juries, the penalizing of indefinite acts, and the denial of the right of citizens to be informed of the nature and cause of the accusation against them, are not suspended or changed by the mere existence of a state of war.

4. Criminal law 🔑13—Food Control Act fatally indefinite as to unreasonable rates or charges in connection with necessaries.

Lever Act, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, § 2, making it unlawful to make any unjust or unreasonable rate or charge in dealing in necessaries, fixes no ascertainable standard of guilt, and does not adequately inform persons accused of violations thereof of the nature and cause of the accusation against them, and is void under Const. Amends. 5, 6.

Mr. Justice Pitney and Mr. Justice Brandeis, concurring in result.

In Error to the District Court of the United States for the Eastern District of Missouri.

Criminal prosecution by the United States against the L. Cohen Grocery Company. The indictment was quashed on demurrer (264 Fed. 218), and the United States brings error. Affirmed.

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*Mr. Solicitor General Frierson, for the United States.

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*Mr. Chester H. Krum, of St. Louis, Mo., for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Required on this direct appeal to decide whether Congress under the Constitution had *86 authority to adopt *section 4 of the Lever Act as re-enacted in 1919, we reproduce the section so far as relevant (Act Oct. 22, 1919, tit. 1, c. 80, § 2, 41 Stat. 297):

> "That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person * * * (e) to exact excessive prices for any necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both. * * *"

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the re-enacted section with the original text (Act Aug. 10, 1917, c. 53, § 4, 40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff]), it will be seen that the only changes made by the re-enactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessaries in the city of St. Louis, was charged with violating this section by willfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary; the specification in the first count being a sale for $10.07 of about 50 pounds of sugar, and that in the second, of a 100-pound bag of sugar for $19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what *87 was forbidden, and *therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments which it had under consideration; that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country. * * *
>
> "Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusa- *88 tion against him, *I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed.

[1, 2] In cases submitted at about the same time with the one before us, and involving identical questions with those here in issue, it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since, if well founded, the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as re-enacted, are broad enough to embrace the price for which a commodity is sold; and, second, because as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its re-enactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

[3] We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war

could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. Ex parte Milligan, 4 Wall. 2, 121–127, 18 L. Ed. 281; Monongahela Navigation Co. v. United States, 148 U. S. 312, 336, 13 Sup. Ct. 622, 37 L. Ed. 463; United States v. Joint Traffic Association, 171 U. S. 505, 571, 19 Sup. Ct. 25, 43 L. Ed. 259; McCray v. United States, 195 U. S. 27, 61, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. *89 561; *United States v. Cress, 243 U. S. 316, 326;[1] Hamilton v. Kentucky Distilleries Company, 251 U. S. 146, 156, 40 Sup. Ct. 106, 64 L. Ed. 194. It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or nonexistence of a state of war becomes negligible, and we put it out of view.

[4] The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases *90 brought before them are vividly *portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject.[2] And again, this *91 condition would be additionally *obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used

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[1] 37 Sup. Ct. 380, 61 L. Ed. 746.

[2] In U. S. v. Leonard, District Judge Howe, of the Northern District of New York, held that in determining whether or not a price was unreasonable, the jury should take into consideration *"what prices the defendants paid for the goods in the market*—whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, *but not how much the market price had advanced from the time the goods were purchased to the time they were sold."*

In U. S. v. Oglesby Grocery Co., 264 Fed. 691, District Judge Sibley of the Northern District of Georgia, said:

"The words used by Congress in reference to a well-established course of business *fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions.* The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer."

Judge McCall, of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 per pair "and then he sells both lots of those shoes at $18, he is profiteering clearly upon the first lot if that only cost him $8. Now he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the $12 shoes."

In U. S. v. Myatt, 264 Fed. 442, District Judge Connor, of the Eastern District of North Carolina, said:

"It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant. He may, within the language of the statute, make an unreasonable, and therefore unlawful, 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchasing price."

District Judge Hand, of the Northern District of New York, in his charge to the grand jury, said:

"Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skillful merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed. But if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss."

In U. S. v. Goldberg, District Judge Bledsoe, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into consideration, among other circumstances, the following:

"That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. United States v. Reese, 92 U. S. 214, 219–220, 23 L. Ed. 563; United States v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190; Todd v.

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United States, 158 U. S. 278, *282, 15 Sup. Ct. 889, 39 L. Ed. 982. And see United States v. Sharp, 27 Fed. Cas. 1041, 1043; Chicago & Northwestern R. R. Co. v. Dey (C. C.) 35 Fed. 866, 876, 1 L. R. A. 744; Tozer v. United States (C. C.) 52 Fed. 917, 919, 920; United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68; United States v. Pennsylvania R. R. Co., 242 U. S. 208, 237–238, 37 Sup. Ct. 95, 61 L. Ed. 251.

But decided cases are referred to which it is insisted sustain the contrary view. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 123; Fox v. State of Washington, 236 U. S. 273, 35 Sup. Ct. 383, 59 L. Ed. 573; Miller v. Strahl, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364; Omaechevarria v. Idaho, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763. We need not stop to review them, however, first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution; and, second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 Sup. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 637, 34 Sup. Ct. 924, 58 L. Ed. 1510; American Seeding Machine Co. v. Kentucky, 236 U. S. 660, 662, 35 Sup. Ct. 456, 59 L. Ed. 773. And see United States v. Pennsylvania R. R. Co., 242 U. S. 208, 237, 238, 37 Sup. Ct. 95, 61 L. Ed. 251.

It follows from what we have said that, not forgetful of our duty to sustain the con-

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stitutionality of the statute *if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

Mr. Justice PITNEY, concurring.

I concur in the judgment of the court, but not in the reasoning upon which it is rested.

Defendant was indicted upon two counts, alike in form, charging in each case that it "did willfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar," in that it demanded, exacted and collected excessive prices for specified quantities of sugar purchased from it in violation of the Lever Act (Act Oct. 22, 1919, c. 80, tit. 1, § 2, 41 Stat. 297, 298, amending section 4 of Act Aug. 10, 1917, c. 53, 40 Stat. 276, 277). I am convinced that the exacting of excessive prices upon the sale of merchandise is not within the meaning of that provision of the act which is cited as denouncing it; that the act does not make it a criminal offense; that for this reason the demurrer to the indictment was properly sustained; and that whether the provision is in conflict with the Fifth or Sixth Amendment is a question not necessarily raised, and which ought not to be passed upon.

In order to appreciate the point it is necessary to quote entire so much of the section as defines the crimes thereby denounced. It reads as follows:

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> *"That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire,

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made upon sugar sold either by manufacturers or jobbers and retailers."

In U. S. v. Culbertson, etc., Co., District Judge Rudkin, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law, defendant was entitled to sell its goods on the basis of the actual *market* value at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

> combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, * * *" etc.

For a definition of "hoarding," the section refers to section 6 of the original act (40 Stat. 278 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛gg]), which declares that necessaries shall be deemed to be hoarded, within the meaning of the act, when (inter alia) "withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price."

The court holds that the words "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" are broad enough to embrace the exaction of an excessive price upon a sale of *95 such *merchandise. Why Congress should employ so unskillful and ambiguous a phrase for the purpose, when it would have been easy to express the supposed purpose in briefer and more lucid words, it is difficult to understand. If the words were to be taken alone, and without reference to the context, it might be possible to stretch their meaning so as to include the exaction of an excessive price. But to do this with a statute defining a criminal offense would, it seems to me, be inconsistent with established rules for construing penal statutes; not only so, but it would violate the rule that a statute is not to be so construed as to bring it into conflict with the Constitution, unless such construction is imperatively required by its plain words. The construction adopted by the court is not thus required. "To make a rate or charge in handling or dealing in or with" merchandise, imports the fixing of compensation for services, rather than the price at which goods are to be sold. It may refer to charges for buying, selling, hauling, handling, storage, or the like.

But the clause in question does not stand alone. It forms a part of a section in which the question of prices is dealt with four times: once in the initial prohibition against destroying any necessaries for the purpose of enhancing the price; a second time in the prohibition of hoarding, defined as including a withholding from market for the purpose of unreasonably increasing or diminishing the price; a third time in the prohibition of a conspiracy to limit the production of necessaries in order to enhance the price; and, finally, in the prohibition of a conspiracy "to exact excessive prices for any necessaries." It seems to me clear, upon the plainest principles of construction that the change of phrase must be deemed to import a difference of purpose, and that "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" must be taken to mean something else than the exaction of an excessive price. It should *96 be *observed how closely it is coupled with a cognate offense: "To engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Evidently the words "in handling or dealing," etc., qualify "wasteful practice or device," as well as "unjust or unreasonable rate or charge."

That it is not altogether evident what was intended to be included within "unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," may be conceded. So much the more reason for not extending the words by construction so as to make criminal that which is not clearly within their meaning, and for not giving to them a meaning which brings the act into conflict with the Constitution, and for not expanding the unconstitutional reach of the act, supposing that even without the particular application now made of the quoted words it would be repugnant to the fundamental law.

It is to my mind plain that section 4 was not intended to control the individual dealer with respect to the prices that he might exact, beyond prohibiting him from destroying any necessaries for the purpose of enhancing the price, and from withholding them from the market for a like purpose. So long as he acts alone he is left uncontrolled except by the ordinary processes of competition, his own sense of fairness, and his own interest. A conspiracy with others to exact excessive prices is an entirely different matter and *that* is clearly prohibited.

And this brings me to another point: Section 4 naturally divides itself into two parts; the first portion denounces a number of substantive offenses; the second portion denounces a conspiracy to commit any one of a number of offenses, but these do not in terms include any of the offenses specifically pro- *97 hibited in the earlier *portion. This, as it seems to me, is significant. Section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088, 1096 [Comp. St. § 10201]), makes it criminal for two or more persons to conspire to commit any offense against the United States, if one or more of them do any act to effect the object of the conspiracy. Hence it was not necessary for Congress to declare in the Lever Act that a conspiracy to commit any of the offenses defined in the first part of section 4 was punishable criminally. But it proceeded in the latter part to declare that a conspiracy to do any one of certain other acts, should be criminal. It seems to me too plain for argument that, under the circumstances, the inclusion in that part of the section of certain acts as forming the object of a criminal conspiracy amounts to a legislative declaration that, in the absence of conspiracy, those acts are not intended to be punished criminally. One of them is "to exact excessive prices for any necessaries."

Still further: Sections 14 and 25 of the original act (40 Stat. 281, 284 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛kk, 3115⅛q]) specifically deal with the question of official price-fixing of certain articles of prime necessity—wheat, coal, and coke—and furnish additional evidence that in the framing of this act, when Congress had price-fixing in mind and the regulation of "prices," it employed that simple term, and that it did not refer to prices in the provision of section 4 upon which the indictment in this case rests.

For these reasons, I regard it as unnecessary to pass upon the question whether that provision is in conflict with the Constitution of the United States.

Mr. Justice BRANDEIS concurs in this opinion.

(255 U. S. 98)

TEDROW, U. S. Atty., v. A. T. LEWIS & SON DRY GOODS CO. et al.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 357.

Appeal from the District Court of the United States for the District of Colorado.

Suit by A. T. Lewis & Son Dry Goods Company and others against Harry B. Tedrow, United States Attorney. From a decree for plaintiffs, defendant appeals. Affirmed.

Messrs. Charles E. Hughes, of New York City, and Clayton C. Dorsey and Gerald Hughes, both of Denver, Colo., for appellees.

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*Mr. Chief Justice WHITE delivered the opinion of the Court.

Various dealers in wearing apparel in the city of Denver filed their bill to enjoin the United States attorney from instituting prosecutions against them under section 4 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, tit. 1, § 2 (41 Stat. 298), on the ground that Congress had no power to adopt that section because a state of peace prevailed, or, if a state of war existed, the regulation of the price for which wearing apparel should be sold was beyond the authority of Congress, and, for the further reason that the section in question was void for repugnancy to the Fifth and Sixth Amendments to the Constitution because of its vagueness, want of standard, and denial of the equal protection of the laws. The case was submitted on bill and answer and the statute was held void because of its uncertainty and want of standard, and its enforcement was enjoined.

That the court was right in this ruling, which is the subject now before us upon direct appeal brought by the government, is not open in view of the decision this day in the Cohen Grocery Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, and, for the reasons stated in that case, it is affirmed.

Decree affirmed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 100)

KENNINGTON et al. v. PALMER, Atty. Gen., et al.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 367.

Injunction 🔑85(2)—Enforcement of unconstitutional penal law may be enjoined.

A suit in equity may be maintained to enjoin the Attorney General and his subordinates from enforcing against plaintiffs the unconstitutional provisions of Lever Act, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, tit. 1, § 2.

Appeal from the District Court of the United States for the Southern District of Mississippi.

Suit by R. E. Kennington and others against A. Mitchell Palmer, Attorney General, and others. From a decree dismissing the bill, plaintiffs appeal. Reversed and remanded.

Messrs. Garner Wynn Green and Marcellus Green, both of Jackson, Miss., for appellants.

The Attorney General, for respondents.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The appellants, dealers in wearing apparel in the city of Jackson, Miss., filed their bill in the court below against the Attorney General and subordinates, charged by him with administrative duties under section 4 of the

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Lever *Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, tit. 1, § 2 (41 Stat. 298), to enjoin the enforcement against them of provisions of that section. Their right to relief was based upon averments as to the unconstitutionality of the assailed provisions of the section, not only in substance upon the contentions which we have this day considered and disposed of in the Cohen Grocery Co. Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, but upon other grounds as well.

Without passing upon the question of constitutionality, the court dismissed the bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal.

As it is no longer open to deny that the averments of unconstitutionality which were relied upon, if well founded, justified equitable relief under the bill,[1] and because the opinion in the Cohen Case has conclusively settled that they were well founded, it follows that the court below was wrong, and its decree must be and it is reversed, and the case remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 102)

KINNANE, U. S. Atty., v. DETROIT CREAMERY CO. et al. UNITED STATES v. SWARTZ. SAME v. SMITH.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

Nos. 376–378.

Appeal from the District Court of the United States for the Eastern District of Michigan.

In Error to the District Court of the United States for the Eastern District of Michigan.

Suit by the Detroit Creamery Company and others against John E. Kinnane, United States Attorney, and criminal prosecutions by the United States against Ben B. Swartz and Jacob M. Smith. From a decree granting a permanent injunction in the first case, defendant appeals. In the criminal prosecutions, the indictments were quashed, and the United States brings error. Affirmed.

For opinion below, see 264 Fed. 845.

No. 376:

Mr. Charles E. Hughes, of New York City, for appellees.

Nos. 377 and 378:

Mr. Charles E. Hughes, of New York City, for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In the first of the above cases the Creamery Company and others, appellees, filed their bill in the court below *against the United States attorney and the members of the "Federal Fair Price Committee" for an injunction to restrain prosecutions against them for selling milk at alleged unjust and unreasonable rates or charges in violation of the fourth section of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted in 1919 (Act Oct. 22, 1919, tit. 1, § 2 [41 Stat. 298]), on the ground, among others, that the section was repugnant to the Constitution because of its vagueness and because it failed to provide a standard of criminality.

The United States attorney after challenging in his answer the right to restrain the performance by him of his official duties, admitted that in its advisory capacity the said Price Committee had fixed what it had deemed to be a fair price for the sale of milk, and that he intended, in the discharge of his official duty, to act upon such advice as the basis for prosecutions, where such price was exceeded, and, asserting the constitutionality of the section and the want of merit in the grounds upon which it was assailed, prayed the dismissal of the bill.

A temporary injunction issued, and the case having been submitted on the pleadings without proof, the court, stating that the sole question involved was whether the provision in question of section 4 of the Lever Act was constitutional, decided that it was not, because of its vagueness and uncertainty, and of the consequent absence from it of all standard of criminality. The enforcement of said provision was therefore permanently enjoined, and upon this appeal, the sole issue raised by the government is whether the court erred in holding the provision of the statute in question to be void for repugnancy to the Constitution. That it did not so err is fully established by the opinion this day announced in the Cohen Grocery Co. Case (No. 324) 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, and therefore it is our duty to affirm.

The two other cases, Nos. 377 and 378, are likewise so controlled. Both were indictments for selling potatoes *at prices which were alleged to be unjust and unreasonable

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[1] Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724; Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194; Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; Ft. Smith & Western R. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862.

in violation of the re-enacted fourth section of the Lever Act and in both cases the indictments were quashed because of the unconstitutionality of the section upon the grounds stated by the court in the Creamery Case, No. 376, and they are both here at the instance of the government because of alleged reversible error committed in so doing. It follows, for the reasons just stated and those expounded in the Cohen Grocery Case that the action below in all three cases must be and the same is hereby

Affirmed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 104)

C. A. WEED & CO. v. LOCKWOOD, U. S. Atty.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 407.

Appeal from the District Court of the United States for the Western District of New York.

Suit by C. A. Weed & Co. against Stephen T. Lockwood, United States Attorney. From a decree dismissing the bill (264 Fed. 453), complainant appeals. Reversed.

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*Messrs. Simon Fleischmann, and Martin Clark, both of Buffalo, N. Y., for appellant.

Mr. Chief Justice WHITE delivered the opinion of the Court.

An indictment having been returned against the appellant in the court below for violating the fourth section of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff) as re-enacted by Act Oct. 22, 1919, tit. 1, § 2 (41 Stat. 298), by selling wearing apparel at an unjust or unreasonable rate or charge, it filed its bill in that court praying that the United States attorney be enjoined from proceeding with the prosecution, assigning as grounds for the injunction, that the section was void because a regulation of prices of wearing apparel was beyond the power of Congress in the existing state of peace, and because the statute was too vague and deficient in standard to justify a criminal prosecution under it.

The court, on demurrer, held that a status of war existed and that although there were some authorities to the contrary, that condition, in its opinion, conferred upon Congress the authority to fix the price at which wearing apparel might be sold, as the business of selling such merchandise was a business in which the public had an interest and which, therefore, the government could regulate. Pointing out, however, that the question as to the vagueness of the statute was more serious, the court nevertheless declared that it was of opinion that Congress had authority to provide against an unjust or unreasonable price, without fixing such price, by leaving it

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to be *adjusted by courts and juries, depending upon the general economic situation at the time an alleged violation of the prohibition came before them for consideration. The bill was accordingly dismissed, and the case is here on direct appeal.

It is evident from the decision in the Cohen Grocery Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, this day announced, that the decree below was wrong, and for the reasons stated in the opinion in that case, it must be and is reversed.

Decree reversed.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 106)

G. S. WILLARD CO. et al. v. PALMER, Atty. Gen., et al.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 418.

Appeal from the District Court of the United States for the Northern District of Ohio.

Suit by the G. S. Willard Company and others against A. Mitchell Palmer, Attorney General of the United States, and another. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

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*Mr. William L. Day, of Cleveland, Ohio, for appellants.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In this case the complainants filed their bill to enjoin the Attorney General and the United States attorney from taking steps to enforce against them provisions of the fourth section of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, tit. 1, § 2 (41 Stat. 298), on the grounds, among others, of their repugnancy to the Constitution of the United States because of their vagueness and want of constitutional standard. On motion, the court dismissed the bill for want of equity, and the case is here by direct appeal.

It presents the question under the Constitution which was this day decided in the Cohen Grocery Co. Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, that is, the repugnancy of the provisions relied upon to the Constitution, and therefore, as a result of the ruling in that case, the decree below must be reversed and the case remanded for further proceedings in conformity with this opinion; and

It is so ordered.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 108)

OGLESBY GROCERY CO. v. UNITED STATES.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 457.

In Error to the District Court of the United States for the Northern District of Georgia.

The Oglesby Grocery Company was convicted of a violation of the Lever Act (264 Fed. 691), and it brings error. Reversed, with directions.

Mr. Edgar Watkins, of Atlanta, Ga., for plaintiff in error.

The Attorney General, for the United States.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The plaintiff in error is here to reverse a verdict and sentence against it on an indictment containing four counts charging it with four separate violations of the fourth section of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as re-enacted by Act Oct. 22, 1919, tit. 1, § 2 (41 Stat. 298). At the close of all the testimony it requested the court to charge the jury that the provisions of that section relied upon were repugnant to the Constitution of the United States on the grounds, among others, which were held to be sound in the Cohen Grocery Co. Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, this day decided.

It is therefore unnecessary for us to do more than to apply to this case the rulings made in the Cohen Case, and in consequence

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of doing so, to reverse the judgment *with directions to set aside the sentence and quash the indictment; and

It is so ordered.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

(255 U. S. 109)

WEEDS, Inc., et al. v. UNITED STATES.

(Argued Oct. 18, 19, and 20, 1920. Decided Feb. 28, 1921.)

No. 558.

Criminal law 🔑13—Food Control Act fatally indefinite as to conspiracy to exact excessive prices.

Lever Act, § 4 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff), as amended by Act Oct. 22, 1919, tit. 1, § 2, making it unlawful to conspire, combine, agree, or arrange with any other person to exact excessive prices for necessaries, is not sufficiently specific to create a standard, and inform accused of the accusation against him, and is void under Const. Amends. 5, 6.

Mr. Justice Pitney and Mr. Justice Brandeis concurring in result.

In Error to the District Court of the United States for the Northern District of New York.

Weeds, Incorporated, and another, were convicted of violations of the Lever Act, and they bring error. Reversed and remanded, with directions.

Mr. Charles E. Hughes, of New York City, for plaintiffs in error.

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*Mr. Chief Justice WHITE delivered the opinion of the Court.

The plaintiffs in error, having been convicted and sentenced under an indictment containing eight counts, one of which, the sixth, was eliminated at the trial, prosecute this direct writ of error. All the counts charged violations of the fourth section of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff)—the first, a conspiracy under the section to exact and to aid and abet in exacting excessive prices for certain necessaries, that is, articles of wearing apparel; and each of the others a specific sale of such an article at an unjust and unreasonable rate or charge.

The indictment was demurred to because of its repugnancy to the Constitution upon these grounds: (1) Want of power in Congress because of a state of peace; (2) that the provisions in question were so vague and wanting in standard of criminality as to constitute a mere delegation by Congress of legislative power in violation of the Fifth and Sixth Amendments, and, furthermore, because by virtue of the exemptions which they contained, they denied to defendants the equal protection of the laws. The demurrer was overruled and at the trial which followed the grounds of demurrer were again held to be without merit and the questions which it presented were saved and are pressed in the argument at bar as grounds for reversal.

As the only difference between the charges in the Cohen Grocery Co. Case, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. ——, and those in this, is the fact that here in one of the counts there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the Cohen Case is decisive here, unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create
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a standard and to inform the *accused of the accusation against him and thus make it not amenable to the ruling in the Cohen Case. But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally as wanting in standard and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the Cohen Case, it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded, with directions to set aside the sentence and quash the indictment.

It is so ordered.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice DAY took no part in the consideration or decision of this case.

Mr. Justice PITNEY, concurring.

In this case, as in No. 324, United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. ——, while concurring in the judgment of the court, I am unable to yield assent to the grounds upon which it is based.

Most of the counts in the indictment upon which plaintiffs in error were convicted allege specific violations of that provision of the Act of October 22, 1919 (chapter 80, tit. 1, § 2, 41 Stat. 297, 298, amending section 4 of the Act of August 10, 1917, c. 53, 40 Stat. 276, 277), which declares it unlawful "to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries"; the alleged offenses having consisted in the sale of specific articles of merchandise at excessive prices. Respecting these, my views are expressed in the concurring opinion in the Cohen Grocery Co. Case.
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*The remaining count alleges a conspiracy to exact, and to aid and abet in exacting, excessive prices for certain specified necessaries. I see no unconstitutional lack of definiteness in the prohibition of a conspiracy to exact excessive prices for necessaries. In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value; the price prevailing under current conditions of supply and demand, uninfluenced by manipulation. So construed, I regard this provision as clearly constitutional, and need only refer to Nash v. United States, 229 U. S. 373, 377, 33 Sup. Ct. 780, 57 L. Ed. 1232. International Harvester Co. v. Kentucky, 234 U. S. 216, 221–223, 34 Sup. Ct. 853, 58 L. Ed. 1284, is distinguishable. In that case it was conceded, arguendo, that a standard fixed by market value under fair competition and normal market conditions was admissible; and the statute was denounced only because in truth it did not apply this standard, but called for an estimate of what prices would have been under nonexistent and imaginary conditions. To the same effect, Collins v. Kentucky, 234 U. S. 634, 638, 34 Sup. Ct. 924, 58 L. Ed. 1510.

I assume (as the court has this day held) that the provision declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is unconstitutional for want of a definite standard; but this does not carry with it the provision now in question, since by section 22 of the Act of August 10, 1917 (40 Stat. 283 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛oo]), it is declared that if any clause, sentence, paragraph, or part of the act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved—a con-
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clusive declaration *by Congress that the various provisions of this complicated statute shall be regarded as separable.

The record shows, however, that the trial court repeatedly rejected testimony offered by defendants for the purpose of showing the market value of the goods in question at times material to the controversy, and that exceptions were duly allowed. The effect of the rulings was to deprive defendants of the benefit of this standard, by which the jury might have determined whether the prices defendants agreed to exact for the merchandise were excessive; and for this reason only I concur in the reversal of the judgment of conviction as to this count. As to the other counts I concur in the reversal upon the ground that the statute, in declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," does not include the exaction of an excessive price for merchandise sold.

Mr. Justice BRANDEIS concurs in this opinion.

(255 U. S. 216)

THE PESARO.

(Argued Jan. 26 and 27, 1921. Decided Feb. 28, 1921.)

No. 317.

1. **Appeal and error 🔑77(1) — Decree dismissing attached vessel without day is "final."**

A decree in a libel in rem which holds for naught the process under which the ship was arrested, declares she is not subject to any such process, and directs her release—in other words dismisses her without day—is a final decree from which an appeal may be taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. **Courts 🔑385(4)—Whether vessel was exempt as property of foreign government is "jurisdictional question."**

Whether a vessel arrested on process on libel in rem was exempt from such arrest because she was owned by a foreign government depends upon whether there is an implied exception of such vessels from Judicial Code, § 24, cl. 3 (Comp. St. § 991), giving the District Courts original jurisdiction of admiralty causes, and is a jurisdictional question within Judicial Code, § 238 (sec. 1215), providing for an appeal from a District Court directly to the Supreme Court in any case in which the jurisdiction of the court may be in issue.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Jurisdictional Question.]

3. **International law 🔑10—Suggestion arrested vessel belongs to foreign government should be made through state department.**

The suggestion that a vessel arrested on process issued by a District Court was exempt from arrest because the property of a foreign government should be made through our state department and a suggestion made directly by a foreign ambassador to the court should not be entertained, even though it was accompanied by a certificate of the Secretary of State establishing the diplomatic status of the ambassador.

Appeal from the District Court of the United States for the Southern District of New York.

Libel in rem against the Italian steamship the Pesaro. From a decree of the District Court releasing the vessel absolutely from arrest, the libelant appeals directly to the United States Supreme Court. Decree reversed.

Messrs. Oscar R. Houston, of New York City, Harold V. Amberg, of Washington, D. C., and Henry J. Bigham, of New York City, for appellants.

Mr. John M. Woolsey, of New York City, for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

The Pesaro, an Italian steamship which carried a shipment of olive oil from Genoa *217 to New York, was sued in rem *in admiralty in the District Court to enforce a claim for damage to that part of her cargo, the libel alleging that she was "a general ship engaged in the common carriage of merchandise by water, for hire." The usual process issued and the ship was arrested. Afterwards upon a direct suggestion by the Italian Ambassador that the ship was owned by the Italian government and at the time of the arrest was in its possession, and therefore was not subject to the court's process, the court vacated the arrest. The libelants objected that a direct suggestion by the Ambassador was not admissible and that, to be entertained, the suggestion should come through official channels of the United States; but the objection was overruled. The libelants then requested permission to traverse the suggestion and to make a showing in opposition; but the request was denied, the court holding that to controvert or question the suggestion was not allowable. The libelants appealed directly to this court, and in that connection the District Court certified the ground of its decisions as follows:

> "I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a court of admiralty, has no jurisdiction to subject to its process a steamship which is by the suggestion of the said Italian Ambassador filed in this court represented to be the public property and in the possession of the kingdom of Italy."

[1] Our authority to entertain the appeal is challenged upon two grounds. One is that the decree is not final, because it does not dismiss the libel. That it does not formally do so is true, but this is not decisive. The suit is in rem—is against the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as if it formally dismissed the *218 libel. *Obviously, therefore, it is final. That it was intended to be so is shown by the court's certificate.

[2] The other ground is that the question raised and decided was not a jurisdictional one in the sense of the statute (Jud. Code, § 238 [Comp. St. § 1215]), providing for an appeal or writ of error from a District Court directly to this court "in any case in which the jurisdiction of the court may be in issue." But we think it was such a question because it directly concerned the power of the District Court, as defined by the laws of the United States, to entertain and determine the suit. The Steamship Jefferson, 215 U. S. 130, 137, 138, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907; The Ira M. Hedges,

218 U. S. 264, 270, 31 Sup. Ct. 17, 54 L. Ed. 1039, 20 Ann. Cas. 1235; United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163. By Judicial Code § 24, cl. 3, the District Courts are invested with original jurisdiction of "all civil causes of admiralty and maritime jurisdiction"; and this is a suit of that character. Whether Congress intended this statute should include suits against ships such as the Pesaro is represented to be in the Ambassador's suggestion, when they are within the waters of the United States, is as yet an open question. The statute contains no express exception of them; but it may be that they are impliedly excepted. The Exchange, 7 Cranch, 116, 136, 146, 3 L. Ed. 287. If so, the implication is a part of the statute. United States v. Babbit, 1 Black, 55, 61, 17 L. Ed. 94; South Carolina v. United States, 199 U. S. 437, 451, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. Thus the answer to the question propounded to the District Court involved a construction of the statute defining its jurisdiction in admiralty.

[3] We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the *Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a "suggestion," and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. In re Muir, Master of the Gleneden, 41 Sup. Ct. 185. And see United States v. Lee, 106 U. S. 196, 209, 1 Sup. Ct. 240, 27 L. Ed. 171. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must.

*219

Decree reversed.

(255 U. S. 219)

THE CARLO POMA.

(Argued Jan. 26 and 27, 1920. Decided Feb. 28, 1921.)

No. 167.

1. Courts 🔑405(5)—Liability of foreign vessel to suit in rem is jurisdictional question giving Supreme Court jurisdiction.

The question of the liability of a vessel owned by a foreign government to process in rem is question of jurisdiction, from which an appeal lies only to the Supreme Court, and not to the Circuit Court of Appeals, under Judicial Code, §§ 128 and 238 (Comp. St. §§ 1120, 1215).

2. Appeal and error 🔑1114—Circuit Court of Appeals decision in case appealable to Supreme Court vacated.

Where the Circuit Court of Appeals affirmed a decree of the District Court which was open to review only by the Supreme Court, the decision of the Circuit Court of Appeals must be vacated, and the case remanded to it, with direction to dismiss the appeal.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel in rem against the Carlo Poma. A decree releasing the vessel from arrest was affirmed by the Circuit Court of Appeals (259 Fed. 369, 170 C. C. A. 345), and libelant brings certiorari. Decree of Circuit Court of Appeals vacated, with direction to dismiss appeal from the District Court.

See, also, Cavallaro v. The Carlo Poma, 250 U. S. 656, 40 Sup. Ct. 14, 63 L. Ed. 1192.

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*Messrs. Oscar R. Houston, of New York City, Harold V. Amberg, of Washington, D. C., and D. Roger Englar, of New York City, for petitioner.

Messrs. Van Vechten Veeder and Charles C. Burlingham, both of New York City, for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This case is much like that of The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. —. The only difference requiring notice is that the appeal in that case was to this court while in this it was to the Circuit Court of Appeals, which rendered a decree of affirmance. 259 Fed. 369, 179 C. C. A. 345. A writ of certiorari brings that decree here for review. Cavallaro v. Carlo Poma, 250 U. S. 656, 40 Sup. Ct. 14, 63 L. Ed. 1192.

[1] The question raised and decided in the District Court was whether, sitting as a court of admiralty, it could entertain a suit in rem against a ship such as the Carlo Poma was represented to be in the suggestion of the Italian Ambassador. That was a jurisdictional question in the sense of section 238 of the Judicial Code. The Pesaro, supra.

The court resolved it in the negative and accordingly released the ship from arrest, thereby disposing of the suit adversely to the libelant.

From that decree an appeal did not lie to the Circuit Court of Appeals, but only to this court. Such is the effect of the statute, Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), defining and regulating the appellate jurisdiction of this court and of the Circuit Courts *221 of Appeals, as is pointed out in United *States v. Jahn, 155 U. S. 109, 114, 15 Sup. Ct. 39, 39 L. Ed. 87. In that case, after an extended review of the statute, it was said:

> "If the jurisdiction of the Circuit Court [now District Court] is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court."

[2] As therefore the decree in the District Court was not open to review by the Circuit Court of Appeals, we must vacate the latter's decision and remand the case to it with a direction to dismiss the appeal. See Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, 74, 23 Sup. Ct. 604, 47 L. Ed. 712; Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658.

Decree of Circuit Court of Appeals vacated, with direction to dismiss appeal from District Court.

(255 U. S. 151)

SILVER KING COALITION MINES CO. v. CONKLING MINING CO. (two cases).

(Argued Jan. 19, 1921. Decided Feb. 28, 1921.)

Nos. 158, 187.

1. Mines and minerals 🔑38(19)—Evidence admissible to show corners referred to in patent were marked by posts which controlled over courses and distances.

Where a patent for a mining claim described the boundary as running from corner No. 1 to corner No. 2, each marked by a pine post and thence by specified courses and distances to corners Nos. 3 and 4, without mentioning any monuments at these last corners, evidence was admissible to show that the field notes showed marked posts at such corners, and that such posts were found on the ground; and, when the court believed such evidence, such monuments controlled the courses and distances.

2. Mines and minerals 🔑42—Reference to natural objects or monuments to be incorporated in patent.

Under Rev. St. § 2324 (Comp. St. § 4620), requiring the location of a mining claim to be marked on the ground, and section 2325 (Comp. St. § 4622), requiring the applicant for a patent to file a plat and field notes and a certificate of the Surveyor General that the plat is correct with such further description by such reference to natural objects or permanent monuments as shall identify the claim and furnish an accurate description to be incorporated in the patent, it is the reference to natural objects or monuments that is to be incorporated into the patent.

3. Mines and minerals 🔑43—Patent can only convey claim as to which notice has been posted and published.

Under Rev. St. § 2325 (Comp. St. § 4622), requiring the applicant for a patent for a mining claim to post notice of the application, and requiring the register to advertise the application, the notice is jurisdictional, and a patent can convey only the claim as to which notice has been given.

4. Mines and minerals 🔑40—Notice of application for patent cannot give priority to junior locator as to land outside monuments.

Notice of an application for a mining patent on land determined by monuments cannot give priority in respect to land outside the monuments where the applicant is a junior locator.

5. Mines and minerals 🔑39—Final receipt from land office fixes right of mining claimant.

The final receipt from the local land officer fixes the rights of the owner of a mining claim as to the land included.

6. Mines and minerals 🔑43—Omission from patent of reference to monuments at corners not adjudication in favor of inconsistent description.

Failure of a patent for a mining claim to describe the monuments at two of the corners was not an adjudication in favor of a description inconsistent with the final receipt from the local land office, where such omission was pursuant to a practice of abbreviating by omission that had been adopted by the land office and was subsequently discarded.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Conkling Mining Company against the Silver King Coalition Mines Company. A decree dismissing the bill was reversed by the Circuit Court of Appeals (230 Fed. 553, 144 C. C. A. 607), and defendant appeals and brings certiorari. Appeal dismissed, and decree reversed.

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*Messrs. Thomas Marioneaux, of Salt Lake City, Utah, Curtis H. Lindley, of San Francisco, Cal., W. H. Dickson and A. C. Ellis, Jr., both of Salt Lake City, Utah, and W. C. Prentiss, of Washington, D. C., for petitioner and appellant.

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*Messrs. F. B. Critchlow and Wm. W. Ray, both of Salt Lake City, Utah, for respondent and appellee.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the respondent, the Conkling Mining Company, in order to establish its right to a large body of ore found under the southwesterly 135.5 feet of its patent as laid out by courses and distances, and to obtain an account from the petitioner, which has mined the ore, making a claim of right on its side. The District Court dismissed the bill. The decree was reversed by the Circuit Court of Appeals. Conkling Mining Co. v. Silver King Coalition Mines Co., 230 Fed. 553, 144 C. C. A. 607. Thereupon a writ of certiorari was granted by this Court. 250 U. S. 655, 40 Sup. Ct. 13, 63 L. Ed. 1192. A short statement will be enough to present the single issue that it is necessary to pass upon here. The only ground upon which the Conkling Mining Company stands is that the ore is within the lines of its patent extended vertically downward. If the patent properly construed does not cover the land in question the case is at an end.

The patent under which the Conkling Mining Company gets its title was granted to the Boss Mining Company and so far as material is as follows: It recites that in pursuance of the Revised Statutes, etc., there have been deposited in the General Land Office of the United States the plat and field notes of survey and the Certificate No. 1697 of the Register of the local land office with other evidence whereby it appears that the grantee duly entered and paid for that certain mining claim known as the Conkling lode mining claim, designated by the Surveyor General as Lot No. 689, "bounded, described, and platted as follows * * * Beginning at corner No. 1 a pine post four inches square marked U. S. 689 P. 1. Thence" *160 *by courses and distances northwesterly "to corner No. 2, a pine post four inches square marked U. S. 689 P. 2," these two corners being undisputed. "Thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3. Thence third course, south twenty-one degrees and nine minutes east six hundred feet to corner No. 4." It then grants "the said mining premises hereinbefore described" and all that portion of veins, lodes or ledges, "the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said Lot No. 689," etc., with a proviso confining "the right of possession to such outside parts of said veins," etc., "to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot No. 689," etc.

If "corner No. 3" and "corner No. 4" are determined by courses and distances alone the Conkling Mining Company is entitled to prevail upon the question that we are discussing. The Circuit Court of Appeals was of opinion that the patent represented an adjudication by the Land Department that the lot was 1500 feet long and 600 feet wide without regard to the location of the other posts which the field notes showed to exist but the patent did not mention. The District Court on the other hand held that evidence was admissible to show that there were monuments at corners No. 3 and No. 4, held that the monuments so established prevailed, and therefore decided that the title of the Conkling Mining Company failed.

[1] The decree of the District Court appears to us to be supported by the face of the patent and by consideration of the circumstances. If a draughtsman were determining his description by courses and distances only it seems unlikely that he would insert "corner No. 3" and "corner No. 4" where the direction changed, as it would add nothing to the change of direction in the boundary *161 line. The *words by themselves suggest a reference to an external object, an interpretation greatly strengthened by the fact that the same phrase in the first two instances of its use referred to one in terms; and coupled with evidence that such an external object was found, the words at least tend to prove that a monument was meant. Of course evidence is admissible, if needed, to show that language is to receive the interpretation that taken by itself it invites. Furthermore the grant is of "the said mining premises hereinbefore described," assumed in the same sentence to be the lot designated by the Surveyor General as Lot No. 689; and, when it is observed that it is the duty of the Surveyor General to see that the lot is identified by monuments on the ground the presumption becomes almost irresistible that "corner No. 3" and "corner No. 4" mean corners determined as they are required to be determined by the law.

[2-4] One statutory foundation of a mining claim is that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." Rev. Sts. § 2324 (Comp. St. § 4620). To obtain a patent the claimant must file in the proper land office along with his application "a plat and field notes of the claim * * * made by or under the direction of the United States Surveyor General, showing accurately the boundaries of the claim * * * which shall be distinctly marked by monuments on the ground." Waskey v. Hammer, 223 U. S. 85, 92, 32 Sup. Ct. 187, 56 L. Ed. 359. He also must file a certificate of the Surveyor General "that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent." Rev. Sts. § 2325 (Comp. St. § 4622). It is the reference to natural objects or monuments that is to be incorporated. Before the applica-

tion is filed notice of it must be posted on the ground. The register subsequently *162 advertises the application in a newspaper, *etc., and if no adverse claim is made and the other conditions are complied with the patent is granted. The notice is jurisdictional. El Paso Brick Co. v. McKnight, 233 U. S. 250, 259, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113. Obviously therefore a patent can convey only the claim as to which notice has been given. A notice of an application for a patent of land determined by monuments cannot give priority to a junior location, such as was that of the Conkling Mining Company, in respect of land outside the monuments, to which adjoining claimants had no notice that the patent would purport to extend.

[5, 6] The final receipt from the local land officer fixed the claimant's rights. El Paso Brick Co. v. McKnight, 233 U. S. 250, 257, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113. The failure of the subsequent patent to the Boss Mining Company, issued February 23, 1892, to describe the monuments at corners Nos. 3 and 4 was not an adjudication in favor of an inconsistent description but simply the following of a practice of abbreviating by omission that had been adopted by the land office in 1891, and which a few years later it was directed to discard. The act of April 28, 1904, c. 1796, 33 Stat. 545, amending Rev. Sts. § 2327 (Comp. St. § 4626), making the monuments the highest authority to which inconsistent descriptions must give way, simply made more explicit or at most carried a little farther the previous policy of the law. We are satisfied that evidence that the field notes, as the regulations of the department required, showed marked posts at the third and fourth corners was admissible, and that witnesses properly were allowed to testify that they found posts upon the ground. The District Judge who saw and heard the witnesses was satisfied that they told the truth and thereupon rightly determined that the monuments so fixed controlled the courses and distances in the instrument evidencing the grant. See Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180; Grand *163 Central Mining Co. v. Mammoth *Mining Co., 36 Utah, 364, 378, 379, 104 Pac. 573, Ann. Cas. 1912A, 254; Foss v. Johnstone, 158 Cal. 119, 128, 110 Pac. 294; McIver v. Walker, 4 Wheat. 444, 447, 448, 4 L. Ed. 611; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063. We see no sufficient reason for disturbing the finding of the trial court upon the facts.

It may be that our decision will end this litigation. If not, our decree is made without prejudice to such further questions as may arise. We confine ourselves to the one here determined.

The petitioner besides applying for the writ of certiorari took an appeal, for greater caution. It is immaterial to the petitioner in which way the relief to which it is entitled is obtained. The appeal will be dismissed.

Decree reversed.

Appeal dismissed.

The CHIEF JUSTICE took no part in the decision of this case.

(255 U. S. 72)

EL BANCO POPULAR DE ECONOMIAS Y PRESTAMOS DE SAN JUAN, P. R., v. WILCOX.

(Argued Nov. 12, 1920. Decided Feb. 28, 1921.)

No. 91.

Courts 🔑382(1)—Supreme Court cannot review Porto Rico decree on appeal from the Circuit Court of Appeals.

Under Act Jan. 28, 1915, c. 22, § 1 (Comp. St. § 1107), section 2, amending Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), and section 3, repealing Judicial Code, § 244, which conferred on the Circuit Court of Appeals for the First Circuit jurisdiction to review certain decisions of the United States District Court for Porto Rico, which had previously been reviewable by the Supreme Court, the Supreme Court cannot review those decisions on appeal from the Circuit Court of Appeals under Judicial Code, § 128, since the latter section manifestly was intended to distribute the appellate jurisdiction over the courts of the United States proper, and the provision of the act of 1915, giving right to direct appeal to the Supreme Court in certain cases and to the Circuit Court of Appeals in other cases, negatives the right to successive appeals in the latter cases.

Appeal from the United States Circuit Court of Appeals for the First Circuit.

Suit by El Banco Popular de Economias y Prestamos de San Juan, P. R., against Elias B. Wilcox. A decree for complainant, rendered by the United States District Court for Porto Rico, was reversed by the Circuit Court of Appeals for the First Circuit (255 Fed. 442, 166 C. C. A. 518), and complainant appeals. Appeal dismissed for want of jurisdiction.

Mr. Boyd B. Jones, of Boston, Mass., for appellant.

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*Messrs. Ben A. Matthews, of New York City, and José R. F. Savage, of San Juan, P. R., for appellee.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In a suit in the United States District Court for Porto Rico where the appellant, a bank incorporated in Porto Rico, was plaintiff, and the appellee, a citizen of the United States, was defendant, a final decree in favor of the bank was rendered, and from that decree the defendant took the case to the Circuit Court of Appeals for the First Circuit.

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*Upon a reversal of the decree in that court, the bank brought this appeal, and upon a motion to dismiss for want of jurisdiction we are required to determine its right to do so. The appellant, not denying that the jurisdiction of this court to review judgments or decrees of the District Court for Porto Rico in cases such as the present one was taken away by the act conferring upon the Circuit Court of Appeals of the First Circuit appellate power over that subject (Act Jan. 28, 1915, c. 22, § 1 [Comp. St. § 1107]; Id. § 2, amending sections 128 and 238 Judicial Code [Comp. St. §§ 1120, 1215]; Id. § 3, repealing section 244, Judicial Code [36 Stat. 1157]; 38 Stat. 803, 804), nevertheless insists that by virtue of the jurisdiction of this court to review judgments and decrees of the Circuit Courts of Appeals, the power taken away is in substance preserved if only successive appeals be resorted to. This rests upon the proposition that, as the act transferring the jurisdiction from this to the Circuit Court of Appeals brought this case within the jurisdiction of the latter court, it hence subjected the decree in this case to the test of finality and the right of review provided in section 128 of the Judicial Code controlling those subjects. While if the section be considered superficially the argument is plausible, its unsoundness becomes apparent by the briefest examination of the context and genesis of the section. Virtually every word of the section relied upon to establish that the decree was not final and to justify the asserted right to review it in this court depends upon limitations expressed in the Judiciary Act of 1891, (26 Stat. 826), and which were intended to carry out the great purposes of that act, to distribute the appellate power of the courts of the United States in the proper sense and were therefore inapplicable to the Porto Rican court. To illustrate, one of the broad distinctions made in the distribution of appellate power under the act of 1891 depended upon whether the jurisdiction of the federal court as fixed by law was exclusively called

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into play because of diverse *citizenship, in the constitutional sense, or whether the jurisdiction was invoked because, aside from diverse citizenship, there existed a federal right or question; a judgment being in one case made final in one court where it was not in the other, and also being subject to one method of review in the one and a different in the other. Thus the proposition is that, because by Act of Congress jurisdiction was conferred upon the Circuit Court of Appeals to review a judgment of the Porto Rican court, therefore by the mere exertion of that jurisdiction the Porto Rican judgment was brought under the control, as to finality and review, of provisions having no possible application or relation to it.

The act of Congress by which jurisdiction was conferred upon the Circuit Court of Appeals for the First Circuit additionally makes clear the misconception upon which the argument rests. At the time that act was passed the jurisdiction of this court to review the Porto Rican court embraced two classes of cases, the one involving enumerated federal questions, in the true sense, and the other where the power depended upon the amount involved. Section 244, Judicial Code. But the transferring act did not divest this court of appellate jurisdiction over the Porto Rican court, but on the contrary preserved its authority, although in some respects limiting and in others enlarging it, and transferred to the Circuit Courts of Appeals appellate jurisdiction in all cases other than those in which jurisdiction by direct appeal was conferred upon this court, unless otherwise provided by law—a result which clearly negates that it was contemplated that a right to successive appeals should exist, and which, moreover, indisputably shows that it was the purpose of Congress not to give the Circuit Court of Appeals an authority which it could not exert compatibly with the distribution of federal appellate judicial power made by the act of 1891.

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*Indeed, we might well have spared ourselves the duty of expressing the considerations we have stated since the proposition relied upon is virtually foreclosed by the ruling in Inter-Island Steam Navigation Co. v. Ward, 242 U. S. 1, 37 Sup. Ct. 1, 61 L. Ed. 113. There a judgment of the Circuit Court of Appeals of the Ninth Circuit, affirming a judgment of the Supreme Court of Hawaii, was brought here by appeal on the theory of the right to successive appeals now relied upon. Coming to consider whether there was jurisdiction to entertain the appeal, and pointing out a reservation of jurisdiction in this court made by the act transferring authority to the Circuit Court of Appeals of the Ninth Circuit to review the Hawaiian court, similar in character to that made with reference to the Porto Rican court which we have previously noticed, it was held that there was no jurisdiction in this court: (a) Because of the inferences properly to be drawn from the reservation in the act of Congress just referred to; (b) because of the impossibility of supposing that jurisdiction was taken away from this court and yet virtually restored by successive appeals; and (c) because of the difference between the systems of judicature obtaining as to the courts of the United States under the Constitution and those of Hawaii making the right to review in the one depend upon legislative limitations not governing as to the other.

It follows from what we have said, and from the principles sustained by the ruling in the case just stated, that we are without jurisdiction to entertain the appeal which is before us, and it must be and is, therefore,

Dismissed for want of jurisdiction.

(255 U. S. 228)

PAYNE, Secretary of Interior, et al. v. CENTRAL PAC. RY. CO.

(Argued Oct. 6, 1920. Decided Feb. 28, 1921.)

No. 17.

1. Public lands 🔑81(1) — Under railroad grant, government's obligation respecting indemnity lands is same as respecting place lands.

Under Act July 25, 1866, granting public lands in aid of the construction of a railway with a provision for the selection of indemnity lands in lieu of those previously disposed of, the ultimate obligation of the government in respect to indemnity lands is on the same plane as that respecting lands in place.

2. Public lands 🔑81(1)—Secretary of Interior cannot enlarge or curtail rights of railroad under land grant.

Under Act July 25, 1866, granting lands to a railroad with a provision for the selection of indemnity lands under the direction of the Secretary of the Interior, the Secretary is not clothed with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, but is to see that the right of selection is not abused, that prior claims are not disturbed, that indemnity is not given except for actual losses, and that the lands selected are subject to selection.

3. Public lands 🔑81(2, 3)—Railroad company on filing proper selection of indemnity lands became equitable owner, and they could not thereafter be withdrawn.

Under Act July 25, 1866, granting public lands to a railroad, a railroad company, which complied with the act in all respects and filed a selection of indemnity lands subject to selection in full compliance with directions promulgated by the Secretary of the Interior, and based on actual losses, was to be regarded as the equitable owner of the lands selected, and such lands could not thereafter be withdrawn by executive order for a water power site, especially where the act authorizing such withdrawal (Act June 25, 1910, c. 421 [Comp. St. §§ 4523–4525]) was confined to "public lands," a term uniformly regarded as not including lands to which rights have attached and become vested through full compliance with an applicable land law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Land.]

4. United States 🔑127—Suit to restrain cancellation of railroad's selection of indemnity lands not suit against United States.

A suit by a railroad company to restrain the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant because subsequent to the filing of the indemnity list the lands had been withdrawn by executive order was not a suit against the United States without its consent, but one to restrain defendants from canceling such selection through a mistaken conception of their authority, and thereby casting a cloud on plaintiff's title.

Appeal from the Court of Appeals of the District of Columbia.

Suit by the Central Pacific Railway Company against John Barton Payne, Secretary of the Interior, and others. A decree dismissing the bill was reversed by the Court of Appeals of the District of Columbia, and an injunction granted (Central Pac. Ry. Co. v. Lane, 46 App. D. C. 374, Ann. Cas. 1918C, 1002), and defendants appeal. Modified and affirmed.

See, also, 40 Sup. Ct. 483.

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*Mr. Assistant Attorney General Nebeker and Messrs. Charles D. Mahaffie and C. Edward Wright, both of Washington, D. C., for appellants.

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*Messrs. A. A. Hoehling, Jr., of Washington, D. C., Frank Thunen, of San Francisco, Cal., and C. F. R. Ogilby, of Washington, D. C., for appellee.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under a railroad land grant. The trial court dismissed the bill, and the Court of Appeals reversed that decree and directed that an injunction issue. Central Pac. Ry. Co. v. Lane, 46 App. D. C. 374, Ann. Cas. 1918C, 1002. An appeal under section 250, par. 6, of the Judicial Code (Comp. St. § 1227) brings the case here.

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*The allegations of the bill were admitted by a motion to dismiss, upon which the defendants announced their purpose to stand; and the case as thus made is as follows:

By the Act of July 25, 1866, c. 242, 14 Stat. 239, a grant of public lands in California and Oregon was made "for the purpose of aiding in the construction" of a line of railroad from a point in Sacramento Valley to Portland, "and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores" over such line. The part of the grant in California was made to the California and Oregon Railroad

Company, its successors and assigns, and the part in Oregon to another company. The grant was in present terms—"there be, and hereby is, granted"—and was of "every alternate section of public land, not mineral, designated by odd numbers," within designated limits on each side of the line. With this was coupled a provision that—

> "When any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections."

The line of the road was to be definitely located by filing a map with the Secretary of the Interior; and the work of construction was to be completed in sections of twenty miles within a time named, which was extended to July 1, 1880, by an amendment of June 25, 1868. 15 Stat. 80, c. 80. The completion of each section was to be ascertained and reported by commissioners appointed by the President, whereupon patents for the lands coterminous therewith were to be issued. The railroad was to be and remain "a public highway for the use of the government of the United States, free of all toll or *233 other charges" for the transportation of *its property or troops. An assent to the act on the part of each grantee was to be filed within one year after its passage.

The California and Oregon Railroad Company duly assented to the act, definitely located its part of the line by filing the required map, and constructed, completed and equipped that part of the railroad within the extended time. The completion was duly reported by the commissioners and was recognized by the President. In addition, that company and its successors have complied with the act in all other respects. The Central Pacific Railway Company, the plaintiff, became the legal successor of that company in 1899, and holds its rights, title and interest under the grant. The part of the road in Oregon also was completed, but that is not of present concern.

In the process of adjusting the grant it has developed that many of the designated sections in the place limits were lost to the grant by reason of other disposals, homestead settlements and pre-emption claims antedating the definite location of the line of the road, thereby making it necessary to resort to the indemnity limits to satisfy the grant. The present ascertained losses amount to thousands of acres, and it is certain that further substantial losses will develop as the adjustment proceeds. As yet it is impossible to determine even approximately the total losses, because a material part of the grant is still unsurveyed; and this makes it uncertain whether all can be made good from the lands available for indemnity.

The lands in question were selected by means of an indemnity list filed in the local land office February 24, 1910, and the selection was in lieu of losses specified in the list which were actual and entitled the plaintiff to indemnity. The lands selected are in the indemnity limits and admittedly nonmineral, and at the time of selection were such as could be selected to supply the losses specified. The list was accompanied by the *234 requisite sustaining proofs *and conformed in all respects to the regulations embodying the directions of the Secretary of the Interior upon the subject. The plaintiff paid the fees collectible thereon, and the local land officers approved the list and promptly forwarded it and the accompanying proofs to the General Land Office with the usual certificates and indorsements. It remained pending in that office until January 16, 1915, when the Commissioner ordered its cancellation solely on the ground that in the meantime the selected lands had been included in a temporary executive withdrawal for a water power site under the Act of June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. §§ 4523–4525). The plaintiff appealed to the Secretary of the Interior, and he affirmed the Commissioner's action. A reconsideration was sought and denied, and the plaintiff then brought this suit.

It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the Commissioner and the Secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that so long as the selection was without the Secretary's actual approval it gave no right as against the government, and that the withdrawal made while it was as yet unapproved became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say:

> "What is the effect then of the mere filing of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter."

Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future *235 compliance with the law, but rather *to the concluding step of one who by full compliance has earned the right to receive the title. Referring to a similar grant and the relative obligations of the government and the grantee, it was said in Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 679, 680, 34 Sup. Ct. 907, 911 (58 L. Ed. 1527):

> "The act did not follow the building of the road, but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. Menotti v. Dillon, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government. In other words, it earned the right to the lands described."

And, speaking specially of the right to indemnity lands under such a grant, it was said in United States v. Southern Pacific R. R. Co., 223 U. S. 565, 570, 32 Sup. Ct. 326, 327 (56 L. Ed. 553):

> "What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction *236 of *a meritorious claim which the government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

[1, 2] The ultimate obligation of the government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits. St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co., 112 U. S. 720, 731-733, 5 Sup. Ct. 334, 28 L. Ed. 872; Southern Pacific R. R. Co. v. Bell, 183 U. S. 675, 687, 22 Sup. Ct. 232, 46 L. Ed. 383. The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stat. §§ 441, 453, 2478 (Comp. St. §§ 681, 699, 5120), that the administrative execution of all public land laws is to be under his "supervision" and "direction." Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166, 15 Sup. Ct. 779, 39 L. Ed. 931. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act. Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Orchard v. Alexander, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; Williams v. United States, 138 U. S. 514, 524, 11 Sup. Ct. 457, 34 L. Ed. 1026; Daniels v. Wagner, 237 U. S. 547, 557-561, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40; Northern Pacific Ry. Co. v. McComas, *237 *250 U. S. 387, 392-393, 39 Sup. Ct. 546, 63 L. Ed. 1049. The cases cited as making for a different conclusion respecting the Secretary's discretion were examined, and that view of them rejected in Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 31 Sup. Ct. 300, 55 L. Ed. 258, and Daniels v. Wagner, 237 U. S. 547, 557-561, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40. In the Weyerhaeuser Case it was held that the authority conferred on the Secretary respecting the selection of indemnity lands "involved not only the power but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

[3] As before shown, this indemnity selection was made in full compliance with the directions promulgated by the Secretary, was of lands subject to selection, and was based on actual losses in the place limits adequate to sustain it. The railroad then had been constructed and equipped as required by the granting act, and nothing remained to be done by the grantee or its successor to fulfill the conditions of the grant and perfect the right to a patent. The rule applicable in such a situation is that—

> "A person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof." Wirth v. Branson, 98 U. S. 118, 121 (25 L. Ed. 86); Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 432, 12 Sup. Ct. 877, 36 L. Ed. 762.

This rule has been applied and enforced where the Secretary through an error of law declined to approve and give effect to lawful selections and certified the lands for the use of another claimant, the court saying that the Secretary could not thus deprive the selecting company of "rights which became vested by its selection of those lands." St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co., 112 U. S. 720, 5 Sup. Ct. 334, 28 L. Ed. 872.

The act under which the subsequent power site withdrawal was made is confined to "public lands," a term uniformly regarded as not including lands to which rights have attached and become vested through full com-

pliance *with an applicable land law. Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; Minnesota v. Hitchcock, 185 U. S. 373, 391, 22 Sup. Ct. 650, 46 L. Ed. 954; United States v. Hemmer, 241 U. S. 379, 385, 386, 36 Sup. Ct. 659, 60 L. Ed. 1055. Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them. Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Lytle v. Arkansas, 9 How. 314, 333, 335, 13 L. Ed. 153; Sinking Fund Cases, 99 U. S. 700, 718, 719, 25 L. Ed. 496; United States v. Jin Fuey Moy, 241 U. S. 394, 400, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

[4] We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority, and thereby casting a cloud on the plaintiff's title. Ballinger v. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 32 Sup. Ct. 340, 56 L. Ed. 570; Lane v. Watts, 234 U. S. 525, 540, 34 Sup. Ct. 965, 58 L. Ed. 1440.

Our conclusion is that in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellants departed from a plain official duty, and that to avoid the resulting injury to the plaintiff, for which no other remedy is available, an injunction should issue, directing a disposal of the selection on its merits unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals. In other respects the decree of that court is

Affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1920

No. —, original. Ex parte In the matter of LINCOLN GAS & ELECTRIC LIGHT COMPANY, petitioner. Jan. 24, 1921. See, also, 41 Sup. Ct. 321. Messrs. Robert A. Brown, of St. Joseph, Mo., and Maxwell V. Beghtol, of Lincoln, Neb., for petitioner. Motion for leave to file petition for a writ of mandamus herein submitted by Mr. Robert A. Brown and Mr. Maxwell V. Beghtol for the petitioner.

No. —, original. Ex parte in the matter of MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, petitioner. Jan. 24, 1921. See, also, 41 Sup. Ct. 321. Mr. Ashby Williams, of Washington, D. C., for petitioner. Motion for leave to file a petition for writ of mandamus herein submitted by Mr. Ashby Williams in behalf of counsel for the petitioner.

No. —, original. Ex parte in the matter of the NATIONAL PARK BANK OF NEW YORK, petitioner. Jan. 24, 1921. For opinion below, see 261 Fed. 817. Motion for leave to file petition for a writ of mandamus herein granted, and a rule to show cause awarded returnable Monday, February 28, next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 218. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Order. The motion of the Sinclair Oil and Gas Company, filed herein on December 20, 1920, for an order to require Frederic A. Delano, Esq., receiver, to refund to it one-sixteenth ($^1/_{16}$) of the proceeds of the oil produced from certain premises in said motion described and heretofore deposited with said receiver pursuant to the order of this court, together with the interest collected thereon by said receiver, and to require said receiver to surrender and pay to said Sinclair Oil and Gas Company one-sixteenth ($^1/_{16}$) of the oil or the proceeds thereof delivered to said receiver since the 15th day of October, 1920, is hereby denied, without prejudice.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America,

intervenor. Jan. 24, 1921. See, also, 254 U. S. 603, 41 Sup. Ct. 317, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Order. The petition of the Oklahoma Petroleum and Gasoline Company, filed herein on December 20, 1920, for an order requiring Frederic A. Delano, Esq., receiver, to file a statement of expenses incurred by him from May 16, 1920, to July 1, 1920, in operating certain wells designated in said petition, and requiring said receiver to pay to said company the proceeds of one-sixteenth ($^{1}/_{16}$) of the oil produced from said wells from April 1, 1920, to November 15, 1920, and the interest collected by said receiver upon said proceeds, and requiring said receiver to refund to said company one-third (⅓) of the three-sixteenths ($^{3}/_{16}$) of the proceeds of the oil from said wells paid to said receiver since November 15, 1920, and that said company be not required hereafter to pay to said receiver more than two-sixteenths ($^{2}/_{16}$) of the oil and gas produced from said wells, and for other relief, is hereby denied, without prejudice.

(254 U. S. 604)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervener. Jan. 24, 1921. See, also, 254 U. S. 603, 41 Sup. Ct. 317, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington, and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Order. The motion of C. J. Benson, William Murdock, and James R. Armstrong, filed herein December 20, 1920, for an order requiring Frederic A. Delano, Esq., receiver, to file an inventory of certain material and equipment purchased by him and paid for out of the proceeds of the oil produced by him from certain premises in said motion described, and to account for the value thereof; and requiring said receiver to file forthwith an itemized statement of moneys charged by him against certain wells and a statement of all sums of money realized by him from certain wells, and for other relief, as in said motion specified, is hereby denied without prejudice.

(254 U. S. 604)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervener. Jan. 24, 1921. See, also, 254 U. S. 604, 41 Sup. Ct. 318, 65 L. Ed. — Mr S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Order. Upon consideration of the motion of Southwest Petroleum Company, filed herein January 3, 1921, for an order directing Frederic A. Delano, Esq., receiver herein, to return to said company pursuant to the order of June 7, 1920, a certain well known as receiver's well No. one hundred and eighty (180), together with the land appurtenant thereto and the structures, equipment, and material pertaining to said well, and the response of the receiver to said motion filed January 5, 1921, and the response of the United States filed January 22, 1921. It is ordered that said receiver do return to said Southwest Petroleum Company said well No. one hundred and eighty (180), which lies south of the south edge of the sand bed of the Red River as it was on the 1st day of April, 1920 (marked generally by the border line of vegetation along the edge of the flood plain), together with the land appurtenant thereto lying to the south of the south edge of the sand bed of said river, and the structures, equipment, and material pertaining to said well, and the net proceeds of the production thereof that have come to the hands of said receiver, less operating expenses and reservations, upon terms that said Southwest Petroleum Company comply with the provisions contained in the order of this court made June 7, 1920, respecting the return of certain lands lying south of the south edge of the sand bed of said river which were on the 1st day of April, 1920, in the possession of persons claiming under patents from the State of Texas, and not included in the river bed lands as in said order defined.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 254 U. S. 604, 41 Sup. Ct. 318, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Leave granted to submit response of the United States to the motion of the Southwest Petroleum Company for the return of receiver's well No. 180, and the appurtenants, and response of the United States to the motion of the Sinclair Oil & Gas Company to be relieved of the payment of any of the general expenses and costs of the receivership, etc., on motion of Mr. Solicitor General Frierson for the United States.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 318. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of General Oil Company to set aside, amend, and change decree dated December 6, 1920, submitted by Mr. K. C. Barkley in that behalf, with leave to Mr. John S. Flannery, of counsel for the receiver, to file brief in opposition on or before Friday next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 318. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of National Petroleum & Refining Company for the return of patented lands submitted by Mr. K. C. Barkley in that behalf, with leave to Mr. John S. Flannery, of counsel for receiver, to file brief in opposition on or before Friday next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 318. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington, and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of T. P. Roberts and A. H. Britain to require the receiver to return certain patented lands submitted by Mr. A. H. Carrigan in that behalf, with leave to Mr. John S. Flannery, of counsel for receiver, to file brief in opposition on or before Friday next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 319. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the state of Texas. Motion of T. P. Roberts and A. H. Britain to require the receiver to account and pay to them twenty thousand dollars and interest, submitted by Mr. A. H. Carrigan in that behalf, with leave to Mr. John S. Flannery, of counsel for receiver, to file brief in opposition on or before Friday next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 319. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of Continental Oil Company for leave to intervene submitted by Mr. Seth Shepard in that behalf, with leave to Mr. John S. Flannery, of counsel for receiver, to file brief in opposition on or before Friday next.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; the United States of America, intervenor. Jan. 24, 1921. See, also, 41 Sup. Ct. 319. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of Continental Oil Company for direction to the receiver with reference to the protection of land claimed by said company against drainage through wells on adjacent land, submitted by Mr. Seth Shepard in behalf of counsel, with leave to Mr. John S. Flannery, of counsel for receiver, to file brief in opposition on or before Friday next.

(254 U. S. 619)

No. 145. Charles S. SICKEL, plaintiff in error, v. The COMMONWEALTH OF VIRGINIA. Jan. 24, 1921. In error to the Supreme Court of Appeals of the State of Virginia. For opinions below, see 124 Va. 821, 97 S. E. 783, 99 S. E. 678. Mr. David H. Leake, of Richmond, Va., for plaintiff in error. Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia.

PER CURIAM. Dismissed for want of jurisdiction upon authority of Murdock v. City of Memphis, 20 Wall. 590, 22 L. Ed. 429; Ross v. Oregon, 227 U. S. 150, 164, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 610, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901; Enterprise Irrigation District v. Canal Co., 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644.

(254 U. S. 620)

No. 150. Louis F. NAGEL, plaintiff in error, v. The STATE OF IOWA. Jan. 24, 1921. In error to the Supreme Court of the State of Iowa. For opinion below, see State v. Nagel, 185 Iowa, 1038, 170 N. W. 289. Mr. W. D. Milligan, of Guthrie Center, Iowa, for plaintiff in error. Messrs. Charles W. Lyon, Horace M. Havner and Freeman C. Davidson, all of Des Moines, Iowa, for the State of Iowa.

PER CURIAM. Dismissed for want of jurisdiction upon authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); Jett Brothers Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

(254 U. S. 620)

No. 160. Maggie HARJO, appellant, v. W. A. KUNKLE, Prairie Oil & Gas Company et al. Jan. 24, 1921. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see Barnett v. Kunkle, 256 Fed. 644, 168 C. C. A. 38. Mr. Lewis C. Lawson, of Holdenville, Okl., for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Toop v. Ulysses Land Co., 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; United Surety Co. v. American Fruit Product Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; Berkman v. United States, 250 U.

S. 114, 118, 39 Sup. Ct. 411, 63 L. Ed. 877; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193, 40 Sup. Ct. 453, 64 L. Ed. 855.

(254 U. S. 620)

No. 163. The GREAT NORTHERN RAILWAY COMPANY, plaintiff in error, v. The CITY OF MINNEAPOLIS. Jan. 24, 1921. In error to the Supreme Court of the State of Minnesota. For opinion below, see 142 Minn. 308, 172 N. W. 135. Messrs. E. C. Lindley and M. L. Countryman, both of St. Paul, Minn., and J. O. P. Wheelwright, of Minneapolis, Minn., for plaintiff in error. Mr. Charles D. Gould, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon authority of section 237 of the Judicial Code as amended by the act of September 6, 1916, c. 448, section 2, 39 Stat. 726; Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

(254 U. S. 621)

No. 170. SANGER BROS., a copartnership, etc., plaintiffs in error, v. Emily Hunsucker et al. Jan. 24, 1921. In error to the Court of Civil Appeals, Second Supreme Judicial District of the State of Texas. For opinion below, see 212 S. W. 514. Mr. Henry C. Coke, of Dallas, Tex., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); Jett Brothers Distilling Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255, 64 L. Ed. 421.

No. 259. VIRGINIA TRUST COMPANY et al., executors, etc., plaintiffs in error, v. The COMMONWEALTH OF VIRGINIA et al. Jan. 24, 1921. For opinion below, see Rixey's Ex'rs v. Commonwealth, 125 Va. 337, 99 S. E. 573, 101 S. E. 404. Mr. John S. Barbour, of Fairfax, Va., for plaintiffs in error. Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia. Motion for a writ of certiorari on suggestion of diminution of the record granted. See, also, 255 U. S. 561, 41 Sup. Ct. 322, 65 L. Ed. —.

(254 U. S. 657)

No. 586. Alexander NEW and Henry C. Ferris, receivers, etc., petitioners, v. Effie McMILLAN, administratrix, etc. Jan. 24, 1921. For opinion below, see 191 Pac. 160. Messrs. Arthur Miller, of Kansas City, Mo., Edward R. Jones and Ephraim H. Foster, both of Muskokee, Okl., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

No. 605. Arthur J. DAHN, petitioner, v. Walker D. HINES, Director General of Railroads of the United States. Jan. 24, 1921. See, also, 254 U. S. 627, 41 Sup. Ct. 147, 65 L. Ed. —. Mr. Walter C. Clephane, of Washington, D. C., for the motion. Substitution of John Barton Payne, as Director General of Railroads, in place of Walker D. Hines, resigned, as the party respondent herein, ordered, on motion of Mr. Walter C. Clephane in that behalf.

(254 U. S. 667)

No. 629. William R. CASTLE et al., trustees, etc., petitioners, v. Julia White CASTLE. Jan. 24, 1921. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 267 Fed. 521. See, also, 254 U. S. 628, 41 Sup. Ct. 148, 65 L. Ed. —. Mr. A. G. M. Robertson, of Honolulu, Hawaii (Robertson, Castle & Olson, of Honolulu, Hawaii, of counsel), for petitioners. Dismissed, with costs, on motion of counsel for petitioners.

(254 U. S. 621)

No. 647. John W. SEAMAN et al., appellants, v. Samuel W. ADLER. Jan. 24, 1921. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see Adler v. Seaman, 266 Fed. 828. See, also, 254 U. S. 655, 41 Sup. Ct. 218, 65 L. Ed. —. Messrs. Ephrim Caplan, of St. Louis, Mo., and Wm. J. Hughes, of Washington, D. C., for petitioners. Mr. Edw. W. Foristel, of St. Louis, Mo., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; St. Anthony's Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 302, 35 Sup. Ct. 598, 59 L. Ed. 965; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(254 U. S. 657)

No. 666. KOKOMO STEEL & WIRE COMPANY, petitioner, v. The REPUBLIC OF FRANCE. Jan. 24, 1921. For opinion below, see 268 Fed. 917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(254 U. S. 628)

No. 672. CARLISLE PACKING COMPANY, petitioner, v. Ole SANDANGER. Jan. 24, 1921. For opinion below, see Sandanger v. Carlisle Packing Co., 192 Pac. 1005. Petition for a writ of certiorari to the Supreme Court of the State of Washington granted.

(255 U. S. 577)

No. 181. The STATE OF KANSAS on the relation of Richard J. HOPKINS, Attorney General, et al., appellants, v. WICHITA NATURAL GAS COMPANY et al. Jan. 26, 1921. Appeal from the District Court of the United States for the District of Kansas. Messrs. F. S. Jackson and Richard J. Hopkins, both of Topeka, Kan., for appellants. Dismissed with costs, on motion of counsel for the appellants.

(255 U. S. 578)

No. 110. YEE BOW, plaintiff in error, v. The CITY OF CLEVELAND et al. Jan. 27, 1921. For opinion below, see 99 Ohio St. 269, 124 N. E. 132. Messrs. John J. Sullivan and

John A. Cline, both of Cleveland, Ohio, for plaintiff in error. Mr. Alfred Clum, of Cleveland, Ohio, for defendant in error. In error to the Supreme Court of the State of Ohio. Dismissed, per stipulation.

(255 U. S. 578)

No. 193. Rose HANSEN, administratrix, etc., petitioner, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. Jan. 27, 1921. On petition for writ of certiorari to the Circuit Court of Hudson County, State of New Jersey. For opinion below, see 93 N. J. Law, 464, 107 Atl. 591. Mr. Alexander Simpson, of Jersey City, N. J., for petitioner. Dismissed for want of prosecution.

No. 636. ST. LOUIS–SAN FRANCISCO RAILWAY COMPANY, appellant, v. George H. MIDDELKAMP, State Treasurer, etc. Jan. 28, 1921. Mr. S. F. Taliaferro, of Washington, D. C., for the motion. Substitution of Larenzo D. Thompson, as State treasurer, and Jesse W. Barrett, as attorney general, as parties appellees herein, ordered, on motion of Mr. S. F. Taliaferro in that behalf.

No. —, Original. Ex parte in the matter of MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, petitioner. Jan. 31, 1921. See, also, 41 Sup. Ct. 317. Motion for leave to file petition for writ of mandamus herein granted, and rule to show cause awarded returnable on Monday, March 14, next.

No. —, Original. Ex parte in the matter of LINCOLN GAS & ELECTRIC COMPANY, petitioner. Jan. 31, 1921. See, also, 41 Sup. Ct. 317. Motion for leave to file petition for writ of mandamus herein granted, and rule to show cause awarded returnable on Monday, March 14, next.

(255 U. S. 578)

No. 2. EASTMAN KODAK COMPANY et al., appellants, v. The UNITED STATES of America. Jan. 31, 1921. Appeal from the District Court of the United States for the Western District of New York. For opinions below, see United States v. Eastman Kodak Co., 226 Fed. 62; Id., 230 Fed. 522. Messrs. John G. Milburn, William S. Gregg, and James J. Kennedy, all of New York City, for appellants. The Attorney General, for the United States. Dismissed, on motion of counsel for the appellants, and mandate granted.

(255 U. S. 560)

No. 154. Ben B. LINDSEY, plaintiff in error, v. The PEOPLE OF STATE OF COLORADO at the relation of John A. RUSH, district attorney, etc. Jan. 31, 1921. In error to the Supreme Court of the State of Colorado. For opinion below, see 66 Colo. 343, 181 Pac. 531. Mr. Horace N. Hawkins, of Denver, Colo., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction under the act of September 6, 1916 (39 Stat. 726).

(255 U. S. 559)

No. 174. W. E. STEWART, plaintiff in error, v. E. G. McALLISTER et al. Jan. 31, 1921. In error to the Court of Civil Appeals, Fourth Supreme Judicial District of the State of Texas. For opinion below, see 209 S. W. 704. Messrs. T. T. Vander Hoeven, of San Antonio, Tex. Don A. Bliss and Benjamin A. Greathouse, both of San Antonio, Tex., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction: 1. Act of September 6, 1916 (39 Stat. 726). 2. Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Toop v. Ulysses Land Co., 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; United Surety Co. v. American Fruit Product Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; Berkman v. United States, 250 U. S. 114, 118, 39 Sup. Ct. 411, 63 L. Ed. 877; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193, 40 Sup. Ct. 453, 64 L. Ed. 855.

(255 U. S. 559)

No. 176. The SUPREME LODGE of the KNIGHTS OF PYTHIAS, plaintiff in error, v. Sallie N. OVERTON. Jan. 31, 1921. In error to the Supreme Court of the State of Alabama. For opinion below, see 203 Ala. 193, 82 South. 443. Mr. Lawrence Cooper, of Huntsville, Ala., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction: 1. Act of September 6, 1916 (39 Stat. 726). See Jett Bros. Co. v. City of Carrollton, 252 U. S. 1, 6, 40 Sup. Ct. 255, 64 L. Ed. 421.

(255 U. S. 559)

No. 191. S. A. McHENRY et al., plaintiffs in error, v. BANKERS' TRUST COMPANY et al. Jan. 31, 1921. In error to the Court of Civil Appeals, First Supreme Judicial District of the State of Texas. For opinion below, see 206 S. W. 560. Mr. Don A. Bliss, of San Antonio, Tex., for plaintiffs in error. Messrs. Sam Streetman and B. F. Louis, both of Houston, Tex., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction under the act of September 6, 1916 (39 Stat. 726).

(255 U. S. 578)

No. 362. The PETROLEUM COMPANY OF LOUISIANA, appellant, v. L. A. TUMLIN et al. Jan. 31, 1921. Appeal from the District Court of the United States for the Western District of Louisiana. Mr. D. H. Hardy, for appellant. Dismissed, with costs, on motion of counsel for the appellants.

No. 600. ANCHOR COMPANY, appellant, v. The P. & M. COMPANY. Jan. 31, 1921. Motion for a writ of certiorari on suggestion of diminution of the record herein granted, and the matter presented with the suggestion ordered filed as the return to the writ.

No. 648. **Carlos Carmelo GARCIA, appellant, v. James B. HOLOHAN, U. S. Marshal, etc. Jan. 31, 1921. Motion for leave to proceed in forma pauperis herein denied.**

(255 U. S. 566)

No. 664. BRITISH COLUMBIA MILLS TUG & BARGE COMPANY, petitioner, v. A. W. MILROIE. Jan. 31, 1921. For opinion below, see 268 Fed. 449. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(255 U. S. 568)

No. 671. COMMERCE TRUST COMPANY, petitioner, v. Samuel RUSNAK, trustee, etc. Jan. 31, 1921. For opinion below, see In re Garden City Parlor Furniture Co., 268 Fed. 318. Messrs. Lewis A. Stebbins, Eugene L. Garey, and Paul L'Amoreaux, all of Chicago, Ill., and W. H. Sears, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(255 U. S. 568)

No. 684. William M. DUNCAN, receiver, etc., petitioner, v. Horace F. BAKER, receiver, etc., et al. Jan. 31, 1921. For opinion below, see Bankers' Trust Co. v. Wabash-Pittsburgh Terminal Ry. Co., 268 Fed. 961. Messrs. Squire, Sanders & Dempsey, of Cleveland, O., and Arthur O. Fording, of Pittsburgh, Pa., for petitioner. Messrs. John Quinn, of New York City, and John Scott Wendt, of Pittsburgh, Pa., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(255 U. S. 567)

No. 686. GREAT NORTHERN RAILWAY COMPANY et al., petitioners, v. MERCHANTS' ELEVATOR COMPANY. Jan. 31, 1921. For opinion below, see Merchants' Elevator Co. v. Great Northern Ry. Co., 180 N. W. 105. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted.

(255 U. S. 560)

No. 144. Kenneth D. STEERE, appellant, v. W. W. BEATTY et al. Feb. 28, 1921. Appeal from the District Court of the United States for the Western District of North Carolina. Messrs. Frank H. Scott, John E. MacLeish, and George Warner Swain, all of Chicago, Ill., and Aubrey L. Brooks, of Greensboro, N. C., for appellant. Messrs. Hiram R. Wood, of Rochester, N. Y., William P. Bynum, of Greensboro, N. C., and W. B. Councill, of Hickory, N. C., for respondent.

PER CURIAM. Dismissed for the want of jurisdiction upon authority of: (1) Ex parte In the matter of Leaf Tobacco Board of Trade of the City of New York, 222 U. S. 578, 581, 32 Sup. Ct. 833, 56 L. Ed. 323. (2) Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(255 U. S. 561)

No. 179. **The DeLAMAR COMPANY, Limited, plaintiff in error, v. The UNITED STATES of America. Feb. 28, 1921.** In error to the District Court of the United States for the District of Idaho. Mr. Richard H. Johnson, of Boise City, Idaho, for plaintiff in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Toop v. Ulysses Land Co., 237 U. S. 580, 582, 35 Sup. Ct. 739, 59 L. Ed. 1127; United Surety Co. v. American Fruit Product Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550.

(255 U. S. 561)

No. 198. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al., plaintiffs in error, v. Hannah L. ZUBER. Feb. 28, 1921. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 184 Pac. 452. Messrs. Joseph M. Bryson, of St. Louis, Mo., J. R. Cottingham, of Oklahoma City, Okl., Clifford L. Jackson, of Muskogee, Okl., Samuel W. Hayes, of Oklahoma City, Okl., and Alex. Britton, of Washington, D. C., for plaintiffs in error. Mr. Charles W. Smith, of Topeka, Kan., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of California Powder Works v. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Farson, Son & Co. v. Bird, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233.

(255 U. S. 578)

No. 255. OREGON SHORT LINE RAILROAD COMPANY, plaintiff in error, v. BOISE COMMERCIAL CLUB. Feb. 28, 1921. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below see Boise Commercial Club v. Oregon Short Line R. Co., 260 Fed. 769. Mr. George H. Smith, of Salt Lake City, Utah, for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(255 U. S. 561)

No. 259. VIRGINIA TRUST COMPANY et al., executors, etc., plaintiffs in error, v. The COMMONWEALTH OF VIRGINIA et al. Feb. 28, 1921. In error to the Supreme Court of Appeals of the State of Virginia. For opinions below, see Rixey's Ex'rs v. Commonwealth, 125 Va. 337, 99 S. E. 573, 101 S. E. 404. See, also, 41 Sup. Ct. 320. Mr. John S. Barbour, of Fairfax, Va., for plaintiffs in error. Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(255 U. S. 562)

No. 305. Otto MUELLER et al., plaintiffs in error, v. NORTHERN PACIFIC RAILWAY COMPANY. Feb. 28, 1921. In error to the Supreme Court of the State of Washington. For opinion below, see Northern Pac. R. Co. v. Mueller, 108 Wash. 684, 185 Pac. 630. Mr. Dallas V. Halverstadt, of Seattle, Wash., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(255 U. S. 562)

No. 618. CITY OF HILLSBORO, OREGON, plaintiff in error, v. PUBLIC SERVICE COMMISSION OF OREGON, etc., et al. Feb. 28, 1921. In error to the Supreme Court of the State of Oregon. For opinions below, see 187 Pac. 617, 192 Pac. 390.

PER CURIAM. Dismissed for want of jurisdiction on authority of (1) section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214); (2) Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; (3) Hunter v. Pittsburgh, 207 U. S. 161, 178, 28 Sup. Ct. 40, 52 L. Ed. 151; Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394, 397, 39 Sup. Ct. 526, 63 L. Ed. 1054.

(255 U. S. 569)

No. 659. Charles WOOSTER et al., petitioners, v. UNION PACIFIC RAILROAD COMPANY. Feb. 28, 1921. For opinion below, see Union Pac. R. Co. v. Wooster, 177 N. W. 740. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied.

(255 U. S. 569)

No. 677. Ed. HAGEN et al., petitioners, v. The UNITED STATES OF AMERICA. Feb. 28, 1921. For opinion below, see 268 Fed. 344. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(255 U. S. 569)

No. 685. Jewel CARMEN, petitioner, v. FOX FILM CORPORATION et al. Feb. 28, 1921. For opinion below, see 269 Fed. 928. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(254 U. S. 665)

No. 267. Michael McCOLE v. The Lighter HOWELL, etc. Jan. 3, 1921. Leave granted to withdraw certificate sent up by the United States Circuit Court of Appeals for the Second Circuit. 262 Fed. 1018.

(255 U. S. 113)

VANDALIA R. CO. v. SCHNULL et al.

(Argued Dec. 16 and 17, 1920. Decided Feb. 28, 1921.)

No. 125.

1. Carriers 🔑1—Have right to revenue subject to state's power to regulate.

The carrier has a right to receive revenue on its property used in its business, subject to the power of the state to regulate the amount of such revenue, because the carrier's property is devoted to public use, and the right to revenue and the power to regulate must each be exercised with regard to the other.

2. Carriers 🔑12(6)—State cannot compel transportation of commodity at unremunerative rate, though entire business is remunerative.

Though the state Legislature in regulating the intrastate rates of a carrier has a wide range of power to prescribe reasonable charges, and is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on any business, it cannot compel a carrier to transport a commodity or a particular class of traffic at a loss or without substantial compensation, even though the entire volume of the carrier's intrastate business returns a remunerative revenue on its capital.

3. Carriers 🔑18(6)—Answer in connection with complaint held to relate to rates fixed by commission.

In a suit by shippers to restrain a carrier from charging more than specified rates fixed by a state commission, an answer alleging that the rates so fixed were not compensatory was not demurrable for failing to allege that the cost of service referred to therein was the cost of service between the particular stations to which the rates apply, since the answer manifestly related to the rates and service referred to in the complaint. and was so regarded by the state Supreme Court, whose judgment was under review.

4. Carriers 🔑18(6)—Appeal from commission held unnecessary to question sufficiency of rates in suit to restrain charges.

In a suit brought by shippers to restrain a carrier from charging more than the rates fixed by the state commission, the carrier can defend on the ground that the commission's rates were not compensatory for the service rendered, though the carrier had not appealed from the order of the commission as authorized by the state law, especially where the contention was first made in the United States Supreme Court on writ of error to the state court.

5. Judgment 🔑565—Dismissal without prejudice for lack of evidence held not a bar.

A former judgment dismissing a bill by a carrier to restrain the enforcement of rates fixed by a state commission because the allegations of the bill were not sustained by the evidence, which dismissal was without prejudice, does not preclude the right of the carrier to question those rates in a suit by shippers to restrain it from charging more than the commission's rates.

Mr. Justice Day, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Indiana.

Suit by Gustav A. Schnull and others, composing the firm of Schnull & Co., and others, against the Vandalia Railroad Company. A judgment for plaintiffs, after demurrer to the answer was sustained, was affirmed by the Supreme Court of Indiana (188 Ind. 87, 122 N. E. 225), and defendant brings error. Reversed and remanded.

*114

*Messrs. D. P. Williams, of Pittsburgh, Pa., Samuel O. Pickens, of Indianapolis, Ind., and F. D. McKenney, of Washington, D. C., for plaintiff in error.

Messrs. Karl K. Gartner, of Washington, D. C., and Charles W. Smith and Henry H. Hornbrook, both of Indianapolis, Ind., for defendants in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Defendants in error, alleging themselves to be engaged either as wholesale or retail grocers in Indianapolis, Indiana, brought this

*115

suit against plaintiff in error, herein *called the Railroad Company, to restrain it from charging or receiving any other compensation than that mentioned and described in an order entered by the Railroad Commission of the state on December 14, 1906, and which, it is alleged, became effective February 14, 1907, and to require the Railroad Company to receive and transport freight at the rates prescribed in the order of the commission.

The first pleading of the Railroad Company was a demurrer to the complaint. We omit it as it was overruled and as the case depends upon the answer of the Railroad Company and a demurrer to it. It was in three paragraphs. In the first it denied "each and every material allegation" of the complaint. In the second it alleged that the order of the Commission would not yield "revenue sufficient to reimburse the Railroad Company for handling and carrying the classes of property specified in the order, and provide a fair return on the property used in the service." And that, therefore, if the order of the Commission should be enforced, the Railroad Company would be deprived of its property without due process of law in violation of the Fourteenth Amendment. In the third paragraph it alleged that within 60 days after the act of the state took effect it filed with the Commission a schedule of its rates and charges between all of the points in the state, that it had kept on file a like schedule in every station and depot and in its offices, that its charges had been in accordance with such schedules and were legal rates for the service, and that complainants (defendants in error) had not been and were not damaged thereby. Dismissal of the suit was prayed.

There was a demurrer to the second paragraph for insufficiency to constitute a defense, and, following the local practice, there was a memorandum specifying the grounds, as follows: (1) There was no statement that *116 the *order of the Commission was unremunerative or confiscatory at the time it was made, or at the time suit was brought, but only at the time the answer was filed. Nor did it aver that at either of those times the rates would not pay the cost of the service to which they were applicable and leave the company a fair return upon the property used in the service. (2) Nor aver that when taken in connection with the other rates lawfully prescribed by the Commission and its successor, the Public Service Commission, the rates did not afford an adequate and remunerative compensation for the handling and transportation of all classes of freight or passengers covered by such orders. (3) The averment that the rates were not compensatory "states no issue of fact, but the mere conclusion of the pleader as to a material fact." (4) The answer did not profess to set out the schedules of rates filed with the Commission or posted in the offices of the Railroad Company. And, further, that if the schedules of rates varied from those of the Commission, they were thus far unlawful and invalid under the laws of the state and constituted no defense to the action; "the mere continuance in such wrongful conduct" did "not constitute a defense." And, further, if the rates charged were the same as those prescribed by the Commission, the fact could be proved under the general denial.

The demurrer was sustained by the court and the Railroad Company ruled to answer by September 5, 1916. The company elected to stand by its answer and declined to plead further. The case, therefore, rested on the complaint and the denial of its allegations by the Railroad Company, and upon the issue thus made there was a trial upon which there were admitted in evidence over the objection of the Railroad Company, a transcript of the record of the suit brought by the Railroad Company against Union B. Hunt et al., constituting the Railroad Commission of the state, in the District Court of *117 the *United States for the District of Indiana, and a transcript of the record in the same case in this court, entitled Wood v. Vandalia Railroad Co., 231 U. S. 1, 34 Sup. Ct. 7, 58 L. Ed. 97, and, over objection, the proceedings before the Railroad Commission under which the order was made, establishing the rates that are the subject of controversy.

The court enjoined the Railroad Company from charging, collecting or receiving from plaintiffs and others in like situation other rates than those mentioned in the order of the Commission, and enjoined the rates in excess thereof. The decree specifically mentioned the rates to be charged. It was affirmed by the Supreme Court of the state.

It will be observed, therefore, that one of the grounds of the demurrer to the second paragraph of the answer of the Railroad Company was not that the rates were noncompensatory but that they were not alleged to be so at the time of the order of the commission or at the commencement of the suit, but were only alleged to be so at the time of filing the answer. The Supreme Court seems to intimate concurrence in this view of the answer, but said whether its ruling be based on that construction of the answer "or upon the evidence heard" it, the court, was satisfied that the railroad had "not tendered or made a defense, and that the decision" of the trial court was correct.

The court put in contrast the contentions of the parties as follows:

> "Appellees [plaintiffs] assert that, for all that thus appears, appellant may receive sufficient net income on all its other business on this division, and on all of its business, including the specified classes, on other divisions, to furnish it a fair return on all its investments and operations, including the transportation of these classes, and therefore appellant will receive all to which it is entitled, though this order be enforced." "Appellant [Railroad Company] asserts that the state has no *118 power *to thus segregate a certain class of traffic and require the railroad company to carry that traffic at unremunerative rates."

The cases that were adduced to sustain the respective contentions the court enumerated, but considered that there was "little or no conflict" in them and that any confusion in them "almost altogether disappears" when they "are read in view of the fundamental principles involved." The court's conclusion from the cases was, that—

> "A carrier is entitled to fair remuneration on all its investments and property. It is entitled to no more. For this it undertakes to reasonably serve in the capacity chosen by it. It undertakes to serve for no less. If the carrier receives, in the aggregate, such fair remuneration, notwithstanding the rates on a part of its business are not remunerative, the carrier has no basis for complaint."

And further—

> "When a rate on a part of the business is too low, some other part of the carrier's business may be paying too much, thus preventing a deficiency of income which would otherwise result from the nonremunerative rates. In such cases the shippers affected by the higher rates may have a basis for complaint. Smyth v. Ames, 169 U. S. 466, op. 540, et seq."

The court considered that the principle of the proposition announced was in its opinion "strongly upheld" in Wood v. Vandalia Railroad Co., which the court regarded "to say the least" as holding that the hearing upon the character of rates "is not properly confined to the particular rates and the 'actual cost and outlay' in carrying the classes specified on a * * * division in ascertaining whether a fair return is provided."

The court, therefore, makes clear the federal question, and its decision makes the question precise by a contrast of the contentions of the parties. Let us repeat them: That of the Railroad Company is that the revenue from traffic to which the rates apply *119 is the test of their legality *and any deficiency in them cannot be made up by rates on some other traffic; that of the defendants in error is that the revenue from all of the intrastate business of the Railroad Company is to be taken into account, and if it be sufficient to remunerate the Railroad Company, the particular rates though unremunerative, are nevertheless legal.

[1] The question presented by the contentions is not easy of offhand solution, though its elements are easy of declaration. A railroad is private property, and, as such, a rate may be fixed for its use; but it is private property devoted to the public service, and as such it is subject to the power of the state to see and require that the rate fixed be just and reasonable, one that, while it will yield a revenue to the railroad, will be proportioned to that which should be charged to the public. And this relation of right and power is illustrated in many cases. It is declared in Northern Pacific Railroad v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, and a test of it given, that is, when the right must yield to the power and when the power is limited by the right. And there was a consideration and review of all of the elements involved. It was declared that the Legislature "has a wide range of * * * power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, or to secure the same percentage of profit on every sort of business. * * * It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic." And this court will not sit in judgment upon such action and substitute its judgment for that of the Legislature when reviewing "a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved." "But," the court said, "a different question arises when *120 a state has segregated *a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted." And, further, "It has repeatedly been assumed in the decisions of this court that the state has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward." It was hence concluded that where there is such segregation and a rate imposed which would compel the carrier to transport a commodity "for less than the proper cost of transportation, or virtually at cost," the carrier would be "denied a reasonable reward for its service," and "the state has exceeded its authority."

The case and its principle were followed and illustrated in Norfolk & Western R. Co. v. Conley, Attorney General of the State of West Virginia, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745, and the principle applied to a passenger rate. It was there said, explaining the "range of permissible action" by a state that it, the state, "has no arbitrary power over rates; * * * and that the state may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal." See, also, Brooks-Scanlon Co. v. R. R. Comm., 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323.

[2] These cases leave nothing to be said, nor need we review prior cases from which they are deductions. The concession of counsel is:

> "That it may be admitted that the North Dakota and West Virginia cases have greatly discredited the previous theory and practice under which a rate which returned any revenue over and above 'out of pocket' costs was considered to be constitutionally remunerative. * * *"

*121 Counsel are mis*taken in their judgment of those cases. They did not discredit what had been announced of either theory or practice; they only removed them from misunderstanding and controversy and declared a principle that assigned to the state a useful power of regulation while it accorded to railroads a reasonable return upon the capital invested and a reward for its enterprise; a principle, therefore, which keeps power and right in proper relation, if we may repeat ourselves, power not exercised in excess, right not used in abuse.

[3] It is, however, contended by the defendants in error that the averments of the answer (second paragraph) are not sufficient to present the issue of law based upon it because it does not allege that the rates are not compensatory of the cost of the service "between the stations to which the rates apply," and that, therefore, it may well be that they are remunerative of that service, and "only be nonremunerative when applied to some other carriage." And it is further

urged that the answer fails to specify upon what part of the carrier's property the rates will not yield a fair return, and, it is consistent with the answer, that there may be a fair return on the value of the property "used in carriage between the stations named in the order, although not sufficient to 'provide a fair return in handling and carrying the classes of property in said order specified' over some other part of its line."

The distinctions are artificial and strained. They are an attempt to make the necessary implications of the answer no part of it. The averment of a pleading need not be so certain than an affirmative allegation of the existence of a fact or condition must be accompanied by the negation of that which is contradictory to it or inconsistent with it. The answer besides is addressed to the complaint and to the rates and order of the Commis*sion that constitute the bases of the complaint, and puts them and the effect of them in issue. In other words, the complaint deals with the rates and service between designated stations, and the answer deals with those rates and that service. And the Supreme Court so regarded it and explicitly said that the evidence made the issue. Counsel attack the conclusion as unsupported, but we must accept it as it is the judgment of the court we are reviewing and it is to be estimated by the reasons given for it.

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We therefore repeat, we regard the answer as a reply to the complaint and as alleging the invalidity of the order of the Commission because it required a service that the rates did not compensate, and necessarily this involves a consideration of all of the elements which are involved in that service, and determine its effect. It is to be remembered that we are dealing with a pleading. What the evidence may show we can neither know nor anticipate.

[4] Another contention of defendants in error is that the law of the state prescribes the remedy to be pursued against an order of the Commission to be to procure from the Secretary of the Commission a transcript of the proceedings before the Commission and file such transcript with a statement of the causes of complaint against the action of the Commission in the office of the clerk of the Appellate Court of the state within a designated time, and give notice to the Commission. And, it is said, the Appellate Court is given power to affirm the action of the Commission or to change, modify, or set it aside as justice may require, and that its judgment is made final. This procedure was not followed, it is said, and that hence the answer (paragraph 2) of the Railroad Company "was not a compliance with this requirement of the substantive law of Indiana, and for that reason failed to state a defense."

The contention is made for the first time in this court. *Its lateness may not militate against it, but that it did not occur sooner to counsel and not at all to the Supreme Court demonstrates its unsoundness. It is to be remembered that this is a suit, not by the Railroad Company, but against the Company, and its purpose is to enforce rates established by the Railroad Commission, which the Railroad Company is resisting. The decision of the Supreme Court upon the grounds of suit and resistance is here for review, and, we must assume, that all that was pertinent to either the court considered, and regarded all else untenable including the contention now urged by counsel. It must, therefore, be rejected.

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[5] The final contention of defendants in error is that Wood v. Vandalia Railroad Co., 231 U. S. 1, 34 Sup. Ct. 7, 58 L. Ed. 97, is res adjudicata of the issues in this case. The suit was by the Railroad Company to restrain the order of the Commission involved in the present litigation, and the ground of attack was, as it is here, that the rates ordered were not compensatory of the service to which they applied. The averments of the bill we held unsustained by the proofs and nothing more was decided. The judgment was not that the order of the Commission was valid but that it was not shown by the bill to be invalid, and the bill was dismissed without prejudice. That is, without preclusion of the right to show it invalid when attempted to be enforced at a subsequent period. Missouri v. Chi., Burl. & Quincy R. R., 241 U. S. 533, 539, 540, 36 Sup. Ct. 715, 60 L. Ed. 1148. We cannot therefore yield to the contention.

It follows that the decree must be reversed and it is

So ordered, and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice DAY, Mr. Justice PITNEY, Mr. Justice BRANDEIS, and Mr. Justice CLARKE, dissent.

(255 U. S. 268)

EDWARD RUTLEDGE TIMBER CO. et al. v. FARRELL.

(Argued Jan. 21, 1921. Decided Feb. 28, 1921.)

No. 172.

1. **Public lands ⚷106(1)—Conclusion of Land Department not disregarded without adequate ground.**

The conclusion of the Land Department that unsurveyed land, selected by a railroad company under Act March 2, 1899 (Comp. St. §§ 5223–5226), in lieu of land relinquished, was described with reasonable certainty, will not be disregarded without adequate ground.

2. **Public lands ⚷53—State's application for survey does not withdraw land from public domain.**

Under Act Aug. 18, 1894, c. 301, authorizing the state of Idaho to apply for the survey of unsurveyed townships, with a view to satisfying the land grant to that state, the application does not withdraw the land from the public domain so as to render wholly ineffective a railroad company's selection of such land in lieu of other land relinquished by it.

3. **Public lands ⚷53—State's application for survey merely gives it an option.**

An application by the state of Idaho under Act Aug. 18, 1894, c. 301, for the survey of unsurveyed townships, with a view to satisfying its land grant, if valid for any purpose, merely gave it an option to select the land, which, when not exercised, did not prevent a railroad company from selecting the land in lieu of land relinquished by it.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by Alra G. Farrell against the Edward Rutledge Timber Company and another. A decree dismissing the bill (271 Fed. 766) was reversed by the Circuit Court of Appeals for the Ninth Circuit (Farrell v. Edward Rutledge Timber Co., 258 Fed. 161, 169 C. C. A. 229), and defendants appeal. Reversed, and decree of District Court affirmed.

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*Messrs. Stiles W. Burr and C. W. Bunn, both of St. Paul, Minn., for appellants.

Mr. S. M. Stockslager, of Washington, D. C., for appellee.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Claiming equitable title thereto under the homestead laws, appellee's predecessor, Delany, instituted this proceeding in the United States District Court for Idaho to compel the appellants to hold certain lands, patented to the railway company, as trustee for him. The insistence is that patent should not have issued to the company, notwithstanding the attempt to make selection under the Act of March 2, 1899 (chapter 377, 30 Stat. 993 [Comp. St. §§ 5223–5226]), prior to initiation of any homestead right in the land, because (1) it was then unsurveyed and not designated with reasonable certainty, and (2) it was within a district survey of which had been applied for by the state of Idaho under Act of August 18, 1894 (chapter 301, 28 Stat. 372, 394).

The District Court decided both points in favor of appellants and dismissed the bill; the Circuit Court of Appeals held against them on the first but did not consider the second point. Farrell v. Edward Rutledge Timber Co., 258 Fed. 161, 169 C. C. A. 229.

[1] The facts pertinent to the first point are substantially the same as those presented by the record in West v. Rutledge Timber Co., 244 U. S. 90, 37 Sup. Ct. 587, 61 L. Ed. 1010, except that here the land *was 7½ miles from any known survey while there the distance was 3½ miles. The Land Department found the description sufficient for reasonable certainty and we see no adequate ground for disregarding that conclusion.

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[2, 3] As the district designated by Idaho for survey contained very much more land than the state was entitled to select, the Land Department refused to consider the application. No appeal was taken. Upon an analysis of pertinent statutes, opinions of the Land Department and of this court, the District Court held that the mere filing of application for survey did not so far withdraw the land from the public domain as to make the railway's selection wholly ineffective; and further, that if valid for any purpose, the application merely gave an option to select, never exercised in respect of the land now in dispute. We agree with the conclusion reached; and in view of the careful supporting opinion further discussion seems unnecessary.

The decree of the Circuit Court of Appeals must be reversed and the decree of the District Court affirmed.

(255 U. S. 339)

OREGON-WASHINGTON R. & NAV. CO. v. UNITED STATES.

(Argued Jan. 13, 1921. Decided March 7, 1921.)

No. 134.

1. Public lands 🔑85—Personal baggage of army officer not entitled to reduced rate from land-grant railway; "property of the United States."

The personal baggage of army officers is not "property of the United States," and, as such, entitled to transportation by land-grant railroads at the reduced rates applying to government property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property of the United States.]

2. Public lands 🔑85—Land-grant railroad held to have charged reduced rates without intention of ultimately asserting claim for higher rate.

The action of a land-grant railroad in charging the government for transportation of the baggage of army officers at land-grant rates, so rendering its bills to the government, and receiving payment without protest or assertion of a greater compensation, *held* deliberate, based upon a consideration of its advantages, and with no thought of ultimate assertion of a right to the regular tariff rate, notwithstanding its claim that such action was due to the fact that the shipments were for the Quartermaster's Department and upon government bills of lading in terms applicable only to government property, and that the Comptroller of the Treasury had held that such transportation was entitled to land-grant rates.

3. Public lands 🔑85—Land-grant railroad, charging government at reduced rate, held not entitled to recover balance of tariff rate.

Where the acts of a land-grant railroad in charging the government the land-grant rates for the transportation of army officers' baggage was deliberate, and based on a consideration of its advantages and without intention of ultimately asserting a claim for the regular tariff rate, it was not subsequently entitled to recover the balance of the tariff rate.

4. Courts 🔑468—Request for findings by Court of Claims held effort to change negative to positive findings.

Where the Court of Claims found implicitly, if not explicitly, that settlements between the government and a land-grant railroad for the transportation of army officers' baggage was final, and not tentative, a request for findings to the contrary was a mere effort to change negative to positive findings.

Appeal from Court of Claims.

Suit by the Oregon-Washington Railroad & Navigation Company against the United States. The petition was dismissed by the Court of Claims (54 Ct. Cl. 131), and claimant appeals. Affirmed.

Messrs. William R. Harr and Charles H. Bates, both of Washington, D. C., for appellant.

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*Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

This action brought by appellant is for the recovery of certain balances amounting to the sum of $4,288.01, being the difference between the amounts paid at certain rates for transportation of the effects of army officers changing stations and those which it is alleged were legally chargeable.

The Court of Claims adjudged that appellant *343 was not *entitled to recover and dismissed its petition. The cost of printing the record in the case was awarded to the United States.

There were findings of fact which show that the rates were presented for payment to the proper accounting officers of the government in the regular way and payments were made by the disbursing officers of the government on vouchers certified to be correct and presented by appellant. The charges so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "land-grant equalization agreements" by which, to quote from the findings:

> "The carriers agreed, subject to certain exceptions, not material to be noted, to accept for transportation all property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement."

That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance as provided in the Railroad Land-Grant Acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the government.

After stating the action to be "for the recovery of various amounts aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States," *344 the *court, by Mr. Justice Downey, said the action—

> "is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items."

And further:

> "The case therefore involves not only the question of the applicability of land-grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed."

The decision referred to is Chicago, Milwaukee & St. Paul Ry. Co. v. United States, 50 Ct. Cl. 412, and the ground of its ruling was that the freight transported was not the property of the United States, it being the effects of army officers, and therefore was not entitled to land-grant deductions, but was subject to the commercial tariff. Necessarily, therefore, the pending case must turn on other questions for the property transported was the property of army officers, and subject, therefore, independently of other considerations, to the commercial rates. Appellant in the present case was paid sums less than those rates, and there is left for consideration only its present right to recover the difference between them and the land-grant rates; the latter being those that were paid.

[1] The government, however, is not inclined to that limitation of the issue, and attacks the ruling of which it is the consequence, and repeats the contention decided against it in that case, and again insists that the property transported was government property and entitled to land-grant rates and all else is irrelevant. To this appellant replies that the government did not appeal from the decision and must be considered as having accepted it. The effect is rather large to attribute to mere nonaction, but we need not make further *345 comment upon it *because we think the decision of the Court of Claims was correct. The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates, and we are brought to the grounds of recovery urged by appellant.

[2, 3] There are reasons for and against them. The assertion is of a right of action and recovery against apparently a concession during a long course of years to an explicit and contrary assertion by the government. Appellant attempts to explain the concession or, let us say, its nonaction, as the compulsion of circumstances, and of a belief of the futility of action, and now urges that it never intended to relinquish but always intended to assert its right. The record, however, has much against this explanation, or that cannot be accommodated to it, if we may ascribe to appellant the usual impulses and interest that influence men.

It "and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books" the transportation charges at land-grant rates and not at regular commercial rates, so rendered its bills to the government, and received payment without protest or the assertion of a greater compensation. And there was prompting to protest and such assertion. In 1904, according to a finding, "the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the army over the railroad bridge at Quincy, Ill." The claim was disallowed, and thereafter the Union Pacific stated its accounts at land-grant rates. It also found that in 1891 and in 1904 there was conversation between the Comptroller of the Treasury and counsel in regard to the rulings of the Comptroller, though not, the Court of Claims says, to a claim then pending before the officer. Appellant, however, was not stirred to either opposition or protest by the incident *346 *with the Union Pacific or the conversation with the Comptroller, but continued to render its accounts at land-grant rates, and accepted payment without opposition or action until the decision of the Court of Claims in Chicago, Milwaukee & St. Paul Railway Co. v. United States, supra.

Counsel seem to make a merit of this uncomplaining and unresisting acquiescence and observe that the government by it obtained the advantage of the plea of the statute of limitations. The fact is significant. It is inconsistent with the reservation of a right and an intention to subsequently make a judicial assertion of it. Creditors are not usually so indulgent and the appellant had remedies at hand. The courts were open to it, certainly protest was open to it. Its explanation for this nonaction is not satisfactory. "It is advised and believes," is its allegation, and now its contention, that "its auditors and agents were led and constrained to render its bills and vouchers * * * at tariff rates with land-grant deductions because the shipments were for the Quartermaster's Department and upon *government* bills of lading which in terms are only applicable to 'government property' and 'public property,' *and also* [*because*] *the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the government) had held that such transportation, upon government bills of lading, when within the amount authorized to be transported by departmental regulations at the expense of the government, was quasi public property and entitled as such to land-grant rates,"* and that it did not intend to waive its right to payment in full or to sue, "if so advised" for the balances due "so far as the same were not barred by the statute of limitations."

The italics are counsel's and we repeat them as they give emphasis to counsel's conviction of the justification *347 *of the excuse. We do not share it. The mere mechanism of the bills of lading or their false designations of the property transported could not have imposed on anybody, certainly not on "the auditors and agents" of a railroad company, and the decisions of the Comptroller were as much open to dispute then as now and resort to suit an inevitable prompting, and yet, we have seen, the statute of limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its "auditors and agents" were not ignorant of affairs, nor unpracticed in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the rights of the companies they represent. We do not say this in criticism, for such is their duty, the necessary condition of their places.

We are forced, therefore, to conclude that appellant's nonaction was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the government until stirred to acquisitiveness by the decision in the Chicago, Milwaukee & St. Paul Case, a decision which we may say in passing, was declared by the Court of Claims to have been improvidently given. B. & O. R. R. Co. v. United States, 52 Ct. Cl. 468.

The case therefore falls within the rulings of United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65; Baird v. United States, 96 U. S. 430, 24 L. Ed. 703; Railroad Co. v. United States, 103 U. S. 703, 26 L. Ed. 454; Central Pacific Ry. v. United States, 164 U. S. 93, 17 Sup. Ct. 35, 41 L. Ed. 362. And they have supplemental force in United States v. Edmondston, 181 U. S. 500, 21 Sup. Ct. 718, 45 L. Ed. 971; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520.

These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the concessions of appellant to the action of the accounting officers, and the *348 *Court of Claims makes this a point in its decision. The court said that from the "long-continued uniform course of action by" appellant "for a long period of years," "it had no intention of claiming anything more in the certified vouchers and paid." And as to these transactions than that claimed added:

> "All the facts justify this conclusion, for a course of conduct is more potent than assertions of belief unacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that the plaintiff's [appellant] charge upon its books was only of the amount claimed in its vouchers, and that when that amount was paid 'the transaction was behind us.' The quoted language is the language of plaintiff's auditor."

In explanation of this, it may be said, and in contradiction of its implication, appellant requested findings by the court that the transaction of the appellant and its predecessor company "was regarded by the auditing department of the company as closed, so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect," and further that the government considered the accounts between "the carriers as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts." And it is contended that the evidence supports such conclusion. This is disputed by the government, and it is doubtful. The government concedes that a motion to remand the case for additional findings has foundation in the record, but contends "that the requests are without merit and that the case is fully covered by the facts found," and adds:

> "Of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive."

[4] The government further urges that the proposed amendment to finding VI is covered *349 by findings VI *and IX, and is only a request "to change a negative to a positive finding," that the amendment to finding X is "rather an argument that certain conclusions should follow from facts found," and that "its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative." The amendment to finding XI is, the government says, "a request to find evidence" which is contrary to the rules, and besides the evidence is immaterial.

We concur with the government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the government as final, and not as tentative.

Judgment affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in the result.

(255 U. S. 349)

WESTERN PAC. R. CO. v. UNITED STATES.

(Argued Jan. 13, 1921. Decided March 7, 1921.)

No. 136.

Public lands ⚷85—Duty of carrier to collect full rate held not to entitle land-grant railroad accepting reduced rates to collect balance of tariff rate.

As Interstate Commerce Act, § 22 (Comp. St. § 8595), permits reduced rates to the United States, and a ruling of the Interstate Commerce Commission has made this applicable to property transported for the United States, the duty of the final carrier to collect the full published tariff rate on the personal effects of army officers changing stations under orders, and its lack of power to release the shipper from any part of the rate *held* not to entitle a carrier accepting land-grant rates without protest to collect the balance of the tariff rate.

Appeal from Court of Claims.

Suit by the Western Pacific Railroad Company against the United States. From a judgment of the Court of Claims (54 Ct. Cl. 215) in its favor for an insufficient amount, the claimant appeals. Affirmed.

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*Mr. William C. Prentiss, of Washington, D. C., for appellant.

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*Mr. Assistant Attorney General Davis, for the United States.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The basic proposition in this case, and most of its subsidiary considerations, are the same as in Oregon-Washington Railroad & Navigation Co. v. United States (No. 134) 255 U. S. 339, 41 Sup. Ct. 329, 65 L. Ed. ——. It was argued at the same time as the latter case, and, as in that case, it is to recover amounts withheld by the accounting officers of the government as land-grant deductions in settlements for transportation of the personal effects of army officers.

It is asserted, however, that this action differs from No. 134 in that the Western Pacific Railroad was not completed and in operation until 1910, so that it is said "there is absent the element of previous course of dealings relied upon by the government, and in that there was introduced in evidence" testimony to the effect that the first voucher presented for transportation service was for full tariff rates.

It is stated in the findings that the real claimants in the case are the receivers of the railroad but that its name is used to designate claimants for convenience, and that between June 10, 1910, and March 18, 1915, the railroad at the request of the United States, as shipper or consignor, received from other railroad companies at connecting points, on government bills of lading, and transported over its lines, the effects and property of officers of the United States army, changing stations under orders.

It further appears that from June 10, 1910 to March 18, 1915, the presentation of claims, character of vouchers accompanying the same, action thereon by the accounting officers of the government, payment and receipt were the same as in No. 134, except it is found that—

"Settlements for charges on freight shipments on government bills of lading were in charge of one David A. McLean, head of the freight revising bureau in the office of the general auditor *354 *of the plaintiff [appellant] in San Francisco."

And it is found:

"It was the practice of said McLean to revise the bills of lading and apply the rates applicable on the traffic at commercial rates, make the land-grant deduction and compute the freight charges at the net rate. After a month's bill of lading had been revised it was his practice to check up with the quartermaster's office and adjust differences, where there were any differences, as to the correct charges. He then caused the claims to be stated on the prescribed voucher form and after being signed they, with the bills of lading attached, were forwarded to the quartermaster for payment. It appears that to the best recollection of said McLean he stated the first of these claims, during this period, at commercial rates, but being informed by the quartermaster's office of the applicability of land-grant rates under the holding of the Comptroller and the established practice, he restated the claim on a land-grant basis. It further appears that he had just come to the service of the plaintiff; that he had had no experience in the rendering of bills for government transportation; that as soon as he learned the custom with reference thereto he rendered bills for transportation of the character here involved at land-grant rates and continued to do so during all of said period. The rendering of the bill referred to at commercial rates, if in fact he so rendered it, was due to his ignorance of established practice and not because of any intention to question the propriety of the practice or to claim as a matter of right the application of commercial rates. It is not shown that at any time during this entire period he ever questioned the application of land-grant rates to such transportation or protested any settlements on that account, but all bills rendered by him, except as stated, were rendered at land-grant rates, and when so rendered he did not expect any further compensation and never expected compensation at other than land-grant rates *355 until after the decision *of the Chicago, Milwaukee and St. Paul Case by this court."[1]

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[1] 50 Ct. Cl. 412.

It is further found that—

> "The difference between the amounts claimed by the plaintiff and paid on account of said transportation during said period and the amount it would receive had it claimed and been paid full commercial rates without land-grant deduction is $5,760.89."

The rulings of the accounting officers are detailed in the findings.

From March 18, 1915, to August 1, 1916, it is found that appellant was entitled "to payment at the regular tariff rates applicable." The government accounting officers, notwithstanding, "issued warrants for net amounts after making land-grant deductions." Against this appellant protested. The amounts deducted amounted to $851.78.

The conclusion of the court was, and its decision was, that appellant was entitled to judgment for the sum of $851.78 and that as to the other amounts its petition should be dismissed. For this the court gave as authority its decision in the Denver & Rio Grande R. R. Co. v. United States, No. 33301, 54 Ct. Cl. 125, decided on the same day.

The opinion in the latter case is set out in the record at page 16.

The argument in this case is the same as in No. 134, and rests on the same considerations. This case, as we have seen, was decided on the authority of Denver & Rio Grande R. R. Co. v. United States and the latter on the B. & O. R. R. Co. v. United States, 52 Ct. Cl. 468, and No. 134.

A contention, however, is made that was not made in No. 134; that is, that—

> "Under the Interstate Commerce Law the final carrier (appellant was final carrier of the transportation with which this case is concerned)
> *356
> is not *only empowered to collect the through charge, but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same."

The further contention is that within this obligation is the property in the pending case. The immediate answer is that section 22 of the Interstate Commerce Act (Comp. St. § 8595) permits reduced rates to the United States and that by Conference Ruling of the Interstate Commerce Commission No. 33 of February 3, 1908, section 22, is made applicable to property transported for the United States. The transportation in the present case was for the government and in providing for it and paying for it the government performed a governmental service.

Judgment affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in the result.

(255 U. S. 367)

PAYNE, Secretary of the Interior, et al. v. STATE OF NEW MEXICO.

(Argued Oct. 6, 1920. Decided March 7, 1921.)

No. 128.

1. Public lands 🔑53—State lieu land selection unaffected by elimination of base tracts from reservation.

Under Act June 21, 1898, §§ 1, 8, Act March 16, 1908 (Comp. St. § 4868), Act June 20, 1910, §§ 6, 10–12, and Act Feb. 28, 1891, c. 384, amending Rev. St. §§ 2275, 2276 (Comp. St. §§ 4860, 4861), which authorizes a state, in case some of the lands granted to it for school purposes were thereafter included in a reservation, to select other lands in lieu thereof with the approval of the Secretary of the Interior, the selection of the lieu lands by the state dates from the time of the application, and if such selection was then regular and valid the right of the states to the land cannot be denied by the Secretary of the Interior because subsequent to such selection the base tract—that is, the one the right to which was waived—had been eliminated from the reservation by a change of boundaries.

2. Public lands 🔑132—Claimant complying with requirements acquires equitable interest.

A claimant to public land, who has done all that is required under the law to perfect his claim, acquires rights thereto against the government, based upon the theory that by virtue of his compliance he has an equitable title to the land, which the government thereafter holds in trust for him.

3. Public lands 🔑53—Necessity for approval by Secretary does not prevent interest vesting at time of selection.

The requirement that the selection by a state of lands in lieu of those included in a reservation be approved by the Secretary of the Interior does not prevent the vesting of the state's right to the land, so as to give it an equitable title at the time of the selection and before the approval, but merely casts upon the Secretary the duty of ascertaining whether the selection was made within the law.

Appeal from the Court of Appeals of the District of Columbia.

Suit by the State of New Mexico against Franklin K. Lane, Secretary of the Interior, and another, to enjoin the cancellation of lieu land selection by the State. A decree for the State was affirmed by the Court of Appeals of the District of Columbia (258 Fed. 980, 49 App. D. C. 80), and the defendants appeal; John Barton Payne, as Secretary of the Interior, being substituted for the original defendant Lane. Affirmed.

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*Mr. Assistant Attorney General Nebeker, for appellants.

Mr. Patrick H. Loughran, of Washington, D. C., for appellee.

Mr. Justice **VAN DEVANTER** delivered the opinion of the Court.

This is a suit by the State of New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling or annuling a lieu land selection of that state under a mistaken conception of their power and duty. A hearing on the bill and answer resulted in a decree for the state, which the Court of Appeals affirmed (Lane v. State of New Mexico, 258 Fed. 980, 49 App. D. C. 80), and the defendants appealed to this court.

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*There was no controversy or difference in the Land Department about any question of fact, but only in respect of the time as of which the officers were authorized and required to determine the validity of the selection.

Congress granted to New Mexico for the support of common schools designated sections of land in each township, subject to specified exceptions, with a provision enabling and entitling the state to select other lands in lieu of those excepted, and with a further provision whereby, in the event any of the designated sections after passing under the grant should be included within a public reservation, the state was to be entitled to waive its right to them and select instead other land of equal acreage. See California v. Deseret Water, etc., Co., 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821. All lieu lands were to be selected "under the direction and subject to the approval of the Secretary of the Interior." Act June 21, 1898, c. 489, §§ 1, 8, 30 Stat. 484; Act March 16, 1908, c. 88, 35 Stat. 44 (Comp. St. § 4868); Act June 20, 1910, c. 310, §§ 6, 10–12, 36 Stat. 557; Act Feb. 28, 1891, c. 384, 26 Stat. 796, amending sections 2275, 2276, Rev. Stat. (Comp. St. §§ 4860, 4861).

Some of the tracts in place after passing under the grant were included within a public reservation called the Alamo National Forest. Afterwards, on March 9, 1915, the state filed in the local land office a selection list waiving its rights to one of these tracts and selecting in its stead other land of like area lawfully subject to selection. The list conformed to the directions given by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was duly posted and published, proof of publication was submitted and the publisher's charge was paid. In other words, the waiver and selection were regularly presented and all was done by the state that needed to be done by it to perfect the selection. The notice did not bring forth any protest or objection, and in due course the local land officers forwarded the list and supporting proofs and papers to the General *Land Office, with a certificate stating that there was no adverse filing, entry or claim to the land selected and that the list had been accepted and approved by them. The list remained pending in that office until May 16, 1916, when the Commissioner directed that the selection be canceled solely on the ground that in the meantime, on April 3, 1916, the base tract—the one the right to which was waived—had been eliminated from the reservation by a change in its boundaries. The state appealed to the Secretary of the Interior and he affirmed the Commissioner's action. Both officers proceeded on the theory that the validity of the selection was to be tested by the conditions existing when they came to examine it and not by those existing when the state made it—in other words, they conceived that although the selection was lawful when made they could and should disapprove it and direct its cancellation by reason of the elimination of the base tract from the reservation a year later.

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[1] The courts below rejected that view and held that those officers were required to give effect to the conditions existing when the selection was made and that, if it was valid then, they were not at liberty to disapprove or cancel it by reason of the subsequent change in the status of the base tract. In our opinion the courts were right. The provision under which the selection was made was one inviting and proposing an exchange of lands. By it Congress said in substance to the state: If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated nonmineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

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[2, 3] *In the brief for the officers it is frankly and rightly conceded to be well settled that "a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government and that his right to a legal title is to be determined as of that time," and also that this rule "is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equity it is his and the government holds it in trust for him." See Lytle v. Arkansas, 9 How. 314, 333, 13 L. Ed. 153; Stark v. Starr, 6 Wall. 402, 417, 418, 18 L. Ed. 925; Ard v. Brandon, 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524; Payne v. Central Pacific Ry. Co., 255 U. S. 228, 41 Sup. Ct. 314, 65 L. Ed. ——. But it is said that, as the selection is "subject to the approval of the Secretary of the Interior," no right can become vested, nor equitable title be acquired, thereunder, unless and until his approval is

had, and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is "judicial in its nature" and not only involves the authority, but implies the duty, "to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections." Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 31 Sup. Ct. 300, 55 L. Ed. 258; Daniels v. Wagner, 237 U. S. 547, 557 et seq., 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40; Payne v. Central Pacific Ry. Co., supra. This view of it has been enforced where the Secretary, misconceiving his authority and the rights of the selector, erroneously declined to approve and canceled selections lawfully made. St. Paul & Sioux City R. R. Co. v. Winona & St. Peter R. R. Co., 112 U. S. 720, 5 Sup. Ct. 334, 28 L. Ed. 872; Daniels v. Wagner, supra. And it should be observed that this view has been recognized and applied by the Land Department, although not

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*with uniformity. In the Case of Gideon v. McDonald, 30 Land Dec. 124, which involved a lieu land selection and a state of facts much like those now before us, it was said by the Secretary of the Interior:

> "When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your [Commissioner's] office, of the character subject to such selection and free from other claim or appropriation. By this deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897 [30 Stat. 36], and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your [Commissioner's] office will therefore carefully examine the papers and records pertaining to this selection and, if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection."

In California v. Deseret Water, etc., Co., supra, which involved a like waiver and selection alleged to have been lawfully made and to be awaiting action by the Secretary, the United States, in a brief presented by leave of the court, took the position that by

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the waiver it acquired such an *equitable right in the base tract as prevented a condemnation of the tract as the property of the state. The state court held the waiver and selection of no effect and this court reversed that decision.

We conclude that an injunction was rightly awarded, but that it will be better suited to the occasion if it be confined to directing a disposal of the selection in regular course unaffected by the elimination of the base tract from the reservation. With this modification the decree is

Affirmed.

(255 U. S. 323)

UNITED STATES v. DIAMOND COAL & COKE CO.

(Argued Nov. 11, 1920. Decided, March 7, 1921.)

No. 87.

1. **Limitation of actions 🔑11(1)—Laches may be invoked against government, to prevent suspension of limitations until discovery of fraud.**

Where the bar of limitations under Act March 3, 1891 (Comp. St. § 4992), would be effective against a suit to cancel patents to coal lands, unless the equitable principle suspending the running of limitations in case of fraud until discovery of the fraud be applied, the doctrine of laches in discovering the fraud, which is an inherent ingredient of such equitable principle, may be invoked against the United States.

2. **Limitation of actions 🔑100(10)—Facts held not to charge government with knowledge of fraud or laches, so as to start limitations running, if concealed from the government.**

Conceding that conveyances by persons entering coal lands to a corporation immediately following the initiation of the right to purchase and preceding the issuance of patents, the uniformity of the method employed and the surrounding circumstances would, if known, have constituted badges of fraud such as would give the government knowledge of the fraud, or charge it with laches in failing to discover the fraud, so as to start the running of limitations against suits to cancel the patents, they would not have such result if, as alleged, they were concealed in such manner as to deceive the officers of the government and lead them to believe that the entries were what they purported to be.

3. Limitation of actions 🔑180(1)—Failure to allege that conveyances by entryman were not recorded held not to justify inference that they were.

In a suit to cancel patents to coal lands claimed to have been fraudulently entered by persons acting for a coal company to which they conveyed before the issuance of the patents, the failure of the bill to allege that the conveyances by the entrymen were not seasonably recorded did not justify the inference, on a motion to dismiss on the ground that the suits were barred by limitations, that they had been recorded and thereby gave notice of the fraud.

4. Limitation of actions 🔑180(2)—In suit to cancel patents, bill held susceptible of construction against government's knowledge of fraud.

In a suit to cancel patents to coal lands alleged to have been fraudulently entered by persons acting for a coal company, to which they conveyed, the bill, though showing possession of the land by the company at the time of the purchase by the entrymen and subsequent to their conveyances, the propinquity of the land to the corporation's field of operations, and its exploitation by the corporation for the purpose of taking coal therefrom, *held* susceptible of the construction that the possession by the corporation and its operations on the property were clandestine, and hence it was error to dismiss the bill on the ground that it showed on its face that the government had knowledge of the fraud, so as to start limitations running.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against the Diamond Coal & Coke Company. A decree dismissing the bill was affirmed by the Circuit Court of Appeals (254 Fed. 266, 166 C. C. A. 554), and the United States appeals. Reversed and remanded.

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*Mr. Assistant Attorney General Nebeker, for the United States.

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*Mr. W. B. Rodgers, of Anaconda, Mont., for appellee.

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*Mr. Chief Justice WHITE delivered the opinion of the Court.

This suit, begun by the United States against the Diamond Coal & Coke Company in October, 1917, had a threefold object: (1) To cancel 18 patents granted to that number of persons, at dates ranging from 14 to 21 years prior to the commencement of the suit, and covering 2,283 acres of coal land situated in the Evanston land district, state of Wyoming; (2) to cancel deeds of conveyance to the corporation made by the entry-

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men who *had purchased from the United States the land which the patents embraced; (3) to recover the value of coal which it was alleged had been taken by mining operations of the corporation from the land in question during the period stated.

It suffices from the view we take of the matters requiring consideration to briefly resume the averments of the bill. It was alleged that in the year 1894 the defendant corporation had formed a conspiracy to defraud the United States of the land covered by the patents by procuring the purchase of said land from the United States by persons acting ostensibly for themselves, but really as the representatives of the corporation and for its sole account and benefit. In furtherance of the conspiracy thus formed, it was alleged that 18 persons described as entrymen, at the suggestion and in the pay of the corporation, made application at the proper land office of the United States to purchase in their own names the land covered by the patents, the land so applied for having been designated by the corporation and the entries being exclusively intended for its benefit. It was charged that these entrymen falsely swore, for the purposes of their applications to purchase, that the applications were made for their own benefit, when in fact they were solely made for the benefit of the corporation; that the entrymen additionally falsely swore that they were in possession of the land, had developed coal mines on it, and were engaged in working the same, when in truth the lands had never been in the possession of the applicants, who had expended no money and had done no work thereon, since the lands were, prior to and at the time of the applications, in the possession of the corporation through its officers or some persons or agents acting for it and for its benefit.

It was further alleged that shortly after the entries were made, in furtherance of the

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fraudulent purpose, and *upon the false allegations and affidavits above stated and before patent issued, the entrymen conveyed the land applied for by warranty deed to the corporation, although there was no allegation concerning the registry or nonregistry of the deeds of conveyance thus made. The bill in addition charged that for the purpose of securing the right which was contemplated for the benefit of the corporation, further false affidavits as to the exclusive interest of the entrymen were made and that all the money paid by way of price for the land or for expenses or otherwise was furnished by the corporation for its own account. It was alleged that the corporation for many years before the transactions thus stated had engaged in the mining, production, and sale of coal in the state and district in which the land covered by the entries was situated; that its operations had been principally carried on in the vicinity of such lands, and that the lands involved in the suit had been mined for coal and large quantities of coal had been and were still being removed therefrom to the irreparable injury of the United States; the value of the coal thus removed being the subject-matter of the claim in that respect to which we have at the outset referred.

There were general averments that the previously alleged acts concerning the making of the entries, which were alike in all, were done not only for the purpose of defrauding the United States and enriching the corporation, but in order to conceal the wrong which was being accomplished, and that the acts of concealment were of such a character as to deceive the officers of the United States and to lead them to believe that the entries were what they purported to be, that is, purchases by the entrymen, and to exclude, therefore, not only the knowledge that they were for the account of the corporation, but also to exclude all basis for affording any reasonable ground to put the United States upon inquiry *332 as to the *real situation. Additionally, it was averred that, so completely did the fraud which was committed and its concealment accomplish the purposes thus intended, that the officers of the United States had no knowledge whatever of the fraudulent title acquired by the corporation and no reason to believe in its existence until a short time before the bringing of the suit when, by report of a special agent of the Land Office, knowledge of the true situation was in part conveyed, leading up to a further investigation by the Department of Justice, consequent upon which the suit was commenced.

It was moved to dismiss on four grounds: (1) That the bill stated no cause of action; (2) that it was barred by the limitation of the Act of March 3, 1891, c. 559, 26 Stat. 1093 (Comp. St. § 4992), as the six-year period fixed by that act had elapsed; (3) because the facts as to fraud and concealment alleged in the bill were not of such a character as to suspend the operation of the statute; and (4) because those facts were of such a nature as necessarily to impute the knowledge of the fraud complained of, or if not, to make it clear that the failure to seek relief within the statutory time was the result of inexcusable laches. The court, not questioning that in an adequate case the fraud and the concealment thereof would suspend the operation of the statute until the discovery of the fraud (Exploration Co. v. United States, 247 U. S. 435, 445, 38 Sup. Ct. 571, 62 L. Ed. 1200), based its conclusion upon the qualifications and limitations inhering in that rule, as stated in the Exploration Case and as previously expounded in Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636. Concluding that the averments of the bill were insufficient to establish that the failure to discover within the statutory time was not solely attributable to laches, and finding the bar of the statute under these circumstances absolute, the court applied the statute and dismissed the bill. The United States having elected not to avail of leave to amend within a period of 90 days *333 allowed by *the court of its own motion, but to stand on its bill, a final decree was entered dismissing the bill, and the case was taken to the court below.

That court, while considering the subject in the light of the burden cast upon the United States resulting from the fact that the time fixed by the statute had run before the suit was brought, and the technical sufficiency of the bill viewed merely from that aspect, proceeded to consider the averments of the bill comprehensively. As a result it concluded (a) that the allegations of the bill did not meet the requirements as to the exertion of due diligence to discover the fraud which they charged had been committed, and (2) that the bar of the statute was applicable because the allegations of the bill stated the existence of facts and circumstances from which knowledge of the fraud was necessarily to be imputed, or from which such inferences were plainly deducible as would have led to discovery if diligence had been exerted; in other words, that there was either knowledge of the fraud within the statutory period, or such laches resulting from failure to make inquiry as to take the case out of the equitable principle by which the positive bar of the statute could be avoided.

[1] Before testing the accuracy of the deductions from the averred facts upon which these conclusions are necessarily based, we dispose of a legal contention of the United States, that in any event the propositions were wrongfully applied because under the statute laches in discovering the fraud could not be imputed to the United States. As the statute in express terms deals with the rights of the United States and bars them by the limitation which it prescribes, and as that bar would be effective unless the equitable principle arising from the fraud and its discovery be applied, it must follow, since the doctrine of laches is an inherent ingredient of the equitable principle in question, that *334 the proposition is wholly without *merit because, on the one hand, it seeks to avoid the bar of the statute by invoking the equitable principle suspending its operation, and, on the other, rejects the fundamental principle upon which the equitable doctrine invoked can alone rest.

[2, 3] Coming, then, to consider the allegations of the bill for the purpose of testing the conclusions based upon them by the court below, as just stated, we are of opinion that such conclusions cannot be sustained without drawing unauthorized inferences from the facts alleged and thus deciding the case by indulging in mere conjecture. Without going into detail, we briefly advert to the inferences from two subjects dealt with by the court below which illustrate the necessity for the conclusion just stated. In the first place, let it be conceded arguendo that the conveyances from the entrymen to the corporation as alleged, following almost imme-

diately the initiation of the right to purchase and preceding the patents, the uniformity of the method employed, and the surrounding circumstances, would all, if known, have constituted badges of fraud of such a character as to produce the result which the court below based upon them. But the result thus stated depends upon the existence of knowledge of such facts or of knowledge of other facts from which they were reasonably deducible—a situation which does not here exist, as the averments of the bill as to concealment exclude that conclusion. True it is, that in dealing with the question of the technical sufficiency of the pleading the court below directed attention to the fact that it contained no allegation that the conveyances made by the entrymen had not been seasonably recorded; but that in no way justifies the inference that they had been recorded and therefore gave notice of the fraud, even if it be conceded, for the sake of the argument, that such recording was adequate to give such notice—a question which we do not now decide.

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[4] *So, also, let it be conceded, as held by the court below, that the allegations of the bill as to the possession of the land by the corporation at the time of the purchase by the entrymen and subsequent to their conveyances; of the propinquity of the land to the field of operations of the corporation; of its exploitation by the corporation for the purpose of taking coal therefrom, all in and of themselves, if open and public so as to be known, constituted such indications of fraud as to give notice to the United States, or at least to put it upon inquiry. But again, that concession is here irrelevant since the averments of concealment and other allegations in the bill are susceptible of the construction that the possession of the corporation was clandestine and that its operations as to the property were of the same character because not conducted in its own name but by persons interposed with the very object of concealment.

Viewing the case in the light of these considerations, as well as of others to the same effect to which we do not stop to refer, we are of opinion that error was committed in disposing of the bill upon the motion to dismiss, and that the ends of justice require that it should be only finally disposed of after hearing and proof, thus excluding the danger of wrong to result from a final determination of the cause upon mere inferences without proof.

It follows that the decree of the court below must be and it is reversed, and the case remanded to the District Court, with directions to set aside its decree of dismissal and to overrule the motion to dismiss, and for further proceedings in conformity with this opinion.

Reversed and remanded.

(255 U. S. 356)

SUPREME TRIBE OF BEN HUR v. CAUBLE et al.

(Submitted Jan. 10, 1921. Decided March 7, 1921.)

No. 274.

1. Courts 🔑308—District Court has jurisdiction over representative suit between citizens of different states.

The United States District Court has jurisdiction over a suit brought against a resident defendant by nonresident members of a class numbering many thousands of persons and residing in many different states.

2. Courts 🔑308—Representation of citizens of same state as defendant does not defeat jurisdiction over class suit.

The jurisdiction of the United States District Court over a suit against a resident defendant, brought by nonresident members of a class for the benefit of all the class, is not defeated by the representation by the nonresident plaintiffs of members of the class who were citizens of the same state as defendant.

3. Courts 🔑332—Equity powers of federal District Courts extend to suits by class representatives, so that equity rule 38 is valid.

The equity powers with which the District Courts of the United States are vested include suits by representatives of a class, which were known before the adoption of our judicial system, so that equity rule 38 as amended (33 Sup. Ct. xxix), authorizing such suits by the representatives of a class who are citizens of a state different from defendant, does not confer upon District Court a jurisdiction not warranted by the Constitution and laws of the United States.

4. Courts 🔑354—Judgment in representative suit conclusive on all members of class.

Under equity rule 38 (33 Sup. Ct. xxix), relating to suits by representatives of a class, which, as amended, omits the provision originally contained that the decree therein should be without prejudice to the rights of the absent parties, a decree by the United States District Court in a suit by representatives of the class who were citizens of a state different from that of defendant is binding on members of that class who are citizens of the same state as defendant.

5. Courts 🔑354—General equity rule of federal court does not apply to case governed by specific rule.

Since equity rule 38 (33 Sup. Ct. xxix), specifically provides for suits on behalf of a class by representatives thereof, rule 39 (33 Sup. Ct. xxix), providing that, if proper parties cannot be joined without ousting the jurisdiction of the court, the court may proceed without such joinder, but that the decree shall be without prejudice to the rights of the absent parties, does not apply to representative suits so as to render a decree therein ineffective against members of the class who are citizens of the same state as defendant.

6. Courts 🔑264(5)—Federal District Court has jurisdiction over ancillary bill to enforce judgment against class.

The United States District Court has jurisdiction over an ancillary bill to enforce a decree rendered in a suit on behalf of a class by complainants who were citizens of a state different from that of defendant, as against members of that class who were citizens of the same state as defendant, by restraining the prosecution of suits brought in the state courts by the citizens.

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Supreme Tribe of Ben Hur against Aurelia J. Cauble and others, to restrain the prosecution of suits in the state court. From a decree of the District Court, dismissing the bill for want of jurisdiction (264 Fed. 247), complainant appeals directly to the Supreme Court. Reversed.

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*Messrs. Charles M. McCabe, of Crawfordsville, Ind., and Samuel D. Miller, William H. Thompson, and Frank C. Dailey, all of Indianapolis, Ind., for appellant.

Mr. William C. Bachelder, of Indianapolis, Ind., for appellees.

Mr. Justice DAY delivered the opinion of the Court.

This case is here upon the question of jurisdiction. Jud. Code, § 238 (Comp. St. § 1215). Appellant is a fraternal benefit association organized under the laws of the state of Indiana. It filed a bill against Aurelia J. Cauble and others, citizens and residents of Indiana, to enjoin them from prosecuting in the state courts certain suits which, it is averred, would relitigate questions settled by a decree of the United States District Court for Indiana; it being the contention that all the members in Class A in the Supreme Tribe of Ben Hur, including the appellees, were bound and concluded by the federal decree.

The bill was filed upon the theory that it is ancillary in character, and justifies a de-

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cree to protect the rights *adjudicated in the original proceeding. A motion to dismiss for want of jursdiction was sustained. (D. C.) 264 Fed. 247.

The ancillary bill alleges that the questions decided in the original suit determined:

(1) The right of the Supreme Tribe of Ben Hur to create a new class of benefit certificate holders known as Class B. (The membership in such society up to July 1, 1908, having been in the class thereafter to be designated as Class A.) (2) The right of the society to determine that all benefit certificates issued after July 1, 1908, should be Class B certificates, and that no Class A certificates should be issued after that date, and no new members taken into Class A, from that time. (3) The right of the Supreme Tribe of Ben Hur to require members of Class B to pay different rates for their insurance from members of Class A. (4) The right of the Supreme Tribe of Ben Hur to require that the mortuary funds of the two classes be kept separate and distinct, and that the death losses occurring therein, should be paid out of the funds of each class respectively. (5) The right of the Supreme Tribe of Ben Hur to authorize members of Class A to transfer, upon a written application therefor to Class B, and to take with them into Class B. their interest in the mortuary, and other funds, of the society, created, or arising prior to July 1, 1908, and requiring the Class B members to pay a monthly payment and rate in excess of that paid by Class A members. (6) The right of the Supreme Tribe of Ben Hur to require members remaining in Class A, and not transferring to Class B, to pay a sufficient number of monthly payments, or assessments, to meet the death losses in Class A. (7) The right of the Supreme Tribe of Ben Hur to use the expense fund of the society for the purpose of creating Class B, and induce Class A members to transfer to Class B, and to secure

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new members in Class B. (8) Whether *the Supreme Tribe of Ben Hur had used the expense fund in a manner justified by its constitution and by-laws and a general examination of expenditures which had been made by that society, out of its expense fund, and the purpose for which these expenditures had been made, and whether any of them were made in violation of the rights of Class A members. (9) The right of the Supreme Tribe of Ben Hur to use its expense fund, including all questions as to whether payments made out of it were equitable and just, or inequitable, wrongful and unlawful; and the question of whether the maintenance of a general expense fund, and the payments of the entire expenses of the society therefrom, was fair, just and legal. (10) Whether the Supreme Tribe of Ben Hur had wrongfully, or unlawfully inaugurated a campaign to persuade and induce the members of the society belonging to Class A to give up their certificates in Class A, and to apply for and procure membership and certificates in Class B; or whether the action of the society, and its officers in that connection, was rightful, just and equitable. (11) The question of whether the rates in Class A, in effect prior to July 1, 1908, were adequate, or inadequate, or whether they were sufficient to provide for the current death losses in Class A, and the expenses of the society; or whether it was necessary, in order to prevent the insolvency of the Supreme Tribe of Ben Hur, to create a new class, and induce the members of the old class, in so far as it was possible to induce them, to transfer to the new class, and the right of the society to take all action necessary for this purpose.

Other details of the reorganization are set forth, and it is averred that in the original suit it was finally determined and adjudged that the reorganization adopted by the Supreme Tribe of Ben Hur was valid and binding upon all the members of the society, including the members known as Class A.

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*The ancillary bill alleges that the commencement of the suit in the state courts of Indiana will have the effect to relitigate questions conclusively adjudicated against the defendants as members of Class A in the action in the United States District Court; that to permit them to do so would destroy the effect of the decree rendered in that suit; that in the several suits commenced in the state courts plaintiffs therein challenged the rights of the society to create Class B; and that the plan of reorganization of the society to create Class B, and the questions of fact and law involved in the causes in the state court are the same questions, and none other than those conclusively adjudged and determined in the main suit.

The District Judge dismissed the suit for want of jurisdiction upon the following certificate:

"I hereby certify that I dismissed the ancillary bill of complaint in the above cause of the Supreme Tribe of Ben Hur v. Aurelia J. Cauble et al., solely because of the lack of jurisdiction of the United States District Court for the District of Indiana to entertain said ancillary bill of complaint.

"I dismissed said ancillary bill of complaint upon a motion filed by the defendants thereto and also upon my own motion.

"The jurisdictional question arose as follows:

"On April 16, 1913, George Balme, a citizen of the state of Kentucky, and five hundred and twenty-three other complainants residing in fifteen different states of the Union outside of the state of Indiana, and one complainant residing in the Dominion of Canada, filed their bill of complaint in the United States District Court for the District of Indiana against the Supreme Tribe of Ben Hur, a fraternal beneficiary society organized under laws of the state of Indiana with its principal office at Crawfordsville in said state and district aforesaid, and its officers, all citizens and residents of the *361 state of In*diana, to enjoin what was claimed to be an unlawful use of trust funds of said defendant, Supreme Tribe of Ben Hur in which all the complainants and other members of Class A of said Supreme Tribe of Ben Hur had a common but indivisible interest, and attacking a plan of reorganization adopted by the supreme legislative body of the Supreme Tribe of Ben Hur to prevent threatened insolvency and disruption of said society; the suit was a class suit brought and prosecuted for the benefit of all members of Class A of said society of whom there were more than seventy thousand at the time of the commencement of said suit, to wit, April 16, 1913; an answer was filed by the defendants, setting up a full answer to the facts averred in the bill of complaint; a long hearing was had before the master, the master filed a written report, and in this report it was found that this was strictly a true class suit, presenting questions of common interest to all the members of Class A and affecting their joint interests in funds and in internal management of the society, written exceptions were filed thereto both by complainants and defendants, and a final decree was entered, dismissing complainants' bill of complaint for want of equity, which said decree has never been appealed from, modified or vacated, but is still in full force and effect. No Indiana members of the society intervened or were made parties to the suit by any subsequent proceeding prior to the filing of said ancillary bill in said cause.

"In 1919 the defendants to the ancillary bill, all being residents of the state of Indiana, and all having been members of said Class A of said Supreme Tribe of Ben Hur or being beneficiaries of persons who were members of said Class A at the time of the commencement, prosecution and final decree in said cause of Balme and Others v. Supreme Tribe of Ben Hur and Others, commenced actions in the *362 circuit court of Montgomery county, *Ind., and in the circuit court of Marion county, Ind., in which they seek to relitigate questions determined in favor of the defendant, Supreme Tribe of Ben Hur, in said suit brought by George Balme and others in the United States District Court for the District of Indiana.

"The ancillary bill of complaint filed herein seeks to enjoin the maintenance and prosecution of the actions commenced by said several defendants to the ancillary bill of complaint in the state courts of Indiana, all of which actions were commenced subsequent to the final decree in said cause of Balme and Others v. Supreme Tribe of Ben Hur, which final decree was entered and rendered on the 1st day of July, 1915.

"That a copy of said ancillary bill, together with the motion of the defendants thereto to dismiss the same, and the order of dismissal are contained in the judgment roll filed herein, to which reference is made for a more particular description thereof, and that there is attached to said ancillary bill contained in said judgment roll a full copy of all the pleadings and proceedings had in said cause of Balme et al. v. The Supreme Tribe of Ben Hur et al., together with the report and findings of the master and the judgment and decree of the court.

"I dismissed the ancillary bill of complaint on the ground only that members of Class A of the Supreme Tribe of Ben Hur residing in the state of Indiana could not be bound by representation by complainants in the class suit of Balme et al. v. Supreme Tribe of Ben Hur et al., as the presence of such Indiana members of Class A as plaintiffs would have ousted the jurisdiction of the court in the main suit, such jurisdiction being based only on diversity of citizenship and not on any federal question, and that therefore the decree in the main case was and is not res adjudicata as to Indiana members of Class A of the Supreme Tribe of Ben Hur.

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*"The only question which arose on the dismissal of the ancillary bill of complaint was the question of jurisdiction, and such question of

jurisdiction only, as above stated, is hereby certified to the Supreme Court of the United States for its decision thereon."

From this statement of the case it is apparent that two points are involved in determining the jurisdictional question before us: First. Was the original decree binding upon citizens of Indiana who were in the class for whom the suit was prosecuted, but not otherwise parties to the bill? Second. Was the present suit ancillary in character, and such as to justify an injunction in the federal court to restrain the proceedings in the state court?

Class suits have long been recognized in federal jurisprudence. In the leading case of Smith et al. v. Swormstedt et al., 16 How. 288, 302 (14 L. Ed. 942) of such suits this court said:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The subject is provided for by rule 38 (33 Sup. Ct. xxix) of the equity rules of this court promulgated in 1912, which reads:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable
> *364
> to bring them all before the court, *one or more may sue or defend for the whole."

As the rule formerly read, it contained the following provision:

> "But in such cases the decree shall be without prejudice to the rights and claims of the absent parties."

The District Court held that this change in the rule could not affect the jurisdictional authority of the court, and added that in its view rule 39 (33 Sup. Ct. xxix) was the applicable one. Rule 39 provides:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties."

Under the latter rule the District Court held that the Indiana citizens were out of the jurisdiction of the federal court in the original suit, and that their joinder would have ousted the jurisdiction of the court, although that fact would not prevent the court from proceeding in the case to a decree without prejudice to their rights. "In other words," said the judge, "although the original bill was a class suit, the class did not include Indiana citizens."

[1] That the persons in Class A of the society were so numerous that it would have been impossible to bring them all before the court is apparent from a statement of the case. They numbered many thousands of persons, and resided in many different states of the Union. There was the requisite diversity of citizenship to justify the bringing of a class suit in the United States District Court for the District of Indiana. The court, therefore, properly acquired jurisdiction of the suit, and was authorized to proceed to a final decree.

[2] The District Court held that in its
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view joinder of In*diana citizens would have defeated jurisdiction in the federal court, which conclusion was necessarily decisive of the case.

In Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329, a creditor's bill was filed in equity to set aside a conveyance of a stock of merchandise. The suit was removed from the state court to the Circuit Court of the United States on the ground of diversity of citizenship. After the cause was removed co-claimants, citizens of the same state as were the defendants, were admitted into the suit. This, it was contended, prevented the court from proceeding to a decree, as it was without jurisdiction because the controversy became one not wholly between citizens of different states. Of this contention this court said (115 U. S. 64, 5 Sup. Ct. 1164, 29 L. Ed. 329):

> "This, of course, could have furnished no objection to the removal of the cause from the state court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, as between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims

of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

This principle controls this case. The original suit was *366 *a class suit brought by a large number of the class as representatives of all its membership.

[3] The change in rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. Street's Federal Equity Practice, vol. 1, § 549.

The District Courts of the United States are courts of equity jurisdiction, with equity powers as broad as those of state courts. That a class suit of this nature might have been maintained in a state court, and would have been binding on all of the class, we can have no doubt. Hartford Insurance Co. v. Ibs, 237 U. S. 662, 672, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765; Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771.

[4] Owing to the number of interested parties and the impossibility of bringing them all before the court, the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented, their rights were duly represented by those before the court. The intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired. Stewart v. Dunham, supra. Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree.

[5] Rule 38, as amended, was intended to apply to just such cases. Rule 39 does not apply to a subject already specifically covered in rule 38. Of course, mere considerations of inconvenience cannot confer jurisdiction, but it is to be noted that if the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which *367 *may be repudiated in another forum as to a part of the same class.

If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization, and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.

[6] As to the other question herein involved, holding, as we do, that the membership of Class A were concluded by the decree of the District Court, an ancillary bill may be prosecuted from the same court to protect the rights secured to all in the class by the decree rendered. Looney v. East Texas R. R. Co., 247 U. S. 214, 38 Sup. Ct. 460, 62 L. Ed. 1084, and cases cited.

It follows that the decree of the District Court, dismissing the ancillary bill for want of jurisdiction, must be reversed.

(255 U. S. 373)

WINTON et al. v. AMOS et al.

No. 6.

BOUNDS v. SAME.

No. 7.

LONDON v. SAME.

No. 8.

FIELD et al. v. SAME.

No. 9.

BECKHAM v. SAME.

No. 10.

VERNON v. SAME.

No. 11.

HOWE v. SAME.

No. 12.

(Argued Jan. 14 and 15, 1919. Restored to Docket for Reargument Jan. 5, 1920. Reargued April 21 and 22, 1920. Decided March 7, 1921.)

1. Indians 🔑27(1)—Statutes held to authorize equitable suit against all Mississippi Choctaws benefited by claimants' services.

Act of April 26, 1906, § 9, as amended by Act May 29, 1908, § 27, authorizing the Court of Claims to adjudicate claims against the Mississippi Choctaws for services rendered in the matter of claims of such Choctaws to citizenship in the Choctaw Nation and to render judgment thereon on the principle of quantum meruit to be paid from any funds due such Choctaws by the United States, contemplates, not an action in personam to establish personal liability against individual Indians or groups of them, but a suit of an equitable nature against that class of Mississippi Choctaws who, through their citizenship in the Choctaw Nation, acquired allotments and a participation in funds held in trust by the United States, to impose an equitable charge upon the trust funds for a proportionate contribution for the services rendered.

2. Indians 🔑31—Grant of citizenship without congressional action does not terminate tutelage.

Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property, and it rests with Congress to determine when their condition of tutelage or dependency shall cease; the mere grant of rights of citizenship not being sufficient to terminate it.

3. Indians 🔑27(5)—Designation of Choctaw Governor and United States Attorney General to defend claims against class held valid.

In authorizing a suit to determine claims against the Mississippi Choctaw Indians, whom it was impracticable to bring before the court as individuals, and who were treated as a class by analogy to the familiar practice recognized in equity rule 38 (226 U. S. 659, 33 Sup. Ct. xxix), it was within the power of Congress to designate the Governor of the Choctaw Nation as the representative of the defendants upon whom notice of the suit was to be served, and the Attorney General of the United States as the attorney of defendants in the suit, and authorizing the suit under those conditions did not deprive the Indians of their property without due process of law contrary to Const. Amend. 5.

4. Indians 🔑24 — Recovery of reasonable value of services before departments and Congress is equitable.

It is equitable to impose a charge upon a fund held for the benefit of a class of Indians for the reasonable compensation of those whose services and expenses incurred contributed to the securing of the benefits to the class, where such services were rendered by proper efforts before Congress and its committees and individual members, and before the Dawes Commission for the enrollment of the Indians, as well as where they are rendered in court.

5. Indians 🔑24—Invalid contract with individuals does not prevent recovery from beneficiaries as class.

The fact that claimants for services rendered to the Mississippi Choctaw Indians in securing their rights as citizens in the Choctaw Nation had contracts with individual Indians for their compensation which were invalid does not deprive the claimants of their right to compensation from the class for the services rendered.

6. Indians 🔑24—Valid contracts for services to individuals do not bar recovery from class benefited.

The fact that claimants who rendered services which benefited the Mississippi Choctaw Indians by securing them their rights of citizenship in the Choctaw Nation had valid and enforceable contracts with individual members of that class for their compensation does not defeat their right to recovery from the class as a whole for the benefits thereby secured, provided they waive their right to compensation under their contracts with the individuals.

7. Indians 🔑27(7) — Finding of benefit to class essential to recovery for services rendered.

On claims for services rendered in obtaining for the Mississippi Choctaw Indians their rights as citizens of the Choctaw Nation under the authority of Act of April 26, 1906, § 9, as amended by Act of May 29, 1908, § 27, a finding by the Court of Claims that the services rendered by claimants materially conduced to bring about the beneficial result is essential to recovery by the claimants.

8. Courts 🔑468 — Requests for findings by Court of Claims, not presented within 60 days, may be rejected.

Requests for additional findings filed in the Court of Claims more than the prescribed 60 days after judgment was rendered may be rejected by the court in its discretion on that ground.

9. Appeal and error 🔑856(1)—Erroneous rejection of requests for additional findings on grounds other than delay not upheld for delay.

Where the Court of Claims rejected requests for additional findings which were filed more than the prescribed 60 days after judgment, not because of the delay, but for reasons which showed that the court misapprehended the nature of the main issue, the Supreme Court cannot say that the Court of Claims would have rejected the requests because of the delay if it had not done so on the other grounds.

10. Indians 🔑27(7) — Rejection of requests for findings as to value of claimants' services held error.

Where the Court of Claims denied a claim for services rendered to the Mississippi Choctaws in securing their rights as citizens of the Choctaw Nation without specifically finding whether the services rendered benefited those Indians, it was error to reject claimants' request for additional findings as to whether such services resulted in any benefit or value, and, if so, what compensation was justly due the claimants.

11. Indians 🔑27(7)—Claims for services held properly rejected under findings failing to show value.

Claims for services rendered the Mississippi Choctaws in securing their rights as citizens of the Choctaw Nation were properly denied by the Court of Claims, where the findings show that the services were not effective in establishing the rights of the Indians, or were rendered on behalf of individual Indians and not on behalf of the class.

Appeals from the Court of Claims.

Seven separate claims by Wirt K. Winton and others, by J. S. Bounds, by John London, by Walter S. Field and another, by J. J. Beckham, by William N. Vernon and by Katie A. Howe, as executor, etc., all against Jack Amos and others, known as the Mississippi Choctaws, to recover for services rendered by the claimants in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation. From judgments of the Court of Claims denying each of the claims (51 Ct. Cl. 284), and denying motion of the claimants Wirt K. Winton and others for additional findings (52 Ct. Cl. 90), said claimants appeal. Reversed as to the claim of Wirt K. Winton and others, and affirmed as to the other claimants.

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*Mr. William W. Scott, of Washington, D. C., for appellants Winton and others.

Mr. Guion Miller, of Baltimore, Md., for other appellants.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

These are appeals from a judgment of the Court of Claims rejecting claims for alleged services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation. The decision of the Court of Claims is reported in 51 Ct. Cl. 284. In the Winton Case (No. 6), a request for additional findings, equivalent to an application for rehearing, was denied, 52 Ct. Cl. 90. The appeals were taken under section 182, Jud. Code (Comp. St. § 1173).

The jurisdiction of the court below arose under an Act of April 26, 1906 (chapter 1876,

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§ 9, 34 Stat. 137, 140), and an *amendatory provision in the Act of May 29, 1908 (chapter 216, § 27, 35 Stat. 444, 457). The former provided:

> "That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the Governor of the Choctaw Nation, and the Attorney General shall appear and defend the said suit on behalf of said Choctaws."

The original petition was filed October 11, 1906, by Wirt K. Winton, one of the heirs at law of Charles F. Winton, in behalf of himself and the other heirs and also in behalf of the associates and assigns of Charles F. Winton. Thereafter it was provided by the amendatory act that the court be authorized and directed to hear, consider, and adjudicate claims of like character on the part of William N. Vernon, J. S. Bounds, and Chester Howe, their associates or assigns, and render judgment on the same principle of quantum meruit; the judgment, if any, to be paid from "any funds now or hereafter due such Choctaws as individuals by the United States"; Vernon, Bounds, and Howe were authorized to intervene in the pending suit of the estate of Winton, and it was "provided further, that the lands allotted to the Mississippi Choctaws are hereby declared subject to a lien to the extent of the claims of the said Winton and of the other plaintiffs authorized by Congress to sue the said defendants, subject to the final judgment of the Court of Claims in the said case. Notice of such suit

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or intervention shall *be served on the Governor of the Choctaw Nation, and the Attorney General shall appear and defend the said suit on behalf of the said Choctaws."

Thereafter a second amended petition was filed by Wirt K. Winton, as administrator of the estate of Charles F. Winton, deceased, in behalf of the estate of Winton and also of Winton's associates and assigns. In this petition James K. Jones, administrator of James K. Jones, deceased, and Robert L. Owen in his own behalf, joined. Intervening petitions were filed by William N. Vernon; Chester Howe, who died pending suit and in whose place his administratrix, Katie A. Howe, was substituted; and several others.

As shown by the findings the claim of Winton and associates arose as follows: By article 3 of the treaty of September 27, 1830 (7 Stat. 333), known as the Treaty of Dancing Rabbit Creek, the Choctaw Nation of Indians ceded to the United States the entire country possessed by them east of the Mississippi river, and agreed to remove beyond the Mississippi during the three years next succeeding. But, in view of the fact that some of the Choctaws preferred not to move, it was provided in article 14 that each head of a family who desired to remain and become a citizen of the states should be permitted to do so, and should thereupon be entitled to a reservation of one section of land, with an additional half section for each unmarried child living with him over ten years of age, and a quarter section for each child under ten. If they resided upon said lands intending to become citizens of the states for five years after the ratification of the treaty, a grant in fee simple should issue; and it was further provided:

> "Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

By another article (19) reservations were provided for certain prominent Choctaws by

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name, *and for limited numbers of heads of families and captains.

The mixed-blood Choctaws who elected to remain in Mississippi were provided for under article 19, while the full bloods who remained and elected to become citizens of the state were provided for under article 14;

hence full-blood Mississippi Choctaws have always been called "Fourteenth Article claimants." Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the state of Mississippi, and the Department held it had no authority to approve contracts made with them.

Pending the negotiation of the treaty, the Legislature of the state of Mississippi passed an act, January 19, 1830, abolishing the tribal customs of Indians not recognized by the common law or the law of the state, making them citizens of the state, with the same rights, immunities, and privileges as free white persons, extending over them the laws of the state, validating tribal marriages, and abolishing the tribal offices and posts of power. Recognition of their citizenship was afterwards embodied in the state Constitution.

The right of the Fourteenth Article Mississippi Choctaws to citizenship in the parent tribe appears to have been recognized at one time by the Choctaw Nation west, which had removed to Indian Territory pursuant to

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the treaty. *On December 24, 1889, the Nation, through its Legislature, memorialized Congress, reciting that there were "large numbers of Choctaws yet in the states of Mississippi and Louisiana who are entitled to all the rights and privileges of citizenship in the Choctaw Nation," and requesting the United States government to make provision for the emigration of these Choctaws from said states to the Choctaw Nation. In 1891 a commission was provided for and funds appropriated by the Choctaw Council for the removal and subsistence of Mississippi Choctaws to the Nation, and during that year 181 were removed and admitted to citizenship.

By Act of March 3, 1893 (chapter 209, § 16, 27 Stat. 612, 645), Congress created the Commission to the Five Civilized Tribes, familiarly known as the Dawes Commission, with the object of procuring through negotiation the extinguishment of the national or tribal title to the lands of those tribes in the Indian Territory, either by their cession to the United States or allotment in severalty among the Indians, with a view to the ultimate creation of a state. By act of June 10, 1896 (chapter 398, 29 Stat. 321, 339, 340), the Commission was directed to make a complete roll of citizenship of each of the Five Civilized Tribes, and applicants for enrollment were to make application to the Commission within three months from the passage of the act and have the right of appeal from its decision to the "United States District Court" (construed by this court, in Stephens v. Cherokee Nation, 174 U. S. 445, 476, 477, 19 Sup. Ct. 722, 43 L. Ed. 1041, to mean the United States Court in the Indian Territory).

At this time the full-blood Mississippi Choctaws were extremely poor, living in insanitary conditions and working at manual labor for daily wages. Their children were not permitted to attend schools provided for the whites, and they were denied all social and political privileges. As already appears, they were receiving neither care nor attention from the Indian Office or the Depart-

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ment of the *Interior; and they were so far overlooked by the Dawes Commission that the time limited by the act just mentioned expired without their being included in the enrollment.

The activities of Winton and associates for which recovery is asked date from this point. Soon after the passage of the Act of June 10, 1896, Messrs. Owen and Winton entered into an agreement under which the latter was to proceed to Mississippi and procure contracts with such Indians as might be entitled to participate in any distribution of lands or moneys of the Choctaw and Chickasaw Nations, arranging to secure evidence, powers of attorney, and contracts, as prescribed by Mr. Owen; Owen was to prepare the necessary forms and represent the claims of the Indians before the proper officers of the United States or Indian governments, with the assistance and co-operation of Winton; Winton to receive one-half of the net proceeds of the contracts. A supplementary agreement between the same parties provided in terms that Owen should have a half interest in the contracts, and in the event of accident to Winton should take them up as attorney in Winton's place. Immediately thereafter Winton proceeded to Mississippi, and during the year 1896 and the years following procured approximately 1,000 contracts with full-blood Mississippi Choctaws, some in the name of Winton, some in the name of Owen, by the terms of which Winton and Owen agreed to use their best efforts to secure the rights of citizenship for said Mississippi Choctaws, as members of the Choctaw Nation, in the lands and funds of said tribe, for a fee of one-half the net interest of each allottee in any allotment thereafter secured. These contracts were subsequently abandoned by Owen and Winton because void and unenforceable under the Acts of June 28, 1898, and May 31, 1900, referred to below, and new contracts were thereafter taken, principally in the

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name of Charles S. Daley, but in behalf *of

Owen and Winton, with whom Daley was associated. These contracts recognized the previous services of Winton and associates as beneficial to the Indians, employed Daley and associates, including Winton and associates, as attorneys to look out for, protect, defend, and secure the interest of the Indians in the lands in Indian Territory to which they might be entitled as Mississippi Choctaws or as members of the Choctaw Nation, and to procure the recognition of their rights in said lands and in and to any funds arising from the Choctaw-Chickasaw lands, and provided that as compensation for all services rendered and to be rendered the attorneys should receive a sum of money equal to one-half of the value of the net recovery, based upon the actual value of the lands recovered. They seem to have contained other provisions looking to the sale or incumbrance, in part at least, of the lands secured for the Indians. The validity of these contracts has not been discussed.

Early in 1897 Mr. Owen spoke to Hon. John Sharp Williams, then representative in Congress from the Fifth Congressional District of Mississippi, wherein practically all full-blood Mississippi Choctaws resided, calling his attention to the possible rights of such Choctaws to participate in the partition of the lands of the Choctaw Nation, at the same time submitting to him a copy of the Dancing Rabbit Creek Treaty, and calling his attention to article 14. This was the first time the matter had been called to the attention of Mr. Williams. Thereafter, and until March 4, 1903, when he ceased to represent that district, he was active in all matters of legislation concerning the Mississippi Choctaws.

In December, 1896, Winton presented to Congress a memorial in behalf of Jack Amos and other full-blood Mississippi Choctaws, asking that their rights under article 14 of the Treaty of 1830 be accorded to them, and that they be provided for by enrollment either *382 by the *Dawes Commission or by a special agent under the direction of the Commissioner of Indian Affairs. In January, 1897, a second memorial in behalf of Jack Amos and 246 other full-blood Mississippi Choctaws being heads of families was presented to Congress through Winton, asking that they be enrolled so as to participate in the proposed allotment of Choctaw lands in Indian Territory; and setting up that by the true construction of article 14 of the Treaty of 1830, when viewed in connection with other treaties and laws and the history of the Choctaw tribe, the Mississippi Choctaws were entitled to remain in Mississippi as United States citizens and still retain the rights of a Choctaw citizen, except as to a participation in the annuity.

In September, 1897, Winton presented a third memorial of like purport to the Secretary of the Interior.

Prior to the presentation of the first of these memorials, and in September or October, 1896, Mr. Owen appeared before the Dawes Commission in behalf of Jack Amos and 97 other full-blood Choctaws residing in Mississippi, and attempted to secure their enrollment under the Act of June 10, 1896. The Commission refused, on the ground that they were not resident in the Indian Territory. Owen appealed to the United States Court for the Central District of Indian Territory, where the ruling of the Commission was affirmed. This decision was "indirectly affirmed" by this court on May 15, 1899, in the case of Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041, where it was held that the legislation under which the judgment was rendered was constitutional, and that this court was without jurisdiction to review decisions of the courts of Indian Territory in citizenship cases except upon the question of the constitutionality or validity of the legislation.

On February 11, 1897, a resolution drawn up by Mr. Owen was passed by the Senate, *383 directing the Secretary *of the Interior to transmit certain historical data and information respecting the rights of the Fourteenth Article claimants. This was referred by the Secretary to the Commissioner of Indian Affairs for reply, and his reply, containing material supporting the claims of the Mississippi Choctaws, was transmitted by the Secretary to the Senate, February 15, 1897. Senate Doc. 129, 54th Cong., 2d Sess.

About the same time, Mr. Owen made an argument before the Committee on Indian Affairs of the House in support of House Bill No. 10,372, intended to permit the Mississippi Choctaws to continue to reside in that state and still claim the rights of Choctaw citizens. A favorable report was made by the Committee, March 3, 1897 (House Report 3,080, 54th Cong., 2d Sess.), but the bill never passed either house.

In the Indian Appropriation Act of June 7, 1897, however, the following provision was contained:

> "That the commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities." Chapter 3, 30 Stat. 62, 83.

Following the passage of this act Mr. Owen appeared before the Dawes Commission in the interest of the Mississippi Choctaws with whom he had contracts. On January 28, 1898, the Commission made a report to Congress as required by the act last mentioned (House Doc. 274, 55th Cong., 2d Sess.), setting forth in brief the history of the Mississippi Choctaws and their then present condition; and submitting an elaborate argument in opposition to the contention that those Choctaws might continue their residence and political status in Mississippi as in the past and still enjoy all the rights of Choctaw citizenship except to share in the Choctaw an- *384 nuities; *declaring that in order to avail himself of the privileges of a Choctaw citizen, any person claiming to be a descendant of those provided for in article 14 of the Treaty of 1830 "must first show the fact that he is such descendant, and has in good faith joined his brethren in the territory with the intent to become one of the citizens of the Nation. Having done so, such person has a right to be enrolled as a Choctaw citizen and to claim all the privileges of such a citizen, except to a share in the annuities. And that otherwise he cannot claim as a right the 'privilege of a Choctaw citizen.'" The Commission further said that, if they were correct in this, still any person presenting himself claiming the right must be required by some tribunal to prove the fact that he was a descendant of some one of those Indians who originally availed themselves of and conformed to the requirements of the Fourteenth Article of the Treaty of 1830. "The time for making application to this commission to be enrolled as a Choctaw citizen has expired. It would be necessary, therefore, to extend by law the time for persons claiming this right to make application and be heard by this commission, or to create a new tribunal for that purpose."

On June 28, 1898, Congress passed an act, commonly known as the Curtis Act, which contained in section 21 provisions for the making of rolls of the Five Civilized Tribes by the Dawes Commission, and among others the following:

> "Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior. * * *
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> *"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: Provided, however, that nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States." Chapter 517, 30 Stat. 495, 503.

Public notice having been given in Mississippi as to the times and places at which the Commission would hear applications for identification under the above provision, one of the commissioners, A. S. McKennon, proceeded to Mississippi in January, 1899, with a force of clerks and stenographers, and there identified and made up a schedule of 1923 persons as being Mississippi Choctaws entitled to citizenship in the Choctaw Nation under article 14 of the treaty. The principle adopted was that proof of the fact that a claimant was a full-blood Indian whose ancestors were living in Mississippi at the date of the treaty was sufficient evidence to report his name as a Mississippi Choctaw under section 21 of the Curtis Act. This schedule, known as the "McKennon Roll," was subsequently approved by the Commission, who forwarded it with a report dated March 10, 1899, to the Secretary of the Interior. The schedule never was approved by the Secretary, and was attempted to be withdrawn by the Commission December 20, 1900; errors having been discovered in it. It was formally disapproved by the Secretary March 1, 1907. The Court of Claims finds that—

> "The work of Commissioner McKennon, covering a period of about three weeks, in identifying and making up said schedule, was interfered with and retarded by said Charles F. Winton, who endeavored to prevent the Indians from appearing for identification."

No explanation of this appears. At the same time it is found that Mr. Owen (who of course was associated with Winton) furnish- *386 ed to Commissioner McKennon a list *of 16,000 Choctaw Indians, which aided McKennon in his official work.

Because of material errors discovered by the Commission in the McKennon Roll, another party was organized and sent out by the Commission for the purpose of making a more accurate and complete roll of the Mississippi Choctaws under the act of 1898, whose hearings were commenced in Mississippi in December, 1900, resumed in April of the following year, and continued until the latter part of August, 1901.

February 7, 1900, Winton and associates presented a memorial to Congress, praying that the treaty rights of the Mississippi Choctaws be so construed as to afford them the rights of Choctaw citizens without removal, or that they be permitted to have those rights determined in the courts. Congress took no action upon this.

April 4, 1900, Winton and his associates memorialized Congress, requesting the following amendment to the Indian Appropriation Act then pending:

> "Provided, that any Mississippi Choctaw duly identified and enrolled as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Mississippi Choctaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement they shall be enrolled by the Secretary of the Interior as Choctaws entitled to allotment."

The act as passed contained the following:

> "Provided, that any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country,

and on proof of the fact of bona fide settlement *387 may be enrolled by the said *United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: Provided further, that all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws, shall be null and void." Act of May 31, 1900, c. 598, 31 Stat. 221, 236, 237.

The Dawes Commission thereafter required from all applicants for enrollment proof of descent from Choctaw Indians who remained in Mississippi and received patents for lands under the Fourteenth Article of the Treaty of 1830. This constituted a reversal of the principle previously adopted in making the McKennon Roll, to wit, a presumption that the ancestors of full-blood Choctaws residing in Mississippi had fully complied with the requirements of article 14. It resulted that only six or seven persons claiming as Mississippi Choctaws were enrolled under the act of May 31, 1900, although from 6,000 to 8,000 applications were filed in 1900 and the early part of 1901.

On April 1, 1901, the second party, already mentioned, sent by the Dawes Commission to Mississippi for the purpose of making a complete and accurate roll of Mississippi Choctaws, resumed hearings at Meridian, Mississippi, and held continuous sessions there and at other places in the state until the latter part of August. The Court of Claims finds that during these hearings and the making of this roll the conduct of Winton and associates increased the work of enrollment and impeded its progress. Being advised by Owen and believing that the McKennon Roll was a finality and constituted a favorable judgment in behalf of the Choctaws whose names appeared therein, Winton and associates advised all Indians who had been previously enrolled not to appear again before the Commission for identification. Nevertheless, as already stated, 6,000 or 8,000 applications for enrollment were made, of which only six or seven were accepted under the stringent rule of proof adopted by the Commission.

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*June 20, 1901, Winton, under advice of counsel, began taking new contracts with individual Choctaws living in Mississippi, in lieu of the previous contracts already mentioned. The new contracts were 834 in number, and embraced in all about 2,000 persons.

March 21, 1902, while preparation of the identification roll of Mississippi Choctaws was still in progress, an agreement was entered into between the Choctaw and Chickasaw Nations and the Dawes Commission in which, by sections 41, 42, 43, and 44, it was proposed to fix the status of the Mississippi Choctaws. This agreement, after some amendments in Congress, was approved by Act of July 1, 1902, and ratified by the Choctaws and Chickasaws on September 25, 1902 (chapter 1362, 32 Stat. 641, 651, 652). It was under this agreement, known as the Choctaw-Chickasaw Supplemental Agreement, that practically all Mississippi Choctaws were enrolled and secured their rights to allotments of Choctaw tribal lands. Section 41 as signed by the parties did not contain the full-blood rule of evidence—that is, that full-blood Choctaws living in Mississippi should be presumed to be descendants of Choctaws who had complied with the requirements of article 14 of the Treaty of 1830. It permitted all persons identified by the Commission under the provisions of section 21 of the act of July 28, 1898, as Mississippi Choctaws entitled to benefits under article 14 of the treaty to make bona fide settlement within the Choctaw-Chickasaw country at any time within six months after the date of the final ratification of the agreement, and upon proof of such settlement to the Commission within one year after the date of such ratification they were to be enrolled by the Commission as Mississippi Choctaws entitled to allotment, but declared:

> "The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after the date of the final ratification of this agreement."

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While the supplemental agreement *as thus proposed was pending in the Senate, Winton and associates presented a memorial to that body in behalf of the full-blood Mississippi Choctaws, reviewing prior legislation and praying that the provisions of the agreement then pending should be amended so that the full-blood rule of evidence should be established and the Mississippi Choctaws given time after identification to remove to the Choctaw country and longer time within which to make application. Senate Doc. 319, 57th Cong., 1st Sess. The memorial prayed that sections 41, 42, 43, and 44, which, it was alleged, imposed onerous conditions upon Mississippi Choctaws, should be struck out and plain provision made that persons whose names appeared upon the McKennon Roll, and such full-blood Mississippi Choctaws as might be identified by the Commission, and the wives, children, and granchildren of all such, should alone constitute the "Mississippi Choctaws" entitled to benefits under the agreement; and that all of them who should have removed to the Choctaw-Chickasaw lands within twelve months after official notification of their identification should be enrolled upon a separate roll designated "Mississippi Choctaws" and lands equal in value to lands allotted to citizens of the Choctaw and Chickasaw Tribes should be selected and set apart for each of them, and that after a bona fide residence for a period of a year and proof thereof they should receive patents as provided in the Atoka Agreement, and be treated in all respects as other Choctaws. An amendment embodying these suggestions was introduced in the Senate at Mr. Owen's request, submitted to the Department of the

Interior, and adversely reported upon. Section 41, however, was subsequently amended, and as finally enacted (32 Stat. 651) established the full-blood rule as a rule of evidence, allowed six months after date of final ratification of the agreement within which applications for identification might be made, *390 six months after *identification within which settlement might be made within the Choctaw-Chickasaw country, and one year after identification for making proof of such settlement to the Commission.

The passage of the Act of July 1, 1902, as thus amended, was opposed by Mr. Owen and the associates of Winton, who protested against the conditions contained in the amended sections relating to the Mississippi Choctaws as finally adopted.

The Indian Appropriation Act of March 3, 1903 (chapter 994, 32 Stat. 982, 997), contained the following:

> "That the sum of twenty thousand dollars, or so much thereof as is necessary, is hereby appropriated, to be immediately available, for the purpose of aiding indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, to be expended at the discretion and under the direction of the Secretary of the Interior."

The special disbursing agent of the Dawes Commission was sent to Mississippi to carry out this provision. He there organized parties and assembled all Indians who could be found and induced to come, and they were later transported by special trains to Indian Territory and there further maintained until placed upon allotments, and supplied with tools and other equipment and rations for six months, all at the expense of the United States. The total number thus transported, maintained, and equipped was 420.

The Dawes Commission received applications from approximately 25,000 persons for enrollment as Mississippi Choctaws. Of this number 2,534 were identified by the Commission; but of these 956 failed to remove to Indian Territory or submit proof of their removal and settlement within the time prescribed by law. The total number of applicants identified and finally enrolled and who have received allotments as members of the Choctaw Nation is 1,578, of whom only 833 *391 appear on the McKennon Roll, *and only 696 had contracts with Winton and his associates. 181 Mississippi Choctaws had voluntarily removed to the territory in 1891 and were received into the Choctaw Nation. These were carried on the rolls as Mississippi Choctaws, making the total enrollment 1,759; but the 181 Indians just mentioned were not regarded as defendants in this proceeding.

The funds derived from sales of allotted lands of enrolled Mississippi Choctaws subject to the restrictions upon alienation prescribed by section 1 of the Act of May 27, 1908 (chapter 199, 35 Stat. 312) are held by the government to the credit of the individual Indians entitled thereto. All other funds belonging to enrolled Mississippi Choctaws are held as tribal funds, the names being carried on a separate roll.

[1] As we construe the jurisdictional acts under which these claims were submitted to the Court of Claims, they contemplate not an action in personam to establish a personal liability against individual Indians, or a group of Indians, but a suit of an equitable nature against that class of Mississippi Choctaws who, through successful assertion of the right of citizenship in the Choctaw Nation, acquired allotments of lands in what formerly was the tribal domain, and a participation in funds held in trust by the United States; a suit having the object of imposing an equitable charge upon their funds and lands for a reasonable and proportionate contribution towards the value of services rendered and expenses incurred by the claimants in securing for said class of Indians a beneficial participation in the trust estate, according to the principle applied in Trustees v. Greenough, 105 U. S. 527, 532, et seq., 26 L. Ed. 1157, and Central Railroad v. Pettus, 113 U. S. 116, 122–127, 5 Sup. Ct. 387, 28 L. Ed. 915. The present suit is of that nature.

[2, 3] It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. *392 *The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it. Lone Wolf v. Hitchcock, 187 U. S. 553, 564, et seq., 23 Sup. Ct. 216, 47 L. Ed. 299; Tiger v. Western Investment Co., 221 U. S. 286, 310–316, 31 Sup. Ct. 578, 55 L. Ed. 738. In authorizing the present suit Congress evidently recognized that it was impracticable to bring before the court all interested individual Choctaws; hence, treating them as a class, it designated the representatives who should defend for them, by analogy to the familiar practice in equity, recognized in Equity Rule 38 (226 U. S. 659, 33 Sup. Ct. xxix). To the objection that the government's trusteeship of the funds of these Indians and its guardianship over their interests in the allotted lands made it necessary that the United States should be a party to the proceeding, it is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the Governor of the Choctaw Nation the representative of the defendants upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. We are clear,

therefore, that there is no substantial basis for the contention that the jurisdictional acts have the effect of depriving the Indians of their property without due process of law, and hence are in conflict with the Fifth Amendment, a contention which, while overruled by a majority of the Court of Claims, was acceded to by the Chief Justice in a concurring opinion. 51 Ct. Cl. 324–327.

[4] The claim of Winton, Owen, and associates, is based wholly upon services rendered—nothing being asked because of expenses incurred or moneys disbursed. According to the findings the services rendered were in the nature of professional services before Congress and its committees, individual Representatives *393 and Senators, the *Dawes Commission, etc., intended to establish the right of the Mississippi Choctaws to participation in the material benefits of citizenship in the Choctaw Nation, and to secure such legislation by Congress as might be needed for the practical attainment of the object sought. The findings render it clear that services of this nature, altogether proper in character—not lobbying, in the odious sense—were rendered by these claimants under particular employment by many individual Mississippi Choctaws, but with the object, incidentally, of benefiting the Mississippi Choctaws as a class, because only so could the clients of the claimants be benefited. We make no doubt that, for proper professional services rendered and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who receive the benefit, the same as if a like result had been reached through successful litigation in the courts. In either case there is the same curious analogy to the salvage services of the maritime law; and, while it may be more difficult to weigh the effect of a service rendered in promoting legislation and to estimate its value than in a case of successful litigation, we think the principle of Trustees v. Greenough and Central Railroad v. Pettus applies in the one case as in the other.

[5] The fact that in the present case the services were rendered under contracts with particular Indians, whether valid or invalid, is no obstacle to a recovery. Services not gratuitous, and neither mala in se nor mala prohibita, rendered under a contract that is invalid or unenforceable, may furnish a basis for an implied or constructive contract to pay their reasonable value. King v. Brown, 2 Hill (N. Y.) 485, 487; Erben v. Lorillard, 19 N. Y. 299, 302; Smith v. Administrators of Smith, 28 N. J. Law, 208, 218, 78 *394 Am. Dec. 49; *McElroy v. Ludlum, 32 N. J. Eq. 828, 833; Gay v. Mooney, Adm'r, 67 N. J. Law, 27, 687, 50 Atl. 596, 52 Atl. 1131; Gray v. N. Y. Central & Hudson River R. R. Co., 161 App. Div. (N. Y.) 924, 932, 145 N. Y. Supp. 1125, affirmed 239 U. S. 583, 587, 36 Sup. Ct. 176, 60 L. Ed. 451.

[6] And assuming the last set of contracts made by Winton and Owen with the Mississippi Choctaws (including the Daley contracts) be regarded as valid, they still do not create an obstacle to the present suit. As between the claimants and their own clients, the existence of valid express contracts would bar recovery upon an implied contract. But there was no privity between claimants and the Mississippi Choctaws as a class, no contract having been made with them in their aggregate capacity and the individual contracts not including all members of the class. Under the equitable doctrine that we hold applicable, claimants, having substantially performed the agreements, might demand compensation under them as against their own clients, and the latter would then be entitled to a ratable contribution upon the basis of a quantum meruit from their fellow beneficiaries whose interests in the trust estate were secured and rendered available through the services of claimants. And by way of avoiding circuity of action the equitable proceeding may well be brought, as it has been brought, by claimants directly against the beneficiaries of the trust; claimants waiving, as they must, any right to recover under the contracts the measure of compensation prescribed therein. Hence, whether valid or invalid, the contracts are important merely as they show that claimants were not intermeddlers, but were employed by large numbers of Mississippi Choctaws, members of the benefited class, and that their services were not intended to be gratuitous.

[7] But, in order that there may be an equitable charge in such a case, it is essential that the services rendered shall have been substantially instrumental in producing a result beneficial to the class of cestuis que *395 trustent upon whose *interests the charge is to be imposed. And while from the facts found it is altogether probable that the services of Winton and associates did materially conduce to bring about a result beneficial to the Mississippi Choctaws by furthering the measures of legislation and administration that were needed to give them a participation in the lands and funds of the Choctaw Nation, there is no specific finding of fact upon that subject. If, from the circumstantial facts as found, it followed as a necessary inference that the services did materially contribute to produce the effect indicated, it might be held that the ultimate fact resulted as a conclusion of law. See United States v. Pugh, 99 U. S. 265, 269–272, 25 L. Ed. 322. But the facts as found are inconclusive respecting the crucial point. Some of the services set forth in the findings clearly tended to

produce a beneficial result; but there were others having apparently a contrary tendency. The interference by Winton with the work of Commissioner McKennon in making up his roll, and with the work of the second party in making identifications; the insistence before Congress upon measures for granting to the Mississippi Choctaws the rights of citizenship in the Nation while retaining their residence in Mississippi; and the opposition to the passage of the Act of July 1, 1902, in its final form—may be mentioned. However reasonable and well-intended these acts on the part of the claimants may have been—attributable as probably they were to zeal in the interests of the Indians—it cannot be said to be free from doubt that the efforts of claimants, taken as a whole, advanced the claims of the Mississippi Choctaws as a class to citizenship in the Nation and constituted a material factor in producing the ultimate advantageous result.

[8, 9] But there were requests for additional findings, directed to the very point upon which findings are wanting. These requests were preferred under rules 90–95, but were filed more than the prescribed sixty days aft-

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er judgment. The *court in its discretion might have rejected them on this ground. Not doing this, however, it passed upon the merits of the requests, as was reasonable in a case so important and so complicated; and since, from the reasons given for rejecting them, it appears that the court to some extent misapprehended the nature of the main issue, and the bearing of the requested findings thereon, it cannot be said that had it not done so it would have rejected the requests because not filed in due season.

[10] Many of the requests, while suggestive of matters that might well have been included in the findings, either are not framed with sufficient definiteness to enable us to say that there was error in rejecting them, or are objectionable for other reasons. But those here stated ought to have been acceded to:

> XXIX–R (52 Ct. Cl. 128): "Whether or not the labor of Robert L. Owen in behalf of the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation, from July, 1896, to 1906, resulted in any benefit or value whatever to the Mississippi Choctaws."
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> XXXI–E (52 Ct. Cl. 130): "Whether or not the 1,643 Mississippi Choctaws who were admitted to citizenship in and received allotments as members of the Choctaw Nation obtained the right to become such citizens and thereby receive allotments as a result to any extent whatever of any of the labor and work done by Robert L. Owen and associates during the period of several years prior to the passage of the acts under which they were enrolled and allotted; and what compensation is equitable or justly due therefor on the principle of quantum meruit as required by the jurisdictional act in this case."

The reasons given for the rejection of these requests are not satisfactory; and for failure to make findings in response thereto, the judgment in the case of Winton and associates, No. 6, must be reversed, and the cause remanded for additional findings as requested.

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[11] *The claim in No. 12, Katie A. Howe, executrix of Chester Howe, deceased, like the one we have been discussing, is based upon alleged legal services rendered before Congress and the Interior Department in representing and protecting the interests of the Mississippi Choctaws and establishing their rights in and to lands in the Choctaw Nation. The findings show that Chester Howe, having acquired an interest in a large number of contracts taken by a firm of Hudson & Arnold, or the members of the firm, with individual Mississippi Choctaw claimants, having the object of securing the rights of the latter to allotments in the tribal lands of the Choctaw Nation and removing the Indians to the Indian Territory, was actively engaged for about a year and a half in pressing the claims of those Choctaws upon Congressmen and Senators, the subcommittee on Indian Affairs of the House of Representatives, the officials of the Indian Office, and the Secretary of the Interior. It is found not to have been established by the evidence that Howe's services were effective in establishing the claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, or that such legislation as was enacted, under which they received allotments in the tribal lands, was the result of his professional services. The vital element of a benefit conferred upon the Mississippi Choctaws as a class is lacking, and from what we have said it is manifest that the judgment of the Court of Claims as to this claim must be affirmed.

In the other cases covered by the present appeals, viz. Bounds, No. 7, London, No. 8, Field and Lindly, No. 9, Beckham, No. 10, and Vernon, No. 11, the findings show no benefit conferred upon the Mississippi Choctaws as a class for which recovery can be had under the jurisdictional acts. The claims of Bounds, Beckham, and Vernon are based upon services rendered and expenses incurred in behalf of individual Indians. London did nothing to advance the claims of

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the Mississippi Choctaws to citizen*ship in the Nation. Lindly and Field claim as associates of Chester Howe; it does not appear that Lindly performed any meritorious service for the Indians; Field was active in impressing upon Congressmen and Senators his views as to necessary and proper legislation for securing the rights of the Mississippi Choctaws to citizenship in the Choctaw Nation; but the extent and effect of such services do not appear, nor does it appear that the legislation finally enacted was the result of said services. In none of these cases does the record show any proper foundation laid for a remand for further findings. All these claims were properly rejected.

No. 6. Judgment reversed, and the cause remanded for further findings of fact as above specified.

Nos. 7, 8, 9, 10, 11, and 12. Judgments affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS took no part in the consideration or decision of these cases.

(255 U. S. 407)

UNITED STATES ex rel. MILWAUKEE SOCIAL DEMOCRATIC PUB. CO. v. BURLESON, Postmaster General.

(Argued Jan. 18 and 19, 1921. Decided March 7, 1921.)

No. 155.

1. **Constitutional law 🔑318—Hearing before Third Assistant Postmaster General on question of revoking second-class privilege satisfies due process.**

A hearing before the Third Assistant Postmaster General on the question of revoking a newspaper's second-class mail privilege of which the publisher had due notice, and at which it was represented by its president and was fully heard, satisfied the requirement of due process of law when fairly conducted.

2. **War 🔑4—Espionage Act of 1917 is constitutional.**

The Espionage Act of June 15, 1917, is a valid constitutional law.

3. **Post office 🔑14—When newspaper contains other than mailable matter, second-class permit may be revoked.**

Under Act March 3, 1879, c. 180, relative to the classification of the mails, and Rev. St. § 396 (Comp. St. § 582), making it the duty of the Postmaster General to superintend the business of the Post Office Department and execute all laws relating to the postal service, the Postmaster General was justified in revoking a second-class mail permit granted to a newspaper, if it had come to be so edited as to contain other than mailable matter.

4. **Post office 🔑14—Finding by Postmaster General that newspaper has published prohibited matter not disturbed, unless plainly wrong.**

The conclusion of the Postmaster General, in revoking a newspaper's second-class mail privileges, that it had published matter rendered nonmailable by Espionage Act, tit. 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d), will not be disturbed by the courts, unless they are clearly of the opinion that it is wrong.

5. **Post office 🔑14—Newspaper articles, criticizing the war, the government, etc., held to render newspaper nonmailable.**

Newspaper articles, denouncing the war, the government, the President, and Congress, and wartime legislation, and impliedly counseling violations of the Draft Law, stating that soldiers in large numbers were becoming insane, etc., *held* to render the newspaper nonmailable under Espionage Act, tit. 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d), on the ground that it was conveying false reports and false statements with intent to promote the success of the enemies of the United States, and attempting to cause disloyalty and refusal of duty in the military and naval forces and obstruct the recruiting and enlistment service of the United States, in violation of section 3, tit. 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).

6. **Post office 🔑14—Second-class mail privileges revocable without reservation of right in permit.**

Under Act March 3, 1901, c. 851, providing that second-class mail privileges shall not be suspended or annulled until after a hearing, a permit granting such privileges is revocable, without a specific reservation in the permit of the right to revoke.

7. **Post office 🔑14—Postmaster General authorized to revoke second-class mail privilege because of previous publication of nonmailable matter.**

Under Rev. St. § 396 (Comp. St. § 582), authorizing the Postmaster General to execute all laws relating to the postal service, where a newspaper for more than five months had contained almost daily matter declared nonmailable by Espionage Act, tit. 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d), the Postmaster General had a right to conclude that it would continue its disloyal publications and to suspend its second-class mail privileges, until it should apply for a renewal of such privileges on a showing that its paper conformed to law.

Mr. Justice Brandeis and Mr. Justice Holmes, dissenting.

In Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on the relation of the Milwaukee Social Democratic Publishing Company, against Albert S. Burleson, Postmaster General of the United States. A judgment dismissing the petition was affirmed by the Court of Appeals of the District of Columbia (49 App. D. C. 26, 258 Fed. 282), and the relator brings error. Affirmed.

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*Messrs. Henry F. Cochems, of Milwaukee, Wis., and Charles Poe, of Washington, D. C., for plaintiff in error.

Mr. William H. Lamar, of Washington, D. C., and Mr. Solicitor General Frierson, of Chattanooga, Tenn., for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

After a hearing on September 22, 1917, by the Third Assistant Postmaster General, of the time and character of which the relator (plaintiff in error) had due notice and at which it was represented by its president, an order was entered, revoking the second-class mail privilege granted to it in 1911 as publisher of the Milwaukee Leader. So far as appears, all that the relator desired to say or offer was heard and received. This hearing was had and *the order was entered upon the charge that articles were appearing in relator's paper so violating the provisions of the National Defense Law, approved June 15, 1917, which has come to be popularly known as the Espionage Act of Congress (40 Stat. 217), as to render it "nonmailable" by the express terms of title 12 of that act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d). On appeal to the Postmaster General the order was approved. Thereupon the relator filed a petition in the Supreme Court of the District of Columbia, praying that a writ of mandamus issue, commanding the Postmaster General to annul his order and restore the paper to the second-class privilege. To a rule to show cause the Postmaster General answered, and a demurrer to his answer being overruled, and the relator not pleading further, the court discharged the rule and dismissed the petition. The Court of Appeals of the District of Columbia affirmed the judgment of the trial court, and, the constitutional validity of laws of the United States being involved, the case was brought here by writ of error.

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The grounds upon which the relator relies are, in substance, that to the extent that the Espionage Act confers power upon the Postmaster General to make the order entered against it, that act is unconstitutional, because it does not afford relator a trial in a court of competent jurisdiction; that the order deprives relator of the right of free speech, is destructive of the rights of a free press, and deprives it of its property without due process of law.

[1] That a hearing, such as was accorded the relator, on precisely such a question as is here involved, when fairly conducted, satisfies all of the requirements of due process of law, has been repeatedly decided. Smith v. Hitchcock, 226 U. S. 53, 60, 33 Sup. Ct. 6, 57 L. Ed. 119; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; Lewis Publishing Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190.

[2] Since the petition in this case was filed, it has also become settled that the Espionage Act is a valid, constitu*tional law. Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561; Debs v. United States, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173.

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The first comprehensive law providing for the classification of mails was enacted on March 3, 1879 (20 Stat. 355). From that time to this, mail classification, frequently approved by this court, has dealt only with "mailable matter." In section 7 of that act (Comp. St. § 7302), still in effect, "mailable matter" is divided into four classes, and by section 10 (Comp. St. § 7304) the second class of such "mailable matter" is defined as including newspapers and periodicals. By section 1 of title 12 of the act of June 15, 1917, supra (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10401a), any newspaper violating any provision of the act is declared to be "nonmailable matter," which shall "not be conveyed in the mails or delivered from any post office or by any letter carrier."

The extremely low rate charged for second-class mail—to carry it was said, in argument, to cost seven times the revenue which it yields—is justified as a part of "the historic policy of encouraging by low postal rates the dissemination of current intelligence." It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. 229 U. S. 301, 304, 33 Sup. Ct. 867, 57 L. Ed. 1190.

By now more than 40 years of departmental practice, admission to the privilege of this second-class mail has been obtained for a publication only by a permit, issued by the Postmaster General after a hearing and upon a showing made, satisfactory to him, or his authorized assistants, that it contains and will continue to contain only mailable matter and that it will meet the various statutory and other requirements. Houghton v. Payne, 194 U. S. 88, 94, 24 Sup. Ct. 590, 48 L. Ed. 888.

[3] That the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it has long been recognized by statute and by many decisions *of this court. 31 Stat. 1107; Smith v. Hitchcock, 226 U. S. 53, 57, 33 Sup. Ct. 6, 57 L. Ed. 119; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894. Under these statutes and decisions, if the newspaper of the relator had come to be so edited that it contained other than "mailable matter," plainly it was the intention of Congress that it should no longer be carried as second-class mail and therefore the order to revoke the permit which had been granted to relator was proper and justified; and that it had become so changed in character is the holding of the Postmaster General and of the two lower courts which we are reviewing.

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For the purpose of preventing disloyalty and disunion among our people of many origins, and to the end that a united front should be presented to the enemy, the Espionage Act, one of the first of the national defense laws enacted by Congress after the entry of the United States into the World War (approved June 15, 1917, 40 Stat. 217), provided severe punishment for any person who "when the United States is at war" shall willfully make or convey false reports or false statements with intent to interfere with the operation and success of the military or naval forces of the country, or with the intent to promote the success of its enemies, or who shall cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in such forces, or who shall willfully obstruct the recruiting and enlistment service of the United States (section 3, tit. 1 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c]). One entire title of this act (title 12) is devoted to "Use of the Mails," and in the exercise of its practically plenary power over the mails (Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Public Clearing House v. Coyne, 194 U. S. 497, 506, 507, 24 Sup. Ct. 789, 48 L. Ed. 1092; Lewis Publishing Co. v. Morgan, 229 U. S. 288, 313, 33 Sup. Ct. 867, 57 L. Ed. 1190) Congress therein provided that any newspaper published in violation of any of the provisions of the act should be "nonmailable" and should not be "conveyed in the mails or delivered from any post office or by any letter carrier."

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*It was under the provisions of this wartime act and under the specific injunction of section 396 of the Revised Statutes of the United States (Comp. St. § 582), declaring it to be the duty of the Postmaster General to "superintend generally all the business of the [Post Office] Department and to execute all laws relating to the postal service," that the order in this case was entered.

The Postmaster General avers that, upon the hearing which we have described, he found, that beginning within a week after the declaration of war against the German Government and continuing to the date of the revocation of the second-class privilege herein, the relator had published in its newspaper frequently, often daily, articles which contained false reports and false statements, published with intent to interfere with the success of the military operations of our government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service. For this cause, exercising the power which we have seen had been invested in the Postmaster General by statute for almost 40 years, and which had frequently been exercised by his predecessors, the respondent revoked the scond-class privilege which had been granted to the relator. A similar executive authority with respect to matters within their jurisdiction has been given to the heads of all the great departments of our government and is constantly exercised by them.

This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts (the claim of the relator was heard and rejected by two courts before this re-examination of it in this court), but it is also subject to control by Congress and by the President of the United States. Under that Constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all three departments of the government, if those

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rights *should be invaded by any ruling of the Postmaster General.

[4] All this being settled law, there remains the question whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer, which are admitted by the demurrer; for the law is that the conclusion of the head of an executive department of the government on such a question, when within his jurisdiction, will not be disturbed by the courts, unless they are clearly of the opinion that it is wrong. Smith v. Hitchcock, 226 U. S. 53, 60, 33 Sup. Ct. 6, 57 L. Ed. 119; Houston v. St. Louis, etc., Packing Co., 249 U. S. 479, 484, 39 Sup. Ct. 332, 63 L. Ed. 717, and cases cited.

In the answer of the Postmaster General there were quoted more than 50 excerpts from editorial articles which appeared in relator's newspaper at intervals between April 14 and September 13, 1917—the first five months after our country entered the Great War—upon consideration of which, with others not reproduced, he averred, his order was based.

[5] Without going much into detail: It was declared in the quoted articles that the war was unjustifiable and dishonorable on our part, a capitalistic war, which had been forced upon the people by a class, to serve its selfish ends. Our government was denounced as a "plutocratic republic," a financial and political autocracy, and resident Russians were praised for defaming it. Other articles denounced the draft law as unconstitutional, arbitrary, and oppressive, with the implied counsel that it should not be respected or obeyed, and it was represented that soldiers in France were becoming insane in such numbers that long trains of closed cars were being used to convey them away from the battle front. It was confidently asserted that the Constitution of the United States was purposely made difficult of amendment, in order that we might not have real democracy in this country, the Presi-

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dent was de*nounced as an autocrat, and the war legislation as having been passed by a "rubber stamp Congress." In the guise of argument these articles sought to convince the readers of them that soldiers could not legally be sent outside the country, and that our government was waging a war of conquest, when Germany was ready to make an honorable peace. The Food Control Law was denounced as "Kaiserizing America." It was declared that we were fighting for commercial supremacy and world domination only, and that when the "financial kings" concluded that further fighting might endanger their loans to the Allies they would move for peace, which would quickly come. Our "Allies" were repeatedly condemned and our enemies frequently praised.

These publications were not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of them. Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it.

Without further discussion of the articles, we cannot doubt that they conveyed to readers of them false reports and false statements, with intent to promote the success of the enemies of the United States, and that they constituted a willful attempt to cause disloyalty and refusal of duty in the military and naval forces, and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law (Schenck v. United States, Frohwerk v. United States, and Debs v. United States, supra), and that therefore their publication brought the paper containing them within the express terms of title 12 of that law, declaring that such a publication shall be
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*"nonmailable" and "shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

While written more adroitly than the usual pro-German propaganda of that time, they nevertheless prove clearly that the publisher of these articles was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our government was engaged and to induce them to lend aid and comfort to its enemies. The order of the Postmaster General not only finds reasonable support in this record, but is amply justified by it.

We shall notice further only the contention that if it should be found that the Postmaster General had authority to revoke the second-class privilege as to a single issue of the paper, nevertheless he did not have power to make such an order applicable to the indefinite future.

[6] The second-class privilege ever since 1879 has been granted to a newspaper, as we have seen, only on application of its publisher for entry of it to that class. Upon such an application, a searching investigation of the character of the publication is made by the Postmaster General, under rules and regulations prescribed by him, which experience has proved necessary to prevent frauds upon the government (United States Postal Laws and Regulations 1913, §§ 411–435, inclusive; 229 U. S. 306, 33 Sup. Ct. 867, 57 L. Ed. 1190), and two representative copies of the issue nearest to the date of the application are required to be filed. If the publication is found to be entitled to the second-class privilege, a permit to that effect is issued, which contains, as did the permit to the relator, the provision that "the authority herein given is revocable upon determination by the department that the publication does not conform to law." Such a permit, however, would be equally revocable without any such specific reservation. 31 Stat. 1107; Smith v. Hitchcock, 226 U. S. 53, 60, 33 Sup. Ct. 6, 57 L. Ed. 119.
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[7] *It is a reasonable presumption that the character of the publication as one entitled to the second-class privilege, when thus established, will continue to be substantially maintained, and therefore such a permit is made applicable to the indefinite future. For the same reason, and because it would not be practicable to examine each issue of a newspaper, the revocation of a permit must continue until further order. Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country, to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it "nonmailable," it was reasonable to conclude that it would continue its disloyal publications, and it was therefore clearly within the power given to the Postmaster General by R. S. § 396, "to execute all laws relating to the postal service," to enter, as was done in this case, an order suspending the privilege until a proper application and showing should be made for its renewal. The order simply withdrew from the relator the second-class privilege, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do, but for reasons not difficult to imagine, it preferred this futile litigation, undertaken upon the theory that a government competent to wage war against its foreign enemies was powerless against its insidious foes at home. Whatever injury the relator suffered was the result of its own choice and the judgment of the Court of Appeals is

Affirmed.

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*Mr. Justice BRANDEIS, dissenting. This case arose during the World War; but it presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether in times of peace our press shall be free.

The denial to a newspaper of entry as second-class mail, or the revocation of an entry previously made, does not deny to the paper admission to the mail; nor does it deprive the publisher of any mail facility. It merely deprives him of the very low postal rates, called second-class, and compels him to pay postage for the same service at the rate called third-class, which was, until recently, from 8 to 15 times as high as the second-class rate.[1] Such is the nature and the only effect of an order denying or revoking the entry. See Postal Laws and Regulations, §§ 421, 422, and 423. In this case entry to the second-class mail was revoked because the paper had, in the opinion of the Postmaster General, systematically inserted editorials and news items which he deemed unmailable. The question presented is: Did Congress confer upon the Postmaster General authority to deny second-class postal rates on that ground? The question is one of statutory construction. No such authority is granted in terms in the statutes which declare what matter shall be unmailable. Is there any provision of the postal laws from which the intention of Congress to grant such power may be inferred? The specific reason why the Postmaster General deemed these editorials and news items unmailable was that he considered them violative of title 12 of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d). But it is not contended that this specific reason *418 is of *legal significance. The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.[2] The question of the scope of the Postmaster General's power is presented to us on the following record:

Some years prior to 1917 the Milwaukee Leader, a daily newspaper published by the Milwaukee Social Democratic Publishing Company, made application to use the second-class mail, was declared entitled to do so, and thereafter used it continuously. It built up a large circulation, of which about 9,000 copies were distributed daily through the second-class mail. In September, 1917, its publisher was directed to show cause—

> "why the authorization of admission * * * to the second-class mail (matter) should not be revoked upon the following ground:
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> "The publication is not 'a newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations."

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*That section relates, not specifically to the second-class mail, but to all mail. It recites the provisions of title 12 of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 230, which declares unmailable all letters, pictures, publications and things "in violation of any of the provisions" of that act, and prescribes fine and imprisonment as punishment for the use or attempt to use the postal service for the transmission of such unmailable matter.[3] On this notice to show cause the Third Assistant Postmaster General held the customary informal hearing. The publisher of the Milwaukee Leader had not been convicted by any court of violating the Espionage Law; and its representative denied that it had ever committed any act in violation of it. But the Third Assistant Postmaster General issued on October 3, 1917, to the postmaster at Milwaukee the instruction that the Milwaukee Leader—

> "is not entitled to transmission in the mail at second-class rates of postage because it appears from the evidence in possession of the department that the publication is not a 'newspaper or other periodical publication' within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in section 481½, Postal Laws and Regulations."

This determination and action were confirmed by the Postmaster General, and the postmaster at Milwaukee thereafter denied to the publication transmission at the rates provided by law for second-class mail. The order did not forbid to the Milwaukee Leader all use of the mails, nor did it limit in any way the use of the mail facilities. It merely revoked the so-called second-class mailing permit, and the effect of this was to impose a *420 *higher rate of postage on every copy of the newspaper thereafter mailed.

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[1] Act March 3, 1885, c. 342, § 1, 23 Stat. 387; Act March 3, 1879, c. 180, § 17, 20 Stat. 359, 360 (Comp. St. § 7315). Compare Act Oct. 3, 1917, c. 63, § 1101, 40 Stat. 327 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7358a). See Message of the President, February 22, 1912, transmitting the Report of the Commission on Second-Class Mail Matter, 62d Cong., 2d Session, H. R. Doc. 559, pp. 56-61.

[2] Criminal Code, § 211, Comp. St. § 10381 (obscene matter, information concerning abortion); section 212, Comp. St. § 10382 (obscene, libelous or threatening matter upon envelopes or postal cards); section 213, Comp. St. § 10383 (matter concerning lotteries); section 215, Comp. St. § 10385 (schemes to defraud); section 217, Comp. St. § 10387 (poisons, insects, reptiles, explosives, intoxicating liquors). By Act March 4, 1911, c. 241, § 2, section 211 of the Criminal Code, supra, was amended to include matter of a character to incite arson, murder, or assassination; by Act March 3, 1879, c. 180, § 15, 20 Stat. 359 (Comp. St. § 7307), matter violating copyright laws was excluded; by Act July 31, 1912, c. 263, § 1, 37 Stat. 240 (Comp. St. § 10416), prize-fight films were excluded; by Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a-10387c), advertisements and solicitations for orders for intoxicating liquors in prohibition states.

[3] Like punishment is provided in all statutes referred to in note 2; except that mailing matter violative of the Copyright Law is not punishable criminally. The maximum punishment for mailing prize-fight films is a fine of $1,000 and imprisonment for one year.

The return filed herein by the Postmaster General alleges that this order "involved the exercise of judgment and discretion on his part," and is "not subject to be reviewed, set aside, or controlled by a court of law"; but he gives this justification for his action:

> "By representations and complaints from sundry good and loyal citizens of the United States and from personal reading and consideration of the issues of the said relator's publication, from the date of the declaration of war down to the time of the service of the citation upon it and the hearing granted in pursuance thereof, it seemed to this respondent in the exercise of his judgment and discretion and in obedience to the duty on him reposed, as well by the general statutes as by the special provisions of said Espionage Law, that the provisions of the latter act were systematically and continually violated by the relator's publication."

It thus appears that the Postmaster General, in the exercise of a supposed discretion, refused to carry at second-class mail rates all future issues of the Milwaukee Leader, solely because he believed it had systematically violated the Espionage Act in the past. It further appears that this belief rested partly upon the contents of past issues of the paper filed with the return and partly upon "representations and complaints from sundry good and loyal citizens," whose statements are not incorporated in this record and which do not appear to have been called to the attention of the publisher of the Milwaukee Leader at the hearing or otherwise. It is this general refusal thereafter to accept the paper for transmission at the second-class mail rates which is challenged as being without warrant in law.

In discussing whether Congress conferred upon the Postmaster General the authority *421 which he undertook to exer*cise in this case, I shall consider, first, whether he would have had the power to exclude the paper altogether from all future mail service on the ground alleged; and, second, whether he had power to deny the publisher the second-class rate.

First. Power to exclude from the mails has never been conferred in terms upon the Postmaster General. Beginning with the Act of March 3, 1865, c. 89, § 16, 13 Stat. 507, relating to obscene matter and the Act of July 27, 1868, c. 246, § 13, 15 Stat. 196, concerning lotteries, Congress has from time to time forbidden the deposit in the mails of certain matter. In each instance, in addition to prescribing fine and imprisonment as a punishment for sending or attempting to send the prohibited matter through the mail, it declared that such matter should not be conveyed in the mail, nor delivered from any post office nor by any letter carrier.[4] By section 6 of the Act of June 8, 1872 (Rev. Stat. 396 [Comp. St. § 582]), the Postmaster General was empowered to "superintend * * * the business of the department, and execute all laws relative to the postal service." As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally *422 exercised.[5] But while he may *thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future mail tendered by a particular person or the future issues of a particular paper shall be refused transmission.

Until recently, at least, this appears never to have been questioned and the Post Office Department has been authoritatively advised that the power of excluding matter from the mail was limited to such specific matter as upon examination was found to be unmailable and that the Postmaster General could not make an exclusion order operative upon future issues of a newspaper.

In 1890 Tolstoi's Kreutzer Sonata had been excluded from the mails as indecent. Certain newspapers began to publish the book in installments and their position was referred to the Attorney General. He replied:

> "* * * I do not see that it necessarily follows that every installment of the story thus published is obscene, because the story as a whole is declared to be so. It may be, indeed, that one or more chapters of this story are entirely unexceptionable in character. If so, the exclusion, as unmailable, of newspapers containing them might involve serious consequences to yourself." 19 Op. Atty. Gen. 667, 668.

Again, in 1908, President Roosevelt asked the Attorney General if the law permitted him to deny the mails to an anarchist newspaper published in the Italian language, in which appeared articles advocating the murder of the police force of Patterson and the burning of the city. The Attorney General advised him that such an article constituted a seditious libel (it has since been made criminal by statute—Act of March 4, 1911, c. 241, § 2 [Comp. St. § 10381]), and that—

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[4] Criminal Code, §§ 211, 212, 213, 217 (Comp. St. §§ 10381-10383, 10387); Act March 3, 1917, c. 162, § 5, 39 Stat. 1069 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a, 10387c); Espionage Act June 15, 1917, c. 30, title 12, 40 Stat. 230.

[5] Orders excluding individual issues of newspapers or periodicals because of unmailable matter contained therein were sustained in Masses Publishing Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999, and Anderson v. Patten (D. C.) 247 Fed. 382. In Post Publishing Co. v. Murray, 230 Fed. 773, 145 C. C. A. 83, and Brooklyn Daily Eagle v. Voorhies (C. C.) 181 Fed. 579, such orders were enjoined as being unwarranted by the facts. See, also, Davis v. Brown (C. C.) 103 Fed. 909.

> "The Postmaster General [would] be justified in excluding from the mails any issue of any periodical, otherwise entitled to the privilege of second-class mail *423 *matter, which shall contain any article constituting a seditious libel and counseling such crimes as murder, arson, riot, and treason." 26 Op. Atty. Gen. 555.

But the Attorney General was careful to point out that the law gave no authority to exclude issues of the paper which should contain no objectionable matter:

> "It must be premised that the Postmaster General clearly has no power to close the mails to any class of persons, however reprehensible may be their practices or however detestable their reputation; if the question were whether the mails could be closed to all issues of a newspaper, otherwise entitled to admission, by reason of an article of this kind in any particular issue, there could be no doubt that the question must be answered in the negative." Page 565.

If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them, tantamount to a denial of the right of circulation. Congress has not granted to the Postmaster General power to deny the right of sending matter by mail even to one who has been convicted by a jury and sentenced by a court for unlawful use of the mail and who has been found by the Postmaster General to have been habitually using the mail for frauds or lotteries and is likely to do so in the future. It has, in order to protect the public, directed postmasters to return to the sender mail addressed to one found by the Postmaster General to be engaged in a scheme to defraud or in a lottery enterprise.[6] But beyond this Congress has *424 never *deemed it wise, if, indeed, it has considered it constitutional, to interfere with the civil right of using the mail for lawful purposes.[7]

The Postmaster General does not claim here the power to issue an order directly denying a newspaper all mail service for the future.[8] Indeed, he asserts that the mail *425 *is still open to the Milwaukee Leader upon payment of first, third, or fourth class rates. He contends, however, that in regard to second-class rates special provisions of law apply under which he may deny that particular rate at his discretion. This contention will now be considered.

Second. The second-class mail rate is confined to newspapers and other periodicals, which possess the qualifications and comply with the conditions prescribed by Congress.[9] In the present case the Postmaster General insists that by reason of alleged past viola-

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[6] Revised Statutes, § 3929, as amended by Act Sept. 19, 1890, c. 908, § 2, 26 Stat. 465 (Comp. St. § 7411) as amended by Act March 2, 1895, c. 191, § 4, 28 Stat. 964 (Comp. St. § 7412).

By section 2 of the Act of May 16, 1918, c. 75, 40 Stat. 554 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212cc, 10401d)—enacted after this case had gone to judgment in the trial court—authority was conferred upon the Postmaster General to stop, in like manner, delivery of mail to a person whom he finds "upon evidence satisfactory to him" to be using the mails in violation of the Espionage Act.

[7] In the Sixty-Third Congress, Third Session (1915), a bill, H. R. 20644, was introduced to deny absolutely the use of the mail to any person who, in the opinion of the Postmaster General, "is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libelous character." It was objected: The "bill would invest one man * * * with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. * * * Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty for an offense not clearly defined. * * * Under such circumstances as these it is not safe to leave to the decision of one man, after an ex parte investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specified act is the only safeguard against an arbitrary and tyrannical power." The bill failed of passage. Hearings before Committee on Post Office and Post Roads, February 1, 1915, On Exclusion of Certain Publications from the Mails, pp. 38, 39, 63d Cong. 3d Sess. See The Postal Power of Congress, by Lindsay Rogers, Johns Hopkins University Studies (1916, Series XXXIV, No. 2) pp. 158, 159.

[8] In a letter to Senator Bankhead the Postmaster General said:

"I will state generally with regard to the action of the department that no newspaper or periodical has been denied the privilege of the mails as such. Particular issues of certain publications have been found to contain matter that would interfere with the operation and success of the military and naval forces, etc., etc. * * * and therefore unmailable under the act in question." Cong. Rec. Aug. 22, 1917, pp. 6851-6857. See, also, a letter to Mr. Moon, Chairman of the House Committee on Post Offices and Post Roads, House Report No. 109, 65th Congress, 1st Session.

[9] Act March 3, 1879, c. 180, § 14, 20 Stat. 359 (Comp. St. § 7306): "That the conditions upon which a publication shall be admitted to the second-class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other sub-tions of title 12 of the Espionage Act, two of the conditions had ceased to be fulfilled. His reasons are these: The Mail Classification Act of March 3, 1879, c. 180, 20 Stat. 358, provides by section 14 (Comp. St. § 7306) that a newspaper to be mailable at the second-class rates "must be regularly issued at stated *426 intervals as frequently *as four times a year," and that it must be "originated and published for the dissemination of information of a public character." If any issue of a paper has contained matter violative of the Espionage Act, the paper is no longer "regularly issued"; and likewise it has ceased to be a paper "published for the dissemination of information of a public character."[10] The argument is obviously unsound. The requirement that the newspaper be "regularly issued" refers, not to the propriety of the reading matter, but to the fact that publication periodically at stated intervals must be intended and that the intention must be carried out. Similarly, the requirement that the paper be "published for the dissemination of information of a public character" refers not to the reliability of the information or the soundness of the opinions expressed therein, but to the general character of the publication. The Classification Act does not purport to deal with the effect of, or the punishment for, crimes committed through a publication. It simply provides rates and classifies the material which may be sent at the respective rates. The act says what shall *427 *constitute a newspaper. Undoubtedly the Postmaster General has latitude of judgment in deciding whether a publication meets the definition of a newspaper laid down by the law, but the courts have jurisdiction to decide whether the reasons which an administrative officer gives for his actions agree with the requirements of the statute under which he purports to act. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. The fact that material appearing in a newspaper is unmailable under wholly different provisions of law can have no effect on whether or not the publication is a newspaper. Although it violates the law, it remains a newspaper. If it is a bad newspaper, the act which makes it illegal, and not the Classification Act, provides the punishment.

There is also presented, in brief and argument, a much broader claim in support of the action of the Postmaster General. It is insisted that a citizen uses the mail at second-class rates, not as of right, but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered, and may not complain if it is denied to him. The service is called the second-class privilege. The certificate evidencing such freedom is spoken of as a permit. But, in fact, the right to the lawful postal rates is a right independent of the discretion of the Postmaster General. The right and conditions of its existence are defined and rest wholly upon mandatory legislation of Congress. It is the duty of the Postmaster General to determine whether the conditions prescribed for any rate exist. This determination in the case of the second-class rate may involve more subjects of inquiry, some of them, perhaps, of greater difficulty, than in cases of other rates. But the function of *428 the Postmaster General is the *same in all cases. In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office.[11] And it is not a function which either involves or permits the

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stantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Act Aug. 24, 1912, c. 389, § 1, 37 Stat. 550, applying to publications of benevolent, professional, etc., societies, educational institutions, state boards, trade unions, etc.

Act Aug. 24, 1912, c. 389, § 2, 37 Stat. 553, requiring a sworn statement of the names of editors, owners, stockholders, bondholders, etc., and that all paid matter be plainly marked "advertisement." Lewis Pub. Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190.

[10] In a letter to Senator Bankhead August 22, 1917, Cong. Rec. pp. 6851-6857, submitted at the argument, the Postmaster General said:

"For many (?) years this department has held publications not to be 'regularly issued' in contemplation of law when any issue contained nonmailable matter; and when the second-class privilege has been withdrawn under such circumstances, the formal notice of withdrawal has contained the statement that the second-class privilege has been revoked on both the grounds stated."

In his report for the year ending June 30, 1918, the Postmaster General says (page 46):

"In the administration of the law governing second-class matter it was again found necessary to revoke the second-class mail privilege of some publications for the reason that their contents consisted more or less of matter which was nonmailable under the Espionage and other laws, and which, therefore, removed them from the class of publications entitled to that privilege."

The statement is repeated in the Postmaster General's Report for the Year Ending June 30, 1919, p. 25.

[11] The orders of the Postmaster General excluding periodicals from second-class mail, sustained in Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888, Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and Smith v. Hitchcock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119; as well as the fraud orders sustained in Public Clearing House v. Coyne, 194 U. S. 497,

exercise of discretionary power. The so-called permit is mere formal notice of his judgment, but indispensable to the publisher because without it the local postmaster will not transmit the publication at second-class rates. The same sort of permit is necessary for the same bulk service at first, third or fourth-class rates.[12] There is nothing, in short, about the second-class rate which furnishes the slightest basis in law for differentiating it from the other rates so far as the discretion of the Postmaster General to grant or withhold it is concerned.

Third. Such is the legislation of Congress. It clearly appears that there was no express grant of power to the Postmaster General to deny second-class mail rates to future issues of a newspaper because in his opinion it had systematically violated the Espionage Act in the past, and it seems equally clear that

there is no basis for the conten*tion that such power is to be implied. In respect to newspapers mailed by a publisher at second-class rates there is clearly no occasion to imply this drastic power.[13] For a publisher must deposit with the local postmaster, before the first mailing of every issue, a copy of the publication which is now examined for matter subject to a higher rate and in order to determine the portion devoted to advertising. Act of March 3, 1879, c. 180, § 12, 20 Stat. 359 (Comp. St. § 7305); Act of October 3, 1917, c. 63, § 1101, 40 Stat. 327 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7358a). If there is illegal material in the newspaper, here is ample opportunity to discover it and remove the paper from the mail. Indeed, of the four classes of mail, it is the second alone which affords to the postal official full opportunity of ascertaining, before deposit in the mail, whether that which it is proposed to transmit is mailable matter. But even if the statutes were less clear in this respect than they seem to me, I should be led to adopt that construction because of the familiar rule that—

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States v. Delaware & Hudson Co., 213 U. S. 366, 408, 29 Sup. Ct. 527, 536 (53 L. Ed. 836).

For adoption of the construction urged by the Postmaster General would raise not only a grave question, but a "succession of constitutional doubts," as suggested in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422, 29 Sup. Ct. 115, 119, 53 L. Ed. 253. It would in practice seriously abridge

the free*dom of the press. Would it not also violate the First Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the Fifth Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate article 3 of the Constitution? It would in practice subject publishers to severe punishment for an infamous crime without trial by jury. Would it not also violate the Sixth Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the Eighth Amendment? If the construction urged by the Postmaster General is rejected, these questions need not be answered; but it seems appropriate to indicate why the doubts raised by them are grave.

(a) The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which carries on its face immoral expressions, threats, or libels. It may go further, and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails. In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Lewis Pub. Co. v. Morgan, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. 1190. As stated in Ex parte Jackson, 96 U. S. 727, 732 (24 L. Ed. 877):

> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

In other words, the postal power, like all its other powers, is subject to the limitations of the Bill of Rights. Burton v. United States, 202 U. S. 344, 371, 26 Sup. Ct. 688, 50

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24 Sup. Ct. 789, 48 L. Ed. 1092, and that with which the court refused to interfere by certiorari in Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. 1135, involved merely decisions of this nature. In American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, his fraud order was set aside because wholly unwarranted by the facts.

[12] Under recent legislation a "permit" may be issued for either first, third or fourth class mail. Under Act April 28, 1904, c. 1759, § 2, as amended by Act May 18, 1916, c. 126, § 13 (Comp. St. § 7364), and Act April 24, 1920 (41 Stat. 583), identical articles may be deposited in large quantities without stamps affixed and sent at first, third or fourth class rates, according to their nature, by paying the postage in advance in cash in a lump sum.

[13] In the one case where drastic preventive measures were considered necessary—in the case of the foreign language press—Congress granted discretionary power to the Postmaster General specifically and in plain terms. By Act Oct. 6, 1917, c. 106, § 19, 40 Stat. 425, Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½j (the Trading with the Enemy Act), it was provided that, until the end of the war, foreign language papers should be nonmailable unless a translation should have been previously filed with the local postmaster, but that the Postmaster General might at his discretion grant a permit to mail without such translation. This act applied to publications sent by any class of the mails.

L. Ed. 1057, 6 Ann. Cas. 362. Compare Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. Congress may not through its postal police power put limitations upon the freedom of the press which, if directly attempted, would be *431 unconstitu*tional. This court also stated in Ex parte Jackson, that—

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

It is argued that, although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." Cummings v. State of Missouri, 4 Wall. 277, 325 (18 L. Ed. 356). The government might, of course, decline altogether to distribute newspapers, or it might decline to carry any at less than the cost of the service, and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.[14]

How dangerous to liberty of the press *432 would be the *holding that the second-class mail service is merely a privilege, which Congress may deny to those whose views it deems to be against public policy, is shown by the following contention made in 1912 by the Solicitor General in the Lewis Case (see Brief, pp. 46, 47):

> "A possible abuse of power is no argument against its existence, but we may as well observe that a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal as having no relation to the thing carried in the mails *unless the views are expressed in the paper;* but *if such views are expressed in the paper* Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff if a majority of Congress thought such views against public policy." (Italics in the original.)[15]

(b) The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. Hoover v. McChesney (C. C.) 81 Fed. 472; Payne v. Nat. Ry. Pub. Co., 20 App. D. C. 581; Id. 192 U. S. 602, 24 Sup. Ct. 849, 48 L. Ed. 583. It is of the same nature as—indeed, it is a part of—the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations. Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. A law by which certain publishers were unreasonably or arbitrarily denied the low rates would deprive them of liberty or property *433 without due process of law; and it *would likewise deny them equal protection of the laws. Compare Second Employers' Liability Cases, 223 U. S. 1, 52, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The court might hold that a statute which conferred upon the Postmaster General the power to do this, because of supposed past infractions of law, was unreasonable and arbitrary; particularly in respect to second-class mail which affords ample opportunity for preventing the transmission of unmailable matter; and hence obnoxious to the Fifth Amendment.

The contention that, because the rates are noncompensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation.[16]

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[14] See "Freedom of Speech" by Zechariah Chafee, Jr., pp. 105-109, 233-234; also page 199: "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." It has been uniformly held that a statute prescribing similar penalties for failure to observe its provisions or the order of a public service commission, although made after full hearing, are a deterrent so potent as to amount to a denial of the right to a judicial review, and operate as a taking of property without due process of law in violation of the Fourteenth Amendment. Ex parte Young, 209 U. S. 123, 147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 349, 33 Sup. Ct. 961, 57 L. Ed. 1507; Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 662, 35 Sup. Ct. 214, 59 L. Ed. 405; Oklahoma Operating Co. v. Love, 252 U. S. 351, 337, 40 Sup. Ct. 338, 64 L. Ed. 596.

[15] It was, perhaps, in reference to this contention that the court said in closing its opinion in that case (229 U. S. 316, 33 Sup. Ct. 876, 57 L. Ed. 1190): "We do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of conditions embodied in the proposition of the government which we have previously stated."

[16] This is true, although the deficit is covered directly, in large part, by profits on first-class mail. The net cost of this service to the government was, before the World War, equal to one-tenth of its

(c) The order revoking the entry of the Milwaukee Leader to second-class mail was clearly a punitive, not a preventive, measure, as all classes of mail except the second were, as the Postmaster General states, left open to it, provided it had sufficient financial resources. *434 Of *the three left available, the third class, being for "miscellaneous printed matter," was an appropriate one for distributing newspapers and was the cheapest. But the additional cost to the publisher involved in distributing daily 9,000 copies, by the third-class mail would be a very serious one. The actual and intended effect of the order was merely to impose a very heavy fine, possibly $150 a day, for supposed transgression in the past. But the trial and punishment of crimes is a function which the Constitution (article 3, § 2, cl. 3) intrusts to the judiciary.[17] I am not aware that any other civil administrative officer has assumed, in any country in which the common law prevails, the power to inflict upon a citizen severe punishment for an infamous crime. Possibly the court would hold that Congress could not, in view of article 3 of the Constitution, confer upon the Postmaster General, as a mere incident in the administration of his department, authority to issue an order which could operate only as a punishment. See Wong Wing v. United States, 163 U. S. 228, 235–237, 16 Sup. Ct. 977, 41 L. Ed. 140.

(d) The Sixth Amendment guarantees that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, and that he shall be confronted with the witnesses against him. It is only in the case of petty offenses that the jury may be dispensed with. Schick v. United States, 195 U. S. 65, 68, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. What is in effect a very heavy fine has been imposed by the Postmaster General. It has been imposed because he finds that the publisher has committed the crime of violating the Espionage Act. And that finding is based in part upon "representations and complaints from sundry good *435 and loyal citizens" *with whom the publisher was not confronted. It may be that the court would hold, in view of article 6 in our Bill of Rights, that Congress is without power to confer upon the Postmaster General, or even upon a court, except upon the verdict of a jury and upon confronting the accused with the witnesses against him, authority to inflict indirectly such a substantial punishment as this. See Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

(e) The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount.[18] Every fine prescribed by Congress is limited in amount. Statutes frequently declare that each day's continuation of an offense shall constitute a new crime. But here a fine imposed for a past offense is made to grow indefinitely each day—perhaps throughout the life of the publication. Already, having grown at the rate of say $150 a day, it may aggregate, if the circulation has been maintained, about $180,000 for the 3 years and 4 months since the order was entered; and its growth continues. It was assumed in Waters-Pierce Oil Co. v. Texas (No. 1) 212 U. S. 86, 111, 29 Sup. Ct. 220, 53 L. Ed. 417, that an excessive fine, even if definite, would violate the Eighth Amendment. Possibly the court, applying the Eighth Amendment, might again, as in Weems v. United States, 217 U. S. 349, 381, 30 Sup. Ct. 544, 554 (54 L. Ed. 793, 19 Ann. Cas. 705), make clear the "difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

The suggestion is made that, if a new application for entry to second-class mail had been made, the publishers might have been granted a certificate. It is no bar to proceedings to set aside an illegal sentence that *436 an ap*plication to the executive for clemency might have resulted in a pardon.

In conclusion I say again—because it cannot be stressed too strongly—that the power here claimed is not a war power. There is no question of its necessity to protect the country from insidious domestic foes. To that end Congress conferred upon the Postmaster General the enormous power contained in the Espionage Act of entirely excluding from the mails any letter, picture or publication which contained matter violating

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expenditures for all other than postal purposes. Compare Lewis Publishing Co. v. Morgan, 229 U. S. 288, 304, 33 Sup. Ct. 867, 57 L. Ed. 1190, with 34 Statistical Abstract of the United States (1911) p. 656. The justification for this noncompensatory service lies in the belief that education in its broad sense—intellectual activity fostered through the dissemination of information and of ideas—is essential to the life of a free, self-governing and striving people. This noncompensatory service is comparable to many rendered by the government; e. g., to the facilitation of communication and commerce by port, canal, passport or consular services, for all of which only small charges, or none, are made.

That a government furnishing public service must be judged by ordinary standards of public callings, see Chafee on Freedom of Speech, p. 109, citing H. J. Laski, in 31 Harvard Law Review, 186, and Laski's Authority in the Modern State, p. 378.

[17] Compare Harbor Commissioners v. Redwood Co., 88 Cal. 491, 26 Pac. 375, 22 Am. St. Rep. 321; Cleveland, etc., Ry. Co. v. People, 212 Ill. 638, 72 N. E. 725; Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108; In re Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261.

[18] Compare Morris v. State, 1 Blackf. (Ind.) 37, 38; State v. Bennett, 20 N. C. 170; Easterling v. State, 35 Miss. 210.

the broad terms of that act. But it did not confer—and the Postmaster General concedes that it did not confer—the vague and absolute authority practically to deny circulation to any publication which in his opinion is likely to violate in the future any postal law. The grant of that power is construed into a postal rate statute passed 40 years ago which has never before been suspected of containing such implications. I cannot believe that in establishing postal classifications in 1879 Congress intended to confer upon the Postmaster General authority to issue the order here complained of. If, under the Constitution, administrative officers may, as a mere incident of the peace time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our Bill of Rights, and in every extension of governmental functions lurks a new danger to civil liberty.

Mr. Justice HOLMES, dissenting.

I have had the advantage of reading the judgment of my Brother BRANDEIS in this case and I agree in substance with his view. At first it seemed to me that if a publisher should announce in terms that he proposed to print treason and should demand a second-class rate it must be that the Postmaster *437 General would have authority *to refuse it. But reflection has convinced me that I was wrong. The question of the rate has nothing to do with the question whether the matter is mailable, and I am satisfied that the Postmaster cannot determine in advance that a certain newspaper is going to be nonmailable and on that ground deny to it not the use of the mails but the rate of postage that the statute says shall be charged.

Of course the Postmaster may deny or revoke the second-class rate to a publication that does not comply with the conditions attached to it by statute, but as my Brother BRANDEIS has pointed out, the conditions attached to the second-class rate by the statute cannot be made to justify the Postmaster's action except by a quibble. On the other hand the regulation of the right to use the mails by the Espionage Act (40 Stat. 217) has no peculiarities as a war measure but is similar to that in earlier cases, such as obscene documents. Papers that violate the Act are declared non-mailable and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the papers when received and to return them to the senders. Act of June 15, 1917, c. 30, Title XII, 40 Stat. 217, 230 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10401a–10401d); Act of May 16, 1918, c. 75, 40 Stat. 553, 554. He could not issue a general order that a certain newspaper should not be carried because he thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the postoffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretence that it has done so. Therefore I do not consider the limits of its constitutional power.

To refuse the second-class rate to a newspaper is to make its circulation impossible *438 and has all the effect of *the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the carriage of unlawful matter of the present kind are to stop and to return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe.

(255 U. S. 336)

WILLIAMS et al. v. UNITED STATES.

(Submitted [on Motion to Dismiss or Affirm] Nov. 22, 1920. Decided March 7, 1921.)

No. 159.

Commerce ⊂⊃3—Reed Amendment does not give preference to ports of one state over those of another.

The Reed Amendment (Act March 3, 1917, c. 162, § 5 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c]), prohibiting the transportation in interstate commerce of intoxicating liquor into any state whose laws prohibit the manufacture or sale of intoxicating liquor for beverage purposes, does not violate Const. art. 1, § 9, cl. 6, prohibiting any regulation of commerce which gives a preference to the ports of one state over those of another.

In Error to the District Court of the United States for the District of Indiana.

Willis D. Williams and another were convicted of violations of the Reed Amendment, and they bring error. Affirmed.

Mr Milton W. Mangus, of Indianapolis, Ind., for plaintiffs in error.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States.

Mr. Chief Justice WHITE delivered the opinion of the Court.

In Clark Distilling Co. v. Western Maryland Railway Co. et al., 242 U. S. 315, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. § 8739]), which prohibited the movement in interstate commerce into any state of intoxicating liquor for purposes prohibited by the laws of such state, was sustained. It was held: (a) That the law in question was appropriate as a regulation of commerce; (b) that any want of uniformity which might *337 arise in its operation *caused from differences in the laws of the several states was to be attributed to such divergent state laws and not to any inherent want of uniformity in the act of Congress; (c) that it was competent for Congress, in regulating commerce as to the movement of intoxicants, to adapt its laws, as far as it deemed advisable, to the regulations prevailing in the several states; (d) that in regulating such commerce the authority of Congress was as complete as that which government possessed over intoxicants and was to be measured by the extent of such power, and not by the authority which controlled the power of government as to other subjects.

In United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337, there came under consideration an indictment for violating the statute known as the Reed Amendment (Act March 3, 1917, c. 162, § 5, 39 Stat. 1058, 1069, [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c]), prohibiting the transportation in interstate commerce of intoxicating liquor into any state whose laws prohibited the manufacture or sale therein of intoxicating liquor for beverage purposes. Reiterating the grounds upon which the constitutionality of the statute considered in the Clark Distilling Co. Case was upheld, and additionally pointing out the reasons why the statute under consideration was within the authority of Congress to enact as a regulation of commerce, the indictment was sustained and the statute of necessity upheld.

The decided cases in this court and in the lower federal courts which are noted in the *338 margin[1] make it certain *that the Clark Distilling Company and the Hill Cases were accepted as determining the validity of both the Webb-Kenyon Law and the Reed Amendment.

The case before us concerns an indictment found and conviction thereon had for a violation of the Reed Amendment after the decision in the Hill Case, and was brought directly here upon the theory that that law was repugnant to article 1, § 9, cl. 6, of the Constitution, prohibiting any regulation of commerce which gives a preference to the ports of one state over those of another. We do not pause to consider whether the constitutional validity of the Reed Amendment had been in terms so completely settled by the Clark Distilling Company and the Hill Cases as to cause the contention here relied upon to be frivolous at the time the writ of error was sued out, but content ourselves with saying that, in any event, the want of merit in the constitutional question relied upon is so plainly and unequivocally established by the cases in question and the authorities which have followed them as to require us to do no more than direct attention to that condition and consequently to affirm the judgment.

Judgment affirmed.

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[1] United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653; United States v. Simpson, 252 U. S. 465, 40 Sup. Ct. 364, 64 L. Ed. 665; United States v. James (D. C.) 256 Fed. 102; Hardy v. United States, 256 Fed. 284, 167 C. C. A. 456; Malcolm v. United States, 256 Fed. 363, 167 C. C. A. 533; United States v. Simpson (D. C.) 257 Fed. 860; Robilio v. United States, 259 Fed. 101, 170 C. C. A. 169; United States v. Luther (D. C.) 260 Fed. 579; Laughter v. United States, 261 Fed. 68, 171 C. C. A. 664; Whiting v. United States, 49 App. D. C. 225, 263 Fed. 477; District of Columbia v. Gladding, 49 App. D. C. 232, 263 Fed. 628; Collins v. United States (C. C. A.) 263 Fed. 657; United States v. Collins (D. C.) 264 Fed. 380; Moran v. United States (C. C. A.) 264 Fed. 768; Berman v. United States (C. C. A.) 265 Fed. 259; Payne v. United States (C. C. A.) 265 Fed. 265; Hockett v. United States (C. C. A.) 265 Fed. 588; Gross v. United States (C. C. A.) 265 Fed. 606; Durst v. United States (C. C. A.) 266 Fed. 65; Ciarfidini v. United States (C. C. A.) 266 Fed. 471; Block v. United States (C. C. A.) 267 Fed. 524.

(255 U. S. 398)

PIERCE et al. v. UNITED STATES.

(Argued Jan. 24, 1921. Decided March 7, 1921.)

No. 173.

1. **Corporations 🔑548(2)—Creditor's bill lies against stockholders to collect fine.**

Under Rev. St. § 1041 (Comp. St. § 1705), providing that judgments for penalties may be enforced by execution, a creditor's bill will lie against stockholders, to whom the property of a corporation has been distributed, on a judgment against the corporation imposing a fine in a criminal proceeding.

2. **Execution 🔑7—Statute held applicable to judgment for penalty in criminal proceeding.**

Rev. St. § 1041 (Comp. St. § 1705), providing that judgments for penalties may be enforced by execution in like manner as judgments in civil cases are enforced, applies to all judgments for penalties, whether recovered by civil or criminal proceedings.

3. **Creditors' suit 🔑1—Nature stated.**

A judgment creditor's bill is in essence an equitable execution, comparable to proceedings supplementary to execution.

4. **Corporations 🔑542(3)—Assets cannot be transferred to stockholders, so as to disable corporation from responding for its acts.**

A corporation cannot disable itself from responding for its acts by distributing its property among its stockholders, and in such a case the claims against the corporation, after being reduced to judgment, may be satisfied out of the assets in the hands of the stockholders.

5. **Corporations 🔑548(2)—Creditor's bill maintainable against stockholders, though judgment recovered after distribution.**

That a judgment for a penalty in a criminal case was not recovered against a corporation until after it had sold its property and distributed the proceeds among its stockholders did not deprive the government of its right to bring a creditor's bill against the stockholders, especially where the stockholders were officers and knew of the government's claim.

6. **Corporations 🔑547(1)—Assets in hands of stockholders liable for claims not liquidated at date of distribution.**

When a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, after recovering judgment, though their claims were contested and unliquidated when the assets were distributed.

7. **Corporations 🔑548(3)—Creditor's bill by government held to lie, though execution in particular district not returned until after commencement of suit.**

Under Rev. St. § 986 (Comp. St. § 1632), under which an execution in favor of the United States issued by any of its courts runs in every part of the United States, the return unsatisfied of an execution in favor of the United States against a corporation in the Western district of Louisiana was sufficient to support a creditor's bill against the stockholders in the Eastern district of Missouri, though execution issued in that district was not returned unsatisfied until after the commencement of the suit, especially where it was agreed that the corporation had no property anywhere out of which the judgment could be satisfied.

8. **Corporations 🔑548(2)—Remedy against corporation's vendee held not to prevent creditor's bill against stockholders.**

Where, pending a criminal prosecution against a corporation, it sold all of its property to another company, which assumed its debts, obligations, and liabilities, and distributed the proceeds among its stockholders, the government's possible remedy against the purchasing corporation on a judgment imposing a fine in the criminal suit did not bar it from maintaining a creditor's bill to follow the assets into the hands of the stockholders.

9. **Corporations 🔑548(2)—Suit against corporation's vendee held not election of remedies, preventing creditor's bill against stockholders.**

Where, pending a criminal prosecution against a corporation, it sold its property to another company, which assumed all debts, obligations, and liabilities, and the proceeds of the sale were distributed among stockholders, a suit by the government against the purchasing corporation to collect a judgment imposing a fine in the criminal suit was not an election of remedies, preventing it from following the assets into the stockholders' hands by a creditor's bill.

10. **United States 🔑145—Execution may be issued to state and district other than that in which judgment was rendered.**

Under Rev. St. § 986 (Comp. St. § 1632), a judgment in favor of the United States may be made the basis of an execution running in a state and district other than that in which the judgment was rendered.

11. **Appeal and error 🔑1082(2)—Technical objection, not assigned in Circuit Court of Appeals, not available in Supreme Court.**

Where the technical objection that the District Court dismissed the bill as against a necessary party was not assigned as error in the Circuit Court of Appeals, it cannot be availed of in the Supreme Court.

12. **Appeal and error 🔑835(2)—Improper allowance of interest should have been noticed, though not assigned.**

Under rule 24 of the Circuit Court of Appeals for the Eighth Circuit (188 Fed. xvi, 109 C. C. A. xvi), authorizing the court to notice a plain error not assigned, the court on a petition for rehearing should have noticed the error in allowing interest on a judgment for a penalty recovered in a criminal prosecution from the date of the indictment.

13. **Interest 🔑22(8)—Judgment imposing fine does not bear interest.**

Under Rev. St. § 966 (Comp. St. § 1605), providing that interest shall be allowed on judgments in civil causes, a judgment in a criminal case imposing a fine did not bear interest prior to the recovery of judgment in a creditors' suit on such judgment, as interest rests solely on statutory provisions.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Clay Arthur Pierce and others. A decree for the government was affirmed by the Circuit Court of Appeals (257 Fed. 514, 171 C. C. A. 1, rehearing denied 260 Fed. 158, 171 C. C. A. 194), and defendants appeal. Modified and affirmed.

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*Messrs. Louis Marshall, of New York City, and Samuel W. Fordyce, Jr., of St. Louis, Mo., for appellants.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1907 the Waters-Pierce Oil Company, a Missouri corporation, was indicted in the District Court of the United States for the Western District of Louisiana under the Elkins Act (Act Feb. 19, 1903, c. 708, § 2, 32 Stat. 847 [Comp. St. §§ 8597-8599]), for receiving rebates. In 1913 the company sold and transferred all its property to the Pierce Oil Corporation, all the proceeds were paid to Henry S. Priest and Clay Arthur Pierce as trustees, and they distributed the same among the stockholders. Of these Henry Clay Pierce and the Pierce Investment Company received millions in cash and stock and Clay Arthur Pierce a small amount. In 1914 the case under the Elkins Act was tried. The company was convicted and sentenced to pay a fine of $14,000, and in the following year the judgment was affirmed by the Circuit Court of Appeals. Waters-Pierce Oil Co. v. United States, 222 Fed. 69, 137 C. C. A. 293. An execution issued thereon to the marshal for that district and was returned nulla bona. Thereafter this bill in equity was brought by the United States in the federal District Court for the Eastern district of Missouri against the Waters-Pierce Oil Company, the trustees, and these three stockholders to obtain satisfaction of the judgment out of the money remaining in the hands of the trustees and that received by these stockholders. The District Court entered a decree dismissing the bill as against the Waters-Pierce Company and the trustees, but *401 granted, as against the stockholders *named, the relief prayed by the government. The decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit, one judge dissenting. The case is brought here by these defendants, under section 241 of the Judicial Code (Comp. St. § 1218). Reversal is sought on several grounds.

[1-4] First. The ground for reversal most strongly urged is that the judgment imposing a fine on the Waters-Pierce Company is not a debt on which a creditor's bill will lie. The argument is that a judgment for a definite sum of money does not necessarily endow the holder with all the rights of a creditor; that a court will look behind a judgment and will grant or deny relief according to the nature of the original cause of action, as it did in Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936, and Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; and that, since liability for a penalty is criminal in its nature and not strictly a debt, a creditor's bill cannot be brought upon a judgment for a penalty. It is true that to the liability for penalties imposed by the United States certain incidents of a criminal proceeding attach. See Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; United States v. Stevenson, 215 U. S. 190, 199, 30 Sup. Ct. 35, 54 L. Ed. 153. But the liability is often enforced by civil proceedings and specifically by the action of debt. Lees v. United States, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. See Adams v. Woods, 2 Cranch, 336, 340, 2 L. Ed. 297. And then certain incidents of civil proceedings attach. Hepner v. United States, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960.

By section 1041 of the Revised Statutes (Comp. St. § 1705) it is provided (in addition to the power existing by general usage to commit a defendant to jail until his fine has been paid, see Ex parte Barclay [D. C.] 153 Fed. 669) that judgments for penalties "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." The statute applies to all judgments for penalties, whether recovered by civil or criminal proceedings. A judgment creditor's bill is in *402 *essence an equitable execution comparable to proceedings supplementary to execution. See Ex parte Boyd, 105 U. S. 647, 26 L. Ed. 1200. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders.[1] There is no good reason why the rule should be limited to judgments arising out of civil proceedings. To the contention that the statute has not made this process available for the government in enforcing a penalty, it may be answered as was done by the King's Bench a hundred years ago, in King v. Woolf, 2 B. & Ald. 609, 611, when it was insisted that a fine due to the crown was not a judgment debt for which execution could be levied:

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[1] Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Railroad Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117; Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 502, 33 Sup. Ct. 554, 57 L. Ed. 931; Kansas City Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; Johnson v. Canfield-Swigart Co., 292 Ill. 101, 126 N. E. 608; Hastings v. Drew, 76 N. Y. 9

> "* * * Mischievous consequences would ensue to the crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and the preventing that will not be a mischievous consequence to any one but himself. Here there is a judgment that the defendant do pay to the king a fine of a certain sum. By that judgment the debt becomes a debt to the king, of record; and it is payable to the king instanter. * * * If we were to say that the crown shall not be at liberty to issue an immediate execution for its own debt, we should place the crown in a worse situation than any subject."

[5, 6] Second. It is contended that the right to bring a creditor's bill did not exist, *403 because the judgment against *the company was not entered in the trial court until a year after the company had divested itself of the property sought to be reached in this suit; and the government did not become a creditor, at all events until after its claim for penalties had ripened into a judgment. But when a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. But, as a matter of substantive law, the right to follow the distributed assets (see Railway v. Howard, 7 Wall, 392, 409, 19 L. Ed. 117; Northern Pacific Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; Kansas City Ry. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579), applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract (Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184), or the holder of a claim in tort (Hastings v. Drew, 76 N. Y. 9; Jahn v. Champagne Lumber Co. [C. C.] 157 Fed. 407); and there is no good reason why the United States with a claim for penalties should be in a worse plight. Here the stockholders receiving the assets are in the position of volunteers; and there is not even the excuse that they were ignorant of the government's claim. They were officers of the corporation, and the indictment was pending when the transfer of the assets was made. See Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., supra.

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[7] *Third. It is contended that the bill should have been dismissed because the execution issued to the marshal for the Eastern district of Missouri was not returned unsatisfied until after the commencement of the suit. It has been held that in litigations between private parties a creditor's bill cannot be maintained in a federal court upon a judgment recovered in a state other than that in which suit is brought (National Tube Works v. Ballou, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070), and that a return unsatisfied of the execution issued on the judgment sued on is held essential to the maintenance of the creditor's suit (Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368). But this strict rule is not applicable where the United States is the judgment creditor. Under section 986 of the Revised Statutes (Comp. St. § 1632) an execution issued in favor of the United States by any of its courts runs in every part of the United States, just as under section 985 (Comp. St. § 1631) an execution on a judgment obtained in favor of any party in a District Court, where the state is divided into two or more districts, may run and be executed in any part of the state. Toland v. Sprague, 12 Pet. 300, 328, 9 L. Ed. 1093. Here the execution issued to the Louisiana marshal had been returned nulla bona before this suit was brought; and it is agreed that when this suit was begun the Waters-Pierce Oil Company had no property in Missouri or elsewhere out of which the judgment could be satisfied at law. To hold that under such circumstances the suit must fail, because the return of nulla bona was not made by the marshal for the Eastern district of Missouri until after the filing of the original bill, would apply a well-settled rule to a case not within its scope.

[8, 9] Fourth. It is contended that the bill should have been dismissed because the government had an adequate remedy by suing the Pierce Oil Corporation, and, indeed, had commenced such a suit. That corporation assumed, as part of the purchase price of the Waters-Pierce Oil Company its "debts, ob- *405 ligations and liabilities." Be*fore commencing this suit the government had brought, in a federal District Court for Louisiana, a suit against the Pierce Oil Corporation, to subject to the satisfaction of its judgment certain parcels of land conveyed to the corporation by the Waters-Pierce Oil Company. But in the Louisiana suit the Pierce Oil Corporation denied liability insisting that the government was not a creditor of the Waters-Pierce Oil Company. The United States

could not have been required to accept in lieu of its claim against the judgment debtor even an admitted obligation of the new corporation to pay it. The existence of that possible remedy did not bar the government from following by a creditor's bill the assets of the corporation into the stockholder's hands. Nor did the suit against the Pierce Oil Corporation amount to an election of remedies which should have led the lower courts to dismiss this bill. The two remedies were consistent. See Zimmerman v. Harding, 227 U. S. 489, 494, 33 Sup. Ct. 387, 57 L. Ed. 608.

[10, 11] Fifth. The contention is faintly made that the decree should be reversed because the District Court dismissed the bill as against the Waters-Pierce Oil Company, a necessary party, citing Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 610, 13 Sup. Ct. 691, 37 L. Ed. 577. The argument ignores the fact that this judgment, being in favor of the United States, is, under section 986 of the Revised Statutes, effective and may be made the basis of an execution running in a state and district other than that in which the judgment was rendered. It was doubtless for this reason that the District Judge concluded that it was unnecessary, if not improper, to enter in this suit judgment against Waters-Pierce Oil Company. The objection is purely technical. Since it was not set up among the many errors assigned in the Court of Appeals and in this court, it cannot be availed of here.

[12, 13] Sixth. It is urged that the District Court erred in allowing interest on the penalty ($14,000) from the date *406 *of the indictment, January 29, 1907. This was not assigned as error in the Circuit Court of Appeals, and for this reason that court refused to consider it on a petition for rehearing. In the assignment of errors filed in this court the objection was properly raised. Under rule 24 of the Circuit Court of Appeals for the Eighth Circuit (188 Fed. xvi, 109 C. C. A. xvi) the court may "notice a plain error not assigned or specified," and we think it should have done so in this case. In allowing interest from January 29, 1907, the District Court was clearly under the misapprehension that that was the date of the judgment, for the decree so recites; whereas, in fact, judgment was not entered until March, 1914. But interest was not even allowable from that time. At common law judgments do not bear interest; interest rests solely upon statutory provision. Perkins v. Fourniquet, 14 How. 328, 14 L. Ed. 441; Washington & Georgetown R. R. v. Harmon, 147 U. S. 571, 584, 585, 13 Sup. Ct. 557, 37 L. Ed. 284. The only applicable statute of the United States is section 966 of the Revised Statutes (Comp. St. § 1605), which provides that "interest shall be allowed on all judgments in civil causes. * * *" Since the penalty was not recovered by civil process, but by judgment in a proceeding initiated by a criminal indictment, it obviously does not fall within the terms of the statute. Interest, therefore, is allowable only on the judgment from the date when it was entered against the defendants in this case, namely March 11, 1918.

The judgment of the Circuit Court of Appeals, as modified, is

Affirmed.

(255 U. S. 438)

PAYNE, Secretary of the Interior, et al. v. UNITED STATES ex rel. NEWTON.

(Argued Dec. 16, 1920. Decided March 14, 1921.)

No. 123.

1. Public lands ⚷110—When no contest or protest pending two years after issuance of receiver's receipt, patent must be issued.

Under Act March 3, 1891, § 7 (Comp. St. § 5113), providing that after the lapse of two years from the issuance of a receiver's receipt on the final entry of land under the homestead laws, etc., when no protest or contest shall be pending, the entryman shall be entitled to a patent and it shall be issued to him, the entryman is entitled to a patent at the expiration of the two years if no contest or protest is pending, and the Land Office must issue it regardless of proceedings subsequently instituted attacking the validity of the entry.

2. Public lands ⚷102—Land Department cannot cancel entry when proceedings not commenced within two years after receiver's final receipt.

Under Act March 3, 1891, § 7 (Comp. St. § 5113), after the expiration of two years from the issuance of a receiver's receipt on the final entry of land under the homestead laws, the Land Office has no power to entertain proceedings to cancel the entry unless commenced within the two years, whether initiated by a government officer or a private individual, and whether based on a charge of fraud or on some other ground.

3. Public lands ⚷110—Pendency of suit to cancel entry commenced more than two years after final receipt does not justify refusal of patent.

Under Act March 3, 1891, § 7 (Comp. St. § 5113), where no contest or protest was pending at the expiration of two years from the issuance of a receiver's final receipt, the pendency of an action subsequently commenced to cancel the entry for fraud and quiet the government's title did not justify the Land Office in refusing to issue a patent.

In Error to the Court of Appeals of the District of Columbia.

Mandamus by the United States, on the relation of Allen L. Newton against John

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Barton Payne, Secretary of the Interior, and others. A judgment for the relator was affirmed by the Court of Appeals of the District of Columbia (Lane v. United States ex rel. Newton, 48 App. D. C. 547), and defendants bring error. Affirmed.

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*Mr. Assistant Attorney General Garnett, for plaintiffs in error.

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*Messrs. F. W. Clements and Alex. Britton, both of Washington, D. C., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was a petition to the Supreme Court of the District of Columbia for a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to pass a homestead entry to patent. A demurrer to the answer was sustained, the defendants elected to stand on the answer, and a judgment awarding the writ was entered. The Court of Appeals affirmed the judgment (Lane v. United States ex rel. Newton, 48 App. D. C. 547), and the defendants prosecute this writ of error under section 250, cl. 6, of the Judicial Code (Comp. St. § 1227).

The important statute, the construction of which is drawn in question by the defendants, is a provision in section 7 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (Comp. St. § 5113), which declares:

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> *"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

The facts which stand admitted can be shortly stated. Allen L. Newton, the relator, made a preliminary homestead entry at the local land office of a quarter section of land. At that time the land was withdrawn for forest purposes, but with the qualification that prior homestead settlers who continued in good faith to maintain their claims should be permitted to carry them to entry and patent. Newton claimed to be a prior settler and within the qualification. In due course, after publication of the regular notice, he submitted commutation proofs under the homestead law and paid the purchase price and the legal fees. The local land officers found the proofs satisfactory, permitted him to make final entry and issued thereon the usual receiver's receipt. That was on November 21, 1904, and there was no protest, contest or other proceeding against the entry within two years, nor until November 27, 1908. On the latter date the Commissioner of the General Land Office ordered a hearing upon a charge that Newton had not complied with the law in point of residence and cultivation; and on March 23, 1912, the Secretary of the Interior held in that proceeding that the charge was sustained and ordered the entry canceled. On May 14, 1918, the Secretary rescinded that order and directed that the entry be passed to patent under the statute before quoted. The following month the Secretary recalled his last action and caused a suit to be brought in the District Court of the district wherein the land is situate to cancel the receiver's receipt and quiet *442 the title *in the United States. The bill in that suit charged that the entry was fraudulently procured in that the proofs submitted by Newton in respect of his settlement, residence and cultivation were false; and that charge is repeated in the answer in the present case. Further proceedings in the suit in the District Court have been suspended, it is said, to await the ultimate decision on this petition.

Both courts below held that, as the final entry was not questioned by any protest or contest in the Land Department within two years after the issue of the receiver's receipt, the statute—the provision in section 7—terminated the authority of that department to entertain any proceeding for the cancellation of the entry, and cast upon the Secretary and the Commissioner a plain and unqualified duty to pass the entry to patent. Whether that ruling was right or otherwise is the matter we are to consider.

[1] The words of the statute are direct and make it very plain that if at the expiration of two years from the date of the receiver's receipt on final entry there is "no pending contest or protest" against the entry its validity no longer may be called in question in the Land Department—that is to say, "the entryman shall be entitled to a patent * * * and the same shall be issued to him." The purpose to fix his right and to command its recognition is obvious. This court so held in Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066, where a writ of mandamus directing the issue of a patent was awarded. In that case, as in this, there was no contest or protest within the designated period, and in a proceeding subsequently initiated the Secretary held that the entryman had not complied with the law in point of residence and cultivation—in other words that the proofs by which he procured the entry were false—and upon that ground the cancellation of the entry was directed. Besides, the entry there bore the same relation to a forest reserve that the present entry *443 bears. Thus in all that is material the *two cases are alike. In the opinion in that case it was pointed out that the practice of the Land Department prior to the statute had been to entertain and act upon belated suggestions of fraud and noncompliance with law, that this had resulted in a practical

blockade in the issue of patents, and that the purpose of the statute was to rectify that situation and prevent its recurrence. The court then observed (page 181):

> "In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course."

[2] In the main the Land Department, as its regulations and decisions show, has construed and applied the statute as taking from the land officers all power to entertain proceedings for the cancellation of final entries of the classes specified, save where the proceeding is begun within the two-year period—and this whether it is initiated by a government officer or by a private individual, and whether it is based upon a charge of fraud or upon some other ground. To illustrate: In the original instructions of May 8, 1891, 12 Land Dec. 450, the department took the position that it no longer could cancel such an entry or withhold the patent "on the ground of fraud, a failure to comply with the law, or a prior claim," unless a proceeding for the purpose was initiated within the period prescribed. In the case of Jacob A. Harris, 42 Land Dec. 611, decided December 13, 1913, the Secretary of the Interior adhered to that position as grounded upon a "sound construction of the law," overruled a decision to the contrary made two years before and rejected a protest presented after the alloted time, which charged that the entryman, contrary to the statements in his proofs, had not complied with the law in the matter of settlement, residence and cultivation. *444 *And in instructions issued April 25, 1914, 43 Land Dec. 294, the Secretary stated that the lapse of two years after the issue of the receiver's receipt "will bar a contest or protest based upon any charge whatsoever," save where the proceeding is sustained by some special statutory provision.

The defendants now call that construction in question. But we perceive no reason for rejecting or disturbing it. On the contrary, we think it is in accord with the natural import of the words of the statute and gives effect to the evident purpose of Congress. That purpose is to require that the right to a patent which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay —and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. See Brown v. Hitchcock, 173 U. S. 473, 477, 19 Sup. Ct. 485, 43 L. Ed. 772. Of course, the purpose is not merely to enable the officers to issue the patent—for which they have other express authority —but to command them to issue it in the event stated; the words of the statute being "the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

[3] It is urged that the pendency in the District Court of the suit before mentioned affords a sufficient justification for withholding the patent. The courts below held otherwise, and rightly so, as we think. The statute contemplates that in the event stated the patent shall not longer be withheld, but shall be issued promptly to the end that the entryman shall have the advantages and protection which go with it. In other words, it is intended that he shall be clothed with the legal title instead of an equitable title only, shall have a patent instead of a receiver's receipt, *445 and *shall have the benefit of the presumptions which are available to other patentees when their rights are called in question. But for this the statute would be without any real purpose or effect.

Judgment affirmed.

(255 U. S. 450)

Ex parte RIDDLE.

(Argued Feb. 28 and March 1, 1921. Decided March 21, 1921.)

No. 27.

1. Mandamus 🔑42, 53—Does not lie to review denial of motion to amend record or set aside judgment.

Where the record failed to show that the case was tried by a jury of 11 by agreement, and defendant's motions to set aside the judgment and to amend the record to show such fact were denied, he might have saved his point by an exception at the trial, or by a bill of exceptions to the denial of the subsequent motion, and then have brought a writ of error; but mandamus would not lie to correct the judge's conclusion.

2. Mandamus 🔑3(8), 26—Does not lie when another statutory method provided, or to reverse decision of record.

Ordinarily mandamus cannot be used when another statutory method has been provided for reviewing the action below or to reverse a decision of record.

3. Mandamus 🔑1—Extent of agreement or dispute as to facts immaterial on question of right to remedy.

The extent of agreement or dispute with regard to the facts is not controlling on the question of right to a writ of mandamus.

Original petition by D. H. Riddle for a writ of mandamus. Rule to show cause discharged, and writ denied.

See, also, 41 Sup. Ct. 147.

Messrs. John London, of Birmingham, Ala., and Benjamin Carter, of Washington, D. C., for petitioner.

Mr. Solicitor General Frierson, and Mr. Erle Pettus, of Birmingham, Ala., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

The petitioner was indicted for a violation of section 215 of the Criminal Code of the United States (Comp. St. § 10385) by a use of the mails in furtherance of a scheme to defraud. This is a felony, section 235 (Comp. St. § 10405), and therefore, we assume, must be tried by a jury of twelve. The petitioner was tried, convicted and sentenced, the record stating that "to try this cause come a jury of good and lawful men

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duly impaneled, sworn and *charged a true verdict to render according to the law and the evidence." During the term the petitioner filed a motion setting forth that as the result of an agreement between himself and the District Attorney the case was tried before a jury of eleven, and asking to have the record corrected to show the fact. There was also another motion to set aside the judgment on this ground. The record recites that after hearing the evidence and argument the Court being of opinion that the record is as it should be, and does not need amendment, denies the motion, and similarly denies the motion to set aside the judgment. The record discloses exceptions to both orders but sets forth no grounds. No exception to the jury seems to have been taken nor does the fact alleged or the exclusion of any evidence competent to prove it appear of record in any form.

[1-3] The petitioner now comes here asking for a mandamus to correct the judge's conclusion and setting forth evidence offered in support of his motion that was rejected and that he says should have been received. He might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof were material, and then have brought a writ of error. Nalle v. Oyster, 230 U. S. 165, 177, 33 Sup. Ct. 1043, 57 L. Ed. 1439. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. Ed. 135; Ex parte Park Square Automobile Station, 244 U. S. 412, 414, 37 Sup. Ct. 732, 61 L. Ed. 1231. In this case the facts were more or less clearly admitted at the argument but the record does not establish them and the extent of agreement or dispute with regard to them does not change the remedy to be sought.

Rule to show cause discharged.

Writ denied.

(255 U. S. 452)

HOLLIS et al. v. KUTZ et al.

(Argued March 2, 1921. Decided March 21, 1921.)

No. 397.

1. Gas 🔑14(1)—Application to commission to review gas rate decision not condition precedent to suit to set it aside.

The filing of a complaint with the Public Utilities Commission of the District of Columbia, asking it to review a decision reached after a public hearing fixing gas rates, is not a condition precedent to the filing of a bill, under Act March 4, 1913, § 8, par. 64, to have the decision declared void.

2. Gas 🔑14(1)—Party suing to set aside decision fixing rates need not have appeared before the commission.

Under Act March 4, 1913, § 8, par. 64, authorizing any person dissatisfied with any order or decision of the Public Utilities Commission of the District of Columbia to bring a proceeding in equity to vacate or set aside the decision or order, the plaintiffs in an equity proceeding to set aside orders fixing gas rates need not have appeared in the original hearing before the commission on the rate, when they ask a decree that the orders be declared void as a matter of law for violation of their constitutional rights, as they are equally parties to the order whether they argued the case to the commission or not.

3. Gas 🔑14(1)—Government can condition establishment of gas works on furnishing of its needs at any price it chooses, though price to others is thereby enhanced.

The government may make it a condition of allowing the establishment of gas works in the District of Columbia that its needs and those of the District be satisfied at any price that it may fix, and others choosing to take gas must submit to such enhancement of price as is assignable to the government's demands.

4. Gas 🔑14(1)—Consumers cannot complain that they are not placed on equality with government.

Whether or not the Public Utilities Commission of the District of Columbia under Act March 4, 1913, § 8, has power to raise the price of gas to the government above the statutory rate, other consumers have no right to complain that they were not treated by the commission on an equality with the government.

Appeal from the Court of Appeals of the District of Columbia.

Bill in equity by William Hollis and another against Charles W. Kutz, Chairman, and others, Commissioners of the District of Columbia, and as such constituting the Public Utilities Commission of the District of Columbia, and another. A decree dismissing the bill was affirmed by the Court of Appeals of the District of Columbia (49 App. D. C. 301, 265 Fed. 451), and plaintiffs appeal. Affirmed.

Mr. Roscoe F. Walter, of Washington, D. C., for appellants.

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*Mr. F. H. Stephens, of Washington, D. C., for appellee Public Utilities Commission.

Mr. Benjamin S. Minor, of Washington, D. C., for appellee Washington Gaslight Co.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by private consumers of gas to have two orders of the Public Utilities Commission that increase the rate for gas to private consumers declared void. The first order, No. 254, March 15, 1918, raised the rate from 75 cents per thousand feet to 90 cents. The second, No. 314, March 15, 1919, raised it to not exceeding 95 cents; the orders being made under the authority of the Act of March 4, 1913, c. 150, § 8, 37 Stat. 938, 974, et seq., establishing the Public Utilities Commission of the District of Columbia and fixing its powers. The bill and the appeal to this Court are said to be based upon paragraph 64, of section 8, 37 Stat. 988. It is alleged that the orders violate the plaintiffs' constitutional rights because the rate to be charged to the United States and to the District remains the statutory rate of 70 cents, and to certain other takers still less, and that if the United States and District had paid 90 cents for the year 1918 the Gas Company would have received a return of about six per cent. It is said that the difference is an unlawful discrimination and that the plaintiffs are required to make up the loss incurred by furnishing the gas to the Government and the District at less than cost. The bill was dismissed by the Supreme Court for want of equity and because not filed within one hundred and twenty days after the entry of the order of March 15, 1918, as required by section 8, par. 65. The Court of Appeals affirmed the decree on the different ground that *454 *a formal complaint and hearing before the Commission were a condition of the right to sue in the courts. The provision in paragraph 67 for the transmission of any new evidence taken in the suit to the Commission for its further consideration, and other details, were thought to indicate that the suit was in the nature of an appeal.

[1, 2] We are unable to agree with the opinion of the Court of Appeals. Assuming that the bill is based upon the statute the language of paragraph 64 is that any person interested and dissatisfied with any order fixing any rate may commence a proceeding in equity. We do not perceive any advantage in requiring a party to file a complaint asking the Commission to review a decision just reached by it after a public hearing, nor do we see such a requirement in the statute. On the other hand we see no requirement that the plaintiffs in equity should have appeared in the original hearing upon the rate. They are parties to the order equally whether they saw fit to argue the case to the Commission or not, and when they stand upon supposed constitutional rights there seems to be no necessity of raising the point until they get into Court. This suit is not for a revision of details but for a decree that the orders are void as matter of law. That by reason of their pecuniary interest the plaintiffs are persons interested within the statute, may be assumed for the purposes of decision. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49, 32 Sup. Ct. 22, 56 L. Ed. 83; Same Case, F. H. Peavey & Co. v. Union Pacific R. Co. (C. C.) 176 Fed. 409, 416, 417. See Detroit & Mackinac Ry. Co. v. Michigan Ry. Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288.

[3, 4] On the merits however there is no doubt that the decree was right. We do not wish to belittle the claim of a taker of what for the time has become pretty nearly a necessity to equal treatment while gas is furnished to the public. But the notion that the Government cannot make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the *455 District shall be *satisfied at any price that it may fix strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands. We do not consider whether the Commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the Government and they have no other ground upon which to found their supposed right.

Decree affirmed.

(255 U. S. 445)

QUONG HAM WAH CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(Argued March 9, 1921. Decided March 21, 1921.)

No. 638.

1. Courts 🔑394(3)—Supreme Court cannot review state court's construction of state statute.

The Supreme Court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state.

2. Courts 🔑394(3)—Statute having been construed in harmony with Constitution, contention that it is unconstitutional is frivolous.

Workmen's Compensation Act of California, § 58, giving the Industrial Accident Commission jurisdiction of injuries suffered outside the state where the injured employee was a resident of the state and the contract of hire was made in the state, having been construed by the California Supreme Court as applying to citizens of other states as well as citizens of California, the contention that it grants to citizens of California privileges denied citizens of other states, contrary to Const. U. S. art. 4, § 2, is frivolous, and will not support a writ of error where there is no other ground of jurisdiction.

3. Courts 🔑394(3)—Supreme Court cannot disregard state court's construction of statute in order to hold it unconstitutional.

The Supreme Court cannot disregard the construction placed on a state statute by the state Supreme Court for the purpose of holding the statute void for repugnancy to the Constitution, where the statute as construed by the state court is valid.

In Error to the Supreme Court of the State of California.

Proceeding under the Workmen's Compensation Act of California by Owe Ming against the Quong Ham Wah Company. Compensation was awarded by the Industrial Accident Commission of the state of California and the award affirmed by the Supreme Court (192 Pac. 1021), and the employer brings error. Writ of error dismissed for want of jurisdiction.

Mr. Warren Gregory, of San Francisco, Cal., for plaintiff in error.

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*Mr. Warren H. Pillsbury, of San Francisco, Cal., for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The Quong Ham Wah Company is engaged in the business of supplying to canneries in *447 California and else*where the labor required by them to carry on their canning operations. The company in 1918 hired in the city of San Francisco one Owe Ming, a resident of California, under an agreement that he was to work as its employee at the cannery of the Alaska Packers' Association at Cook's Inlet, Alaska, during the canning season, and that upon his return to San Francisco he would be paid off by the Quong Ham Wah Company and his employment terminated.

While working at the cannery Owe Ming sustained an injury resulting in a permanent disability, for which on returning to San Francisco he petitioned the Industrial Accident Commission of California for the allowance of compensation under Workmen's Compensation Act (St. 1917, p. 870) § 58 of which provides:

> "The Commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act."

The Alaska Packers' Association was joined with the Quong Ham Wah Company as defendant in the proceedings before the Commission, which culminated in a joint and several award against the said defendants. Thereafter the Quong Ham Wah Company filed with the Commission a petition for rehearing, asserting among other things, that the Commission was without jurisdiction to award compensation for injuries occurring outside the territorial limits of the state of California, except as provided in section 58 of the Compensation Act, and that that section was void as repugnant to article 4, § 2, of the Constitution of the United States, because it granted to citizens of California the privilege of recovering for injuries sustained outside the state in the course of employ- *448 ments *contracted for within the state, while at the same time denying that privilege to citizens of other states. The rehearing was refused by the Commission.

The company thereupon applied to the Supreme Court for a writ of certiorari, which was allowed, and that court, concluding that section 58 discriminated against nonresidents as alleged and was consequently repugnant to the Constitution of the United States and void, decided that the Commission was without jurisdiction and annulled its award. Upon a rehearing, however, this view was retracted, and the court concluded that the effect of the constitutional provision relied upon was, not to render void the provisions of section 58 for discrimination against nonresidents, but to lead to or cause a construction of that section which would include citizens of other states, and therefore avoid all question as to the discrimination relied upon. The court consequently held that "the statute itself is valid and may be made to apply uniformly to citizens of California and the citizens of the other states," and, giving effect to this interpretation, affirmed the action of the Commission.

[1, 2] To reverse the judgment so rendered this writ of error is prosecuted. All the assignments and contentions made rest in their last analysis upon the assumption that, despite the construction of the statute made by the court below, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. Commercial Bank v. Buckingham, 5 How. 317, 342, 12 L. Ed. 169; Johnson v. New York Life Insurance Co., 187 U. S. 491, 496, 23 Sup. Ct. 194, 47 L. Ed. 273; Ross v. Oregon, 227 U. S. 150, 162, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; Ireland v. Woods, 246 U. S. 323, 330, 38 Sup. Ct. 319, 62 L. Ed. 745; Stadelman v. Miner, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. 875; Erie R. R. Co. v. Hamilton, 248 U. S. 369, 371, 372, 39 Sup. Ct. 95, 63 L. Ed. 307. It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be

based *is so wanting in foundation as to be frivolous, and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Toop v. Ulysses Land Co., 237 U. S. 580, 583, 35 Sup. Ct. 739, 59 L. Ed. 1127; Sugarman v. United States, 249 U. S. 182, 184, 39 Sup. Ct. 191, 63 L. Ed. 550; Berkman v. United States, 250 U. S. 114, 118, 39 Sup. Ct. 411, 63 L. Ed. 877; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193, 40 Sup. Ct. 453, 64 L. Ed. 855.

[3] True it is elaborately argued that the court below erred in supposing that the statute was susceptible of the construction which it affixed to it, and that, instead of adopting that construction, its duty was to hold the statute void for repugnancy to the Constitution on the grounds which were urged. But this in a different form of statement but disputes the correctness of the construction affixed by the court below to the state statute, and assumes that that construction is here susceptible of being disregarded upon the theory of the existence of the discrimination contended for when, if the meaning affixed to the statute by the court below be accepted, every basis for such contended discrimination disappears. It follows that the argument but accentuates the frivolous character of the federal question relied upon.

Dismissed for want of jurisdiction.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(255 U. S. 564)

No. —, original. Ex parte. In the matter of William BRADLEY et al., petitioners. March 7, 1921. Motion for leave to file petition for a writ of certiorari herein denied.

(255 U. S. 564)

No. —, original. (Ex parte In the matter of) The EGRY REGISTER COMPANY, petitioner. March 7, 1921. Motion for leave to file petition in contempt herein denied.

(255 U. S. 564)

No. 389. Cornelius C. WATTS et al., petitioners, v. ELY REAL ESTATE & INVESTMENT COMPANY. March 7, 1921. For opinion below, see 262 Fed. 721. Mr. Hartwell P. Heath, of New York City, for petitioners. Motion to dismiss the petition for writ of certiorari in this case for want of prosecution granted.

(255 U. S. 562)

No. 422. Henri Eunice Moncravie VAN TINE, now Harrison, et al., appellants, v. Luella MONCRAVIE. March 7, 1921. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 264 Fed. 776. Messrs. T. J. Leahy and C. S. Macdonald, both of Pawhuska, Okl., for appellants. Mr. Alfred M. Jackson, of Winfield, Kan., for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Roman Catholic St. Anthony's Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) Spencer v. Duplan Silk Co., 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; Devine v. Los Angeles, 202 U. S. 313, 333, 26 Sup. Ct. 652, 50 L. Ed. 1046;

Shulthis v. McDougal, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; Merriam Co. v. Syndicate Publishing Co., 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148.

(255 U. S. 563)

No. 429. Alice HARN and W. F. Harn, plaintiffs in error, v. INTERSTATE BUILDING & LOAN COMPANY et al. March 7, 1921. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 77 Okl. 265, 188 Pac. 343. Alice Harn and Mr. W. F. Harn, of Oklahoma City, Okl., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214.)

(255 U. S. 567)

No. 519. Hulett C. MERRITT, petitioner, v. The UNITED STATES of America. March 7, 1921. For opinion below, see 264 Fed. 870. See, also, 41 Sup. Ct. 375, 255 U. S. 579, 65 L. Ed. —. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted, the transcript of record heretofore filed as an exhibit to the petition to stand as a return to the writ.

(255 U. S. 579)

No. 519. Hulett C. MERRITT, petitioner, v. The UNITED STATES of America. March 7, 1921. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 264 Fed. 870. See, also, 41 Sup. Ct. 375, 255 U. S. 567, 65 L. Ed. —. Reversed, on confession of error by Mr. Solicitor General Frierson; and cause remanded to the District Court of the United States for the Southern District of California for further proceedings.

(255 U. S. 563)

No. 612. UNITED STATES FIDELITY & GUARANTY COMPANY et al., plaintiffs in error, v. TRAVELERS' INSURANCE MACHINE COMPANY. March 7, 1921. For opinion below, see 188 Ky. 841, 224 S. W. 496. See, also, 41 Sup. Ct. 216, 254 U. S. 653, 65 L. Ed. —. In error to the Court of Appeals of the State of Kentucky.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(255 U. S. 564)

No. 620. ILLINOIS CENTRAL RAILROAD COMPANY, plaintiff in error, v. C. B. JOHNSON. March 7, 1921. For opinion below, see 87 South. 866. See, also, 41 Sup. Ct. 218, 254 U. S. 654, 65 L. Ed. —. In error to the Supreme Court of the State of Alabama.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(255 U. S. 569)

No. 656. The NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, petitioner v. The UNITED STATES of America. March 7, 1921. For opinion below, see 269 Fed. 351. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(255 U. S. 569)

No. 678. Louise Marie Bailey SHANNON et al., heirs, etc., et al., petitioners, v. GULF PRODUCTION COMPANY et al., etc. March 7, 1921. For opinion below, see Dolbear v. Gulf Production Co., 268 Fed. 737. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(255 U. S. 570)

No. 682. Mrs. Julia A. WHITEHEAD, petitioner, v. RAILWAY MAIL ASSOCIATION. March 7, 1921. For opinion below, see 269 Fed. 25. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 694. RAILROAD COMMISSION of WISCONSIN et al., appellants, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. March 7, 1921. Substitution as two of the appellants, William J. Morgan, present attorney general of the State of Wisconsin, and George B. Clementson, present district attorney of Grant County, State of Wisconsin, in place of John J. Blaine and Frank C. Meyer, former attorney general and district attorney, respectively, ordered, on motion of Mr. Bruce Scott for the appellee.

(255 U. S. 570)

No. 696. George A. CALLICOTTE, petitioner, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. March 7, 1921. For opinion below, see 267 Fed. 799. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(255 U. S. 570)

No. 697. G. A. BARNETT, petitioner, v. Roland R. CONKLIN. March 7, 1921. For opinion below, see 268 Fed. 177. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(255 U. S. 570)

No. 701. Carl H. WRIGHT, petitioner, v. INTER-URBAN RAILWAY COMPANY. March 7, 1921. For opinion below, see 179 N. W. 877. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

(255 U. S. 571)

No. 703. BATES COUNTY, MISSOURI et al., petitioners, v. A. V. WILLS et al., partners, etc. March 7, 1921. For opinion below, see 269 Fed. 734. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(255 U. S. 571)

No. 704. The NEW YORK CENTRAL RAILROAD COMPANY, petitioner, v. Perfetti COSMO. March 7, 1921. For opinion below, see 184 N. Y. Supp. 915. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied.

(255 U. S. 571)

No. 705. The NATIONAL ORDER of the DAUGHTERS of ISABELLA, petitioner, v. NATIONAL CIRCLE, DAUGHTERS of ISABELLA. March 7, 1921. For opinion below, see 270 Fed. 723. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(255 U. S. 571)

No. 715. HAMILTON INVESTMENT COMPANY et al., petitioners, v. Otto BOLLMAN. March 7, 1921. For opinion below, see 268 Fed. 788. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(255 U. S. 571)

No. 717. Samuel J. MASTERS et al., petitioners, v. Charles A. HARTMANN et al. March 7, 1921. For opinion below, see 269 Fed. 483. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(255 U. S. 572)

No. 719. Max WAGMAN, petitioner, v. The UNITED STATES of America. March 7, 1921. For opinion below, see 269 Fed. 568. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(255 U. S. 572)

No. 721. Clifford D. HOUK, petitioner, v. Charles V. WEDDELL et al. March 7, 1921. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(255 U. S. 572)

No. 729. CHURCHWARD INTERNATIONAL STEEL COMPANY, petitioner, v. BETHLEHEM STEEL COMPANY. March 7, 1921. For opinion below, see 268 Fed. 361. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(255 U. S. 572)

No. 733. Carl E. SPICER, as Administrator, etc., petitioner, v. NEW YORK LIFE INSURANCE COMPANY. March 7, 1921. For opinion below, see 268 Fed. 500. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(255 U. S. 573)

No. 738. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, petitioner, v. Joseph S. McINTYRE, Administrator, etc. March 7, 1921. For opinion below, see 227 S. W. 1047. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(255 U. S. 573)

No. 740. The CHESAPEAKE & OHIO RAILWAY COMPANY, petitioner, v. L. N. ARRINGTON. March 7, 1921. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(255 U. S. 579)

No. 203. EVERGLADES SUGAR & LAND COMPANY et al., plaintiffs in error, v. NAPOLEON B. BROWARD DRAINAGE DISTRICT et al. March 8, 1921. In error to the Supreme Court of the State of Florida. For opinion below, see 78 Fla. 276, 82 South. 815. Mr. Clair D. Vallette, of Washington, D. C., for plaintiffs in error. Dismissed with costs, on motion of counsel for the plaintiffs in error.

(255 U. S. 579)

No. 204. David M. SIMPSON, plaintiff in error, v. The BOARD of SUPERVISORS of KOSSUTH COUNTY, IOWA, et al. March 9, 1921. In error to the Supreme Court of the State of Iowa. For opinion below, see 186 Iowa, 1034, 171 N. W. 259. Mr. George S. Wright, of Council Bluffs, Iowa, for plaintiff in error. Mr. James W. Morse, of Estherville, Iowa, for defendants in error. Dismissed with costs, pursuant to the tenth rule.

(255 U. S. 565)

No. 551. SOUTHERN PAPER COMPANY, plaintiff in error, v. Stokes V. ROBERTSON. State Revenue Agent. March 14, 1921. In error to the Supreme Court of the State of Mississippi. For opinion below, see 85 South. 139. Messrs. W. A. White and White & Ford, all of Gulfport, Miss., for plaintiff in error. Mr. George Butler, of Jackson, Miss. (Wells, May & Sanders, of Jackson, Miss., of counsel), for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(255 U. S. 573)

No. 700. Charles L. KILLGORE, petitioner, v. H. W. SKINNER. March 14, 1921. For opinion below, see 269 Fed. 120. Mr. H. M. Garwood, of Houston, Tex. (Kimbrough, Underwood, Jackson & Simpson, of Amarillo, Tex., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(255 U. S. 574)

No. 713. PHOENIX PORTLAND CEMENT COMPANY, petitioner, v. BALTIMORE & OHIO RAILROAD COMPANY. March 14, 1921. For opinion below, see 269 Fed. 136. Mr. Wm. Jay Turner, of Philadelphia, Pa., for petitioner. Mr. H. B. Gill, of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(255 U. S. 573)

No. 718. J. A. CALHOUN, Sr., as Administrator, etc., petitioner, v. SOUTHERN RAILWAY COMPANY. March 14, 1921. For opinion below, see 106 S. E. 780. Messrs.

John H. Clifton, L. D. Jennings and A. S. Harby, all of Sumter, S. C., for petitioner. Messrs. S. R. Prince and H. O'B. Cooper, both of Washington, D. C., and F. G. Tompkins, of Columbia, S. C., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied.

(255 U. S. 574)

No. 727. FINKBINE LUMBER COMPANY, petitioner, v. GULF & SHIP ISLAND RAILROAD COMPANY. March 14, 1921. For opinion below, see 269 Fed. 933. Mr. W. A. White, of Gulfport, Miss., for petitioner. Mr. B. E. Eaton, of Gulfport, Miss., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(255 U. S. 574)

No. 734. The TEXAS COMPANY, petitioner, v. The COMMONWEALTH of VIRGINIA. March 14, 1921. Messrs. Willcox, Cooke & Willcox and Thomas H. Willcox, all of Norfolk, Va., and Herman Block, of Brooklyn, N. Y., for petitioner. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(255 U. S. 567)

No. 737. INDUSTRIAL ACCIDENT COMMISSION of the State of CALIFORNIA, petitioner, v. John Barton PAYNE, as Agent, etc. (Los Angeles & Salt Lake Railway Company). March 14, 1921. For opinion below, see 195 Pac. 81. Petition for a writ of certiorari to the District Court of Appeal, Second Appellate District, Division 2, of the State of California, granted.

(255 U. S. 574)

No. 749. JOSE TAYAS' SONS COMPANY, petitioner, v. The POMPEIAN COMPANY. March 14, 1921. For opinion below, see The Arpillao, 270 Fed. 426. Mr. D. Roger Englar, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(255 U. S. 574)

No. 754. DUNDEE PETROLEUM COMPANY, petitioner, v. R. P. CLAY. March 14, 1921. For opinion below, see 267 Fed. 145. Messrs. W. A. Ledbetter and H. L. Stuart, both of Oklahoma City, Okl., for petitioner. Messrs. F. E. Riddle, of Tulsa, Okl., and E. G. McAdams, of Oklahoma City, Okl., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(255 U. S. 575)

No. 785. CZARNIKOW RIONDA COMPANY et al., petitioners, v. BINGHAMTON STEAMSHIP COMPANY et al. March 14, 1921. For opinion below, see The Binghamton, 271 Fed. 69. Messrs. John G. Milburn, T. Catesby Jones, Geo. Whitefield Betts, Jr., and Robert McLeod Jackson, all of New York City, for petitioners. Messrs. James K. Symmers, of New York City, and Edward E. Blodgett, of Boston, Mass., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(255 U. S. 472)

UNITED STATES v. CORONADO BEACH CO. (two cases).

(Argued March 1 and 2, 1921. Decided March 28, 1921.)

Nos. 524 and 525.

1. **Public lands 🔑223(1) — Reservation in Mexican grant held not to authorize taking without compensation.**

The provision of the Mexican law authorizing the government to make use of any portion of certain land for public purposes does not import into a grant under that law a reservation of the right to take the land from the grantee without compensation, so that the United States did not, when it succeeded to the sovereignty of Mexico over those lands, acquire such right.

2. **Public lands 🔑223(1)—State title to tide lands is subject to prior Mexican grants.**

The title acquired by the state of California to the tide lands within its borders was subject to prior Mexican grants of such lands.

3. **Public lands 🔑213—Court had jurisdiction after statehood to determine validity of prior Mexican grants, and determination relates back to grant and is conclusive.**

The United States District Court had jurisdiction to determine the extent of prior Mexican grants within the state of California after that state was admitted into the Union, and its determination that such grant included tide lands relates back to the date of the grant and is conclusive, though erroneous.

4. **Public lands 🔑117—Line adopted as boundary for patent cannot be collaterally impeached.**

The line adopted as the deep water line by the United States for the purpose of making its grant cannot thereafter be impeached by the United States by showing that it was not surveyed but was taken from the coast survey maps.

5. **Public lands 🔑213—Direct attack on decree confirming Mexican grant held too late.**

A bill by the United States to have determined the rights of private persons in a certain island cannot be construed as a direct attack upon the decree confirming a Mexican grant to the island, where it was not brought within the five years within which a suit to annul a patent must be brought under Act March 3, 1891, § 8 (Comp. St. § 5114), since that act, though in terms applying only to suits to annul a patent, has the effect of giving patent validity even against the United States.

6. **Witnesses 🔑252—Maps and drawings held admissible to illustrate opinion of value.**

In proceedings to condemn an island, maps or drawings showing the adaptability of the island to a system of improvements were properly admitted for the purpose of illustrating the opinion of the witness as to the value of the property, and were not rendered inadmissible because such improvements were speculative, and not commercially practicable, which affected only the weight of the opinion.

7. **Eminent domain 🔑318—Tide lands as well as uplands held condemned.**

Under Act July 27, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1867ddd), authorizing the government to take the whole of an island and providing for the determination of any rights private parties may have therein, and a bill for determination of such rights in condemnation which followed the language of the act, the government sought to condemn not only the uplands, but also the tide lands of the island which were owned by private parties.

In Error to and Appeal from the District Court of the United States for the Southern District of California.

Suit by the United States against the Coronado Beach Company to ascertain the rights of defendant in a certain island and to condemn the island for public purposes. After a decree adjudging defendant to hold title to the entire island, the case was transferred to the law side and the value assessed by jury and judgment entered, and the United States appeals and brings error. Decree and judgment affirmed.

For opinion below, see 274 Fed. 230.

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*Mr. Assistant Attorney General Garnett, for the United States.

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*Mr. Peter F. Dunne, of San Francisco, Cal., for Coronado Beach Co.

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*Mr. Justice HOLMES delivered the opinion of the Court.

These cases arise out of a proceeding brought by the United States under the Act of July 27, 1917, c. 42, 40 Stat. 247 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1867ddd), for the double purpose of ascertaining the rights of private parties in North Island in the harbor of San Diego, California, and of condemning the whole of said island for public purposes after the value of such rights has been fixed and paid into Court. The proceeding was begun by a bill in equity against the Coronado Beach Company. In its answer that Company alleged title to the whole island, and after a hearing obtained a decree in its favor, subject to the question of the rights of the United States brought up by the appeal in No. 525. The case then was transferred to the law side, the value of the plaintiff's island was assessed by a jury, and a judgment was entered that upon payment of $5,000,000 into Court within thirty days the United States might have a final order of condemnation. The writ of error in 524 presents the questions raised in this stage of the case.

[1] The title of the Coronado Beach Company is derived from a Mexican grant of May 15, 1846, to one Carillo, a Mexican citizen, the Company having succeeded to his rights. At this point it is necessary to mention only that Carillo is given the right to

enclose the land "without prejudice to the crossings, roads, and servitudes." The grant was under a law of August 18, 1824, by the *486 fifth *section of which—

> "If, for the defence or security of the nation, the Federal Government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the General Congress, or during its recess with that of the Government Council." Hall, Laws of Mexico, 148, § 492.

The United States interprets this as a reservation of power against all persons, as one of the servitudes to which the Carillo grant was subject, and as a sovereign right to which it succeeded when the land became territory of the United States. We cannot accept so broad an interpretation. We need not repeat the discussion in Arguello v. United States, 18 How. 539, 15 L. Ed. 478, wherein it was laid down that the first eight sections apply wholly to colonists and foreigners. The decision immediately concerned the fourth section of the law, but the ground for the construction given to it was that the others obviously were limited as stated and that there was no reason for giving to the fourth a greater scope. Moreover the second section states that—

> "The objects of this law are those national lands which are neither private property nor belong to any corporation or pueblo and can therefore be colonized." United States v. Yorba, 1 Wall. 412, 17 L. Ed. 635.

It is hardly credible that section five should have been intended to reserve the right to displace private owners, and wholly incredible that it reserves the right to do so without compensation, especially when it is noticed that by the law of April 6, 1830, the value of lands taken for fortification, &c., is to be credited to the States. Camou v. United States, 171 U. S. 277, 284, 285, 18 Sup. Ct. 855, 43 L. Ed. 163; Hall, Laws of Mexico, 108, § 291.

The more serious questions arise on the writ of error and concern primarily the extent of the grant; the main dispute being whether the Company owns the tide lands in front of the upland of the island. Carillo's petition states as its ground that he is in want of proper land for the breeding of *487 *cattle and horses and asks the grant for a cattle farm of the island or peninsula in question, bounded substantially as in the subsequent grant, viz.: on the north by the Estero of San Diego towards the town, east by the end of the rancho of Don Augustin Meliso, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. On April 20, 1852, Billings and others then holding the title petitioned the Commissioners to settle Private Land Claims, appointed under the Act of March 3, 1851, c. 41; 9 Stat. 631, to confirm to them this tract of land. The petition was rejected by the Board but on appeal the title was declared good and confirmed by the District Court of the United States. The decree stated the boundaries on the north, east and south as in the original grant, and "west by the anchorage for ships according to the documents of title and map to which reference is had." This decree was filed on January 12, 1857; on May 7, 1867, after an appeal to this Court had been dismissed, there was a substitution of Peachy and Aspenwall as parties, and on June 11, 1869, a patent was issued reciting the decree, a return with a plat of a survey approved under section 13 of the Act of 1851, and giving and granting to them the land described in the survey. The Mexican map is not in the record and is not material since the plat accompanying the patent of the United States shows the line marking the "Anchorage for Ships," which includes the tide lands in dispute.

[2-5] The jurisdiction of the decree and the validity of the patent so far as they cover the tide lands is denied by the United States, a special reason being found in the fact that California became a State in 1850 and thereby acquired a title to the submerged lands before the date of the decree. But the title of the State was subject to prior Mexican grants. The question whether there was such a prior grant and what were its boundaries were questions that had to be decided in the proceedings for confirmation and there *488 was *jurisdiction to decide them as well if the decision was wrong as if it was right. The title of California was in abeyance until those issues were determined, as the decree related back to the date of the original grant. The petitioner asked a confirmation of the tract conveyed to Carillo. The grant to Carillo was bounded "west by the anchorage for ships" and although it well may be that in view of the purpose set out in his petition and the circumstances the grant could have been construed more narrowly, that was a matter to be passed upon and when the decree and the patent went in favor of the grantee it is too late to argue that they are not conclusive against the United States. It is said that the field notes, not put in evidence at the trial, show that the deep water line was not surveyed, but was taken from the Coast Survey maps. But however arrived at it was adopted by the United States for its grant and it cannot now be collaterally impeached. Knight v. United Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096; Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88. It was suggested that the bill might

be regarded as a direct attack upon the patent; but this probably was an afterthought and in any event the attack would be too late. Act of March 3, 1891, c. 561, § 8; 26 Stat. 1099 (Comp. St. § 5114); United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 450, 28 Sup. Ct. 579, 52 L. Ed. 881.

[6] A subordinate objection is urged to the admission of maps or drawings showing the adaptability of the island to a great system of improvements possible if the Coronado Beach Company owned the submerged land. It is urged that such improvements were speculative, remote, and not shown to be commercially practicable. But the drawings were admitted only to illustrate the opinion of the witness as to value and were explained as meaning no more. If the reasons for his opinion were inadequate they detracted from the weight of his testimony but were not inadmissible on that account.

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[7] *Finally it is contended that the Government took only the upland. But the Act of 1917 provides for the taking of "the whole of North Island" and for "the determination and appraisement of any rights private parties may have in said island," and the bill follows the act and prays that if the defendant company has any right to the tract or any part thereof the right "and the whole thereof" may be "appraised and condemned." We discover no error in the proceedings below.

Decree and judgment affirmed.

Mr. Justice CLARKE took no part in the decision of this case.

(255 U. S. 486)

FRIEDMAN v. UNITED STATES.

(Argued March 14, 1921. Decided March 28, 1921.)

No. 221.

Mines and minerals 🔑35—Coal lands may be sold at higher price than minimum price fixed by statute; "less;" "more."

Rev. St. § 2347 (Comp. St. § 4659), providing for the sale of coal lands within 15 miles of a railroad for not less than $20 an acre, does not require that such land shall be sold at that price, and the Secretary of the Interior may classify and appraise the land and place a higher selling price thereon, notwithstanding the practice of the department from 1873 to 1907 to sell at such minimum price, the prior legislation (Act July 1, 1864, Act March 3, 1865, and Act March 3, 1873), and the fact that such construction puts no restraint on the Secretary of the Interior, especially where no arbitrary abuse of power is claimed; as "less" and "more" are words of contrast and opposition and cannot be confounded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Less; More.]

Appeal from the Court of Claims.

Action by Henry Friedman against the United States. From a judgment dismissing the petition (54 Ct. Cl. 225), claimant appeals. Affirmed.

Messrs. Charles A. Keigwin and William R. Andrews, both of Washington, D. C., for appellant.

Mr. Solicitor General Frierson, for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

Action to recover the sum of $3,600, excessive payment exacted by the Secretary of the Interior for 120 acres of coal land, which plaintiff (we so designate him in this opinion) was entitled to enter and did enter under section 2347 of the Revised Statutes (Comp. St. § 4659).

The Court of Claims dismissed the petition and from its judgment this appeal is prosecuted.

The right of plaintiff to enter the land is not disputed. The dispute is as to the price prescribed by section 2347. Its provision is that payment shall be made of not less than $10 per acre if the lands selected be more *469 than 15 miles *from a completed railroad, and not less than $20 per acre if they be within 15 miles of the railroad.

The entry of plaintiff was within 15 miles of the railroad and the Secretary required the payment of $50 per acre. The requirement is attacked as beyond the power of the Secretary, it being in excess of the statutory price which, it is contended, is $20 per acre; and to sustain the attack there is adduced the prior practice of the Interior Department and cases whose analogy, it is contended, demonstrate that the words "not *less* than twenty dollars per acre" mean not *more* than $20 per acre. The answer to the contention would seem necessarily to be that "less" and "more" are words of contrast—indeed of opposition, and cannot be confounded. It is easy to see that if their difference should be disregarded in dealing with the things of the world, sensible or insensible, the resulting confusion would be hard to describe.

Plaintiff makes the words even more facile to management than in the above contention, and makes them exclude all freedom of judgment and choice of price, which they seem not only to imply but require, in the administration of section 2347. In support of the liberty of identifying or confusing different things plaintiff invokes the practice of the Interior Department from 1873 to 1907 and urges that Congress by silence gave sanction and approval to the practice.

The inference deduced from the practice and the asserted sanction we cannot accept.

The practice was but the exercise of administration by the Department upon the then circumstances, deemed proper and adequate then and accepted as such by Congress.

In 1907 there was a change of conditions and they dictated a change in administration and in aid of a judgment of values and its exercise under the direction of section 2347, coal lands were subjected to classification and appraisement, a procedure not *470 arbitrary but safe and sensible, establish*ing a proportional relation between the payment made and the value of the lands received. And this is consonant to the statute; indeed, is its direction, if its words be considered. There has been no protesting objection from Congress, and the Executive and Legislative Departments have been in accord for 14 years. The present practice of the Interior Department therefore has the same confirmation that plaintiff asserts for its prior practice.

Plaintiff, however, contends that section 2347 is the successor of prior legislation and that by such legislation, and decisions under it, the words "not less than" of that section have been made the equivalent "of the minimum and minimum price" of prior legislation and that $20 per acre is the "sole price fixed by law" for lands within 15 miles of a completed railroad.

The legislation referred to is an Act of July 1, 1864 (13 Stat. 343), an Act of March 3, 1865 (13 Stat. 529), and an Act of March 3, 1873 (17 Stat. 607). The latter statute becoming section 2347 and other sections.

The first act provided for the sale of coal lands at public auction "at a minimum price of $20 per acre," and "that any lands not thus disposed of" should "thereafter be liable to private entry at said minimum." The second act provided that coal land could be entered by a citizen actually engaged in mining upon it "at the minimum of $20 per acre fixed in the Town and Property Act of July 1, 1864." The third act omits provision for offering coal lands at auction and subjects them to private entry at not less than $10 or $20 an acre, according to distance from a completed railroad. This provision became section 2347.

These acts were the successors of one another in general policy but not in details. In the latter they differed in provision and progressed to the explicit declarations of section 2347 and their inevitable meaning. And there is nothing to the contrary in Colorado *471 C. Co. v. United *States, 123 U. S. 307, 325, 8 Sup. Ct. 131, 31 L. Ed. 182. The case, indeed, was concerned with other provisions than those involved here.

We need not go beyond this general exposition. It would extend this opinion to a repellant length to trace and comment upon the details and refinements of plaintiff's reasoning, and upon the analogies he urges of the price of lands under the preemption and other laws.

We are not impressed with the contention that if the price of $20 an acre is not the fixed and ultimate price there is no test of price and that the Secretary of the Interior "may charge what price he chooses, * * * no law putting any restraint upon his action," and that the "sale of coal lands may be stopped altogether if, for any reason, the Secretary considers that to be judicious or desirable." This is tantamount to saying that the Secretary may abuse his trust and the power conferred upon him to execute it. There is no argument against conferring power or denying power in the assertion that it may be abused. The world acts and must act upon a different consideration. Government would otherwise be impossible. Besides, there is no contention that there is an arbitrary abuse of power in the present case, and when such abuse shall occur a remedy may be of concern and no doubt will be found.

Judgment affirmed.

Mr. Justice CLARKE took no part in the consideration and decision of this case.

(255 U. S. 455)

LANG v. NEW YORK CENT. R. CO.

(Argued March 1, 1921. Decided March 28, 1921.)

No. 290.

1. Master and servant 🔑129(6)—Violation of Safety Appliance Act must be proximate cause of injury.

There must necessarily be a causal relation between an interstate carrier's violation of Safety Appliance Act, § 2 (Comp. St. § 8606), prohibiting the use of cars not equipped with automatic couplers, and an injury to an employee, in order to impose liability on the carrier for the injury.

2. Master and servant 🔑111(1½)—Safety Appliance Act intended to provide against risk in coupling cars.

Safety Appliance Act, § 2 (Comp. St. § 8606), forbidding the use by carriers engaged in interstate commerce of cars not equipped with automatic couplers, which can be uncoupled without men going between the cars, was intended to provide against the risk of coupling cars, and not to provide a place of safety for employees between colliding cars.

3. Master and servant 🔑129(6)—Absence of coupler held not proximate cause of injury.

Where a car not equipped with couplers as required by Safety Appliance Act, § 2 (Comp. St. § 8606), was standing on a siding, and a train crew kicking cars on the siding, did not intend to disturb, move, or couple to the crippled car, and it was the duty of a brakeman to stop the moving cars before coming in contact with the crippled car, but he failed to perform such duty, and his foot was caught between the moving cars and the crippled car, the collision was not the proximate result of the defect in the car.

Mr. Justice Clarke and Mr. Justice Day dissenting.

On Writ of Certiorari to the Supreme Court of the State of New York.

Action by Anna Lang, as administrator of Oscar G. Lang, deceased, against the New York Central Railroad Company. A judgment for plaintiff and an order denying a new trial (104 Misc. Rep. 634, 172 N. Y. Supp. 196) were affirmed by the Appellate Division (187 App. Div. 967, 175 N. Y. Supp. 908), but reversed by the Court of Appeals (125 N. E. 681), and plaintiff brings certiorari. Affirmed.

See, also, 253 U. S. 479, 40 Sup. Ct. 482, 64 L. Ed. 1023.

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*Mr. Hamilton Ward, of Buffalo, N. Y., for plaintiff in error.

Mr. Maurice C. Spratt, of Buffalo, N. Y., for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

Action for damages laid in the sum of $50,000 for injuries sustained by petitioner's intestate, Oscar G. Lang, while assisting in switching cars at Silver Creek, N. Y. The injuries resulted in death. The Safety Appliance Act (Comp. St. §§ 8605–8612) is invoked as the law of recovery.

There was a verdict for $18,000, upon which judgment was entered. It and the order denying a new trial were affirmed by the Appellate Division, March 5, 1918, by a divided court.

The Court of Appeals reversed the judgments, and directed the complaint to be dismissed, to review which action this certiorari is directed.

In general description the court said:

> "In the case before us the defendant [respondent] was engaged in interstate commerce. A car without a drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman, and was riding on a second car kicked upon the same siding. A collision occurred, and the deceased was crushed between the car upon which he was riding and the defective car."

There is no dispute about the facts; there is dispute about the conclusions from them. We may quote, therefore, the statement of the trial court, passing upon the motion for new trial, as sufficient in its representation of the case. It is as follows:

> "The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, N. Y. On the same track was also standing another car destined *457 for Farnham, the *next station east. At Silver Creek this way freight had orders to leave a couple of cars and to take on the car going to Farnham. The car loaded with iron above referred to was defective. The drawbar, the draft timber, and the coupling apparatus on the westerly end of this car were gone. This car had been on the siding at Silver Creek several days, loaded with iron consigned to a firm at Silver Creek, waiting to be unloaded. Its condition was known to the crew of the way freight generally and to the plaintiff's intestate prior to the accident. In fact, its crippled condition was the subject of conversations between him and the train conductor only shortly before the accident happened. In getting out the car for Farnham, the engine went onto the siding from the westerly end, pulled out a string of six cars, including the Farnham car, then shunted the Farnham car onto an adjoining track, placed two of the other cars they had hauled out onto a third track, and then kicked the other three cars back onto the track where the crippled car stood. Plaintiff's intestate was on one of these three cars for the purpose of setting the brakes, and so placing them on this siding as not to come into contact with the crippled car. He evidently was at the brake on the easterly end of the easterly one of the three cars moving toward the crippled car. His foot was resting on the small platform at the end of the car just below the brake wheel. For some reason he did not stop the three cars moving on this track before the cars came into contact with the crippled car. The cars collided, and owing to the absence of coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars, and he was so injured that he died from the injuries so received. It evidently was not the intention of any of the crew to disturb, couple onto, or move the crippled car."

The statement that "owing to the absence of the coupler attachment and bumpers on *458 the crippled car intestate's *leg was caught between the ends of the two cars" is disputed as a consequence or as element of decision independently of what Lang was to do and did—indeed, it is the dispute in the case. Based on it, however, and the facts recited, the contention of petitioner is that they demonstrate a violation of the Safety Appliance Act, and justify the judgment of the trial court, and its affirmance by the Appellate Division. For this Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931 is cited.

The opposing contention of respondent is that—

> "The proximate cause of the accident was the failure of the deceased to stop the cars before they came in collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause."

To support the contention St. Louis & S. F. R. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290 is adduced.

[1] The Court of Appeals considered the Conarty Case controlling. This petitioner

contests, and opposes to it the Layton Case, supra, and contends that the court failed to give significance and effect to the fact that the car in the Conarty Case was out of use, and that while out of use the car upon which Conarty was riding collided with it; whereas, in the case at bar, it is insisted, that the defective car was in use by defendant and was required to be used by the intestate. The trial court made this distinction and expressed the view that the defective car in the case at bar "must be deemed to have been in use within the meaning of the statute." The distinction as we shall presently see is not justified. It is insisted upon, however, and to what is considered its determination is added a citation from the Layton Case declaring that the Safety Appliance Act makes "it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not" equipped as there provided, and, further, "by this legislation the qualified duty of the common carrier is expanded *into an absolute duty in respect to car couplers," and by an omission of the duty the carrier incurs "a liability to make compensation to any employee who" is "injured by it." But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares. Its concluding words are, expressing the condition of liability, "that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." The plaintiff recovered because the case came, it was said, within that interpretation of the statute.

We need not comment further upon the case, nor consider the cases which it cites. There is no doubt of the duty of a carrier under the statute, and its imperative requirement, or of the consequences of its omission. But the inquiry necessarily occurs, to what situation, and when, and to what employees do they apply?

The Court of Appeals was of the view that it was the declaration of the Conarty Case that section 2 of the Safety Appliance Act[1] "was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of cars. It was not to provide a place of safety between colliding cars" and that "the absence of coupler and drawbar was not a breach of duty toward a servant in that situation." It further decided that Lang was in "that situation," and he "was not one of the persons for whose benefit the Safety Appliance Act was passed."

*Two questions are hence presented for solution: (1) Was the Court of Appeals' estimate of the Conarty Case correct? (2) Was it properly applied to Lang's situation?

[2] (1) The court's conclusion that the requirement of the Safety Appliance Act "was intended to provide against the risk of coupling cars" is the explicit declaration of the Conarty Case. There, after considering the act and the cases in exposition of it, we said:

> Nothing in its provisions "gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.' 27 Stat. 531."

The case was concerned with a collision between a switch engine and a defective freight car resulting in injuries from which death ensued. The freight car was about to be placed on (we quote from the opinion)—

> "an isolated track for repairs and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued."

The deceased was on the switch engine and it was on its way—

> "to do some switching at a point some distance beyond the car and was not intended and did not attempt to couple it to the engine or to handle it in any way. Its movement was in the hands of others."

[3] (2) That case, therefore, declares the same principle of decision as the Court of Appeals declared in this, and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car. In that case the movement of the colliding car was at night, and it may be inferred that there was no knowledge of the situation of the defective car. In *this case the movement of the colliding car was in the daytime and the situation of the defective car was not only known and visible, but its defect was known by Lang. He therefore knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. "It was not," the trial court said, "the intention of any of the crew [of the colliding car] to disturb, couple onto, or move the crippled car." It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it "so as not to come into con-

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[1] Section 2 of the Safety Appliance Act is as follows: "On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier [one engaged in interstate commerce] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531 (Comp. St. § 8606).

tact with the crippled car," to quote again from the trial court. That duty he failed to perform, and, if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, "still the collision was not the proximate result of the defect," or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law "but only that, had they been complied with, it [the collision] would not have resulted in injury to the deceased."

Judgment affirmed.

Mr. Justice CLARKE (dissenting). Because I think that the court's decision of this case will result in seriously confusing the law applicable to the Safety Appliance Acts of Congress, I shall state, as briefly as I may, my reasons for dissenting from it.

When Lang, a brakeman in the employ of the New York Central Railroad Company, received his fatal injuries, the Safety Appliance Acts of Congress declared it to be "unlawful" for an interstate carrier by rail to "use on its line" any car not equipped

with automatic couplers, and also *provided that any employee injured by any car not so equipped should not be held to have assumed the risk of injury thereby occasioned by continuing to work after the unlawful use of such a car had been brought to his knowledge. 27 Stat. 531, §§ 2 and 8 (Comp. St. §§ 8606, 8612); 32 Stat. 943, § 1 (Comp. St. § 8613).

At that time, also, the federal Employers' Liability Act provided that in any action brought under the act no employee should be held to have been guilty of contributory negligence or to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of its employees contributed to the injury or death of such employee. 35 Stat. 65, §§ 3 and 4 (Comp. St. §§ 8659, 8660).

It is obvious that these statutes take out of this case all question as to assumption of risk by, and contributory negligence of, the deceased brakeman.

Since the decision in St. Louis, Iron Mountain & Southern Railway Co. v. Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621 (52 L. Ed. 1061) this court has consistently held that in enacting the Safety Appliance Acts:

> "The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

Chicago, Burlington & Quincy R. R. Co. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582: Here the court declares that the Safety Appliance Act imposes "an absolute duty on the carrier and the penalty cannot be escaped by the exercise of reasonable care."

Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874: Here the court said:

> "Disregard of the Safety Appliance Act is a wrongful act; and, where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover the damages from the party in default is implied."

*Louisville & Nashville Railroad Co. v. Layton, 243 U. S. 617, 621, 37 Sup. Ct. 456, 457 (61 L. Ed. 931): Here the foregoing cases are cited, and the court declares:

> "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995. Here a brakeman, going over the tops of cars when a train was in motion, was thrown under the wheels by a sudden jerk caused by the setting of brakes when defective couplers parted, and the company was held liable "in view of the positive duty imposed by the statute to furnish safe appliances for the coupling of cars."

Regarding the case at bar as ruled by the decisions we have cited, especially by Louisville & Nashville R. R. Co. v. Layton, supra, the trial court held the railroad company liable and sent the case to the jury for the assessment of damages only. The Appellate Division affirmed the judgment, but the Court of Appeals reversed it, solely upon the authority of St. Louis & San Francisco Railroad Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290.

*It is plain that the principle of the cases quoted from is that carriers should be held liable to employees in damages whenever failure to obey the Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of their duty.

With these statutes and decisions in mind we come to the consideration of the facts in this case.

Lang, a brakeman, was a member of the crew of a local freight train, running from Erie, Pa., easterly to Buffalo, N. Y. When the train reached Silver Creek, an intermediate station, the conductor was directed to pick up a car then on the "house track," and to take it in his train to Farnham, N. Y. We shall refer to this car as the "Farnham car."

For more than two weeks prior to the accident to Lang, there had been in the Silver Creek yard a box car loaded with steel, from one end of which, for three or four days before the accident certainly (how much longer does not appear) the entire coupler and draw bar had been missing. This car had been held for unloading, which had been commenced before but was completed on the day of the accident. It had been necessary during this time to switch the car about the yard, and the crew of which Lang was a member had shifted it at least once on the day before the accident.

When the conductor went to look for the Farnham car he found it standing on the "house track" with five other cars to the west of it and four cars to the east of it, the car next it on the east being the defective car, with the drawhead missing from its west end (the end next the Farnham car). Thus this "house track," with capacity for 12 cars, had 10 standing upon it, of which the defective car was one—necessarily they must have been very close together.

The conductor saw that it was impossible to switch out the Farnham car from the
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east end of the "house track" *without moving the defective car, and thereupon he ordered his engine to go through the switch at the west end of the "house track," to couple to the six cars standing to the west of the defective car, and then to back out and switch the Farnham car (which would be the most easterly one of the string) onto another track, where it could be picked up later. This being done, the two cars farthest from the engine were shunted onto a third track, thus leaving but three cars attached to the engine. The plan then was to "kick" these three cars back onto the "house track," and to stop them when near to the defective car, but before they came in contact with it. It was while attempting to accomplish this purpose that the accident occurred.

The movement which resulted in the accident is described by the conductor, who was standing at the switch at the west end of the "house track," as follows:

The engine kicked the three remaining cars onto the "house track," and after they were started Lang, who was standing near the conductor, got on the head car, "the one nearest to the cripple," for the purpose of stopping them. When he got upon this box car, it was about four car lengths from the defective end of the defective car, and the track was slightly down grade toward it. His purpose was to get to the brake at the head end of the head car, so as to stop the three before they touched the defective car, but either because the cars had been started too rapidly by the engine, or because the brake did not work well, or because the track was down grade, or because the time or distance was too short, he did not get the cars stopped in time to prevent them from colliding with the defective car. At the moment of the impact, Lang, who was in the act of setting the brakes, had one foot on the brake step attached to the end of the head car, and, because the drawhead was missing from the defective car, the ends of the two cars came together, so crushing his
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leg between them that he died *within a few days thereafter. Thus did Lang, who was as much without fault in fact as the statutes cited rendered him without fault in law, come to his death.

It is the uncontradicted evidence that, if the bad order car had been equipped with such a coupler as the law required, the ends of the two cars could not have come nearer together than 30 inches, and the accident, of course, could not have occurred.

It seems to be the theory of the opinion of the court that because the conductor realized the danger there was in the defective car and aimed to avoid moving it, therefore it was not "in use" by the company within the meaning of the Safety Appliance Acts.

But a car in such dangerously defective condition as this one was, which for convenience in unloading was kept for days, perhaps for weeks, in a yard so crowded that it was necessary to move it from time to time in the ordinary yard switching, cannot reasonably be said to have been "out of use" during that time. To allow such a car to be placed upon an unloading track, so short and crowded that a slight excess of speed in moving other cars, or a slight defect in the brakes or a moment of delay in applying them, might result, as it did in this case, in the injury or death of employees, cannot reasonably be said to be keeping such a car "out of use." As a matter of fact, the defective car was actually in use in a most real and familiar way on the very day of the accident, for, on that day the unloading of it, which had been commenced before, was completed while it was on the "house track" on which the accident occurred.

The Layton Case, supra, coming after the Conarty Case, decided (all the members of this court as now constituted concurring) that:

"Carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when in the discharge of duty."

And the Gotschall Case, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, *467 *clearly proceeded upon the same principle. Neither of the men injured in the Layton or Gotschall Cases was engaged in coupling or uncoupling cars when the accident occurred, but each was injured because of defective coupling appliances when he was going over the cars of his train in the discharge of his duty. Here Lang was injured, when in the discharge of his duty, because a defective car had been placed upon a much-used track in a busy yard in such a position that it was impossible for him, in the exercise of due care, to prevent the cars he was seeking to control from coming in contact with it.

It would be difficult to conceive of a case in which the negligence of the master could be a more immediate and proximate cause of injury to a servant than it was in this case.

Having regard to the extent to which this case must be accepted by other courts as a rule of decision, it would seem that the orderly and intelligible administration of justice required that the principle of the Layton and Gotschall Cases should be disavowed or overruled, for that principle is so plainly in conflict with the opinion in this case that courts and advising counsel will otherwise be left without any rule to guide them in the disposition of the many similar cases constantly pressing for disposition.

For the reasons thus stated, I think the judgment of the Court of Appeals entered by the Supreme Court of New York should be reversed, and the original judgment of the Supreme Court affirmed.

Mr. Justice DAY concurs in this opinion.

(255 U. S. 509)

MERCHANTS' LOAN & TRUST CO. v. SMIETANKA.

(Argued Jan. 11 and 12, 1921. Decided March 28, 1921.)

No. 608.

1. **Courts 🔑385(6)—Claim construction of Income Tax Act rendered it unconstitutional sustains direct writ of error.**

The contention that a fund assessed as income and on which the tax was paid under protest was not income within the scope of Const. Amend. 16, and that the effect given by the lower court to the revenue act rendered it unconstitutional and void is sufficient to sustain a writ of error from the Supreme Court to the District Court.

2. **Internal revenue 🔑7—Testator cannot render fund nontaxable.**

In determining whether the proceeds of the sale of corporate stock by testamentary trustees was income within Income Tax Act 1916, (Comp. St. § 6336a et seq.), the provision of the will that dividends and accretions of selling values should be considered principal and not income may be disregarded, since the testator could not render the fund nontaxable.

3. **Internal revenue 🔑7—Profit by sale of corporate stock is "income" within provision of Income Tax Act.**

Under Income Tax Act 1916, § 2 (a), being Comp. St. § 6336b, defining income of a taxable person as including gains and profits from sales of real or personal property or from any source whatever, the difference between the market value of stock, on March 1, 1913, made the basis for determining gain by section 2(c), and the price for which it was sold, was "income."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

4. **Internal revenue 🔑7—Trustee for life tenant and remainderman is "taxable person" as to profits for contingent interests.**

A trustee under a will requiring him to pay the income to the testator's widow for her life and then to the children until they became 25 years of age, and providing that accretions of selling values should be principal, not income, is a "taxable person" within Act Oct. 3, 1917, § 1204 (1) (c), being Comp. St. 1918, § 6336h, and Act Sept. 8, 1916, § 2 (b), being Comp. St. § 6336b, requiring such trustees to make an income return and to pay taxes on income held for contingent interests.

5. **Internal revenue 🔑7—Profit from sale of corporate stock is "income" within constitutional amendment.**

For the purpose of assessing the income tax as well as for the purpose of levying the previous corporate excise tax which was based on the corporation's income, income is defined as a gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets, so that the profit derived by a sale of corporate stock was income within Const. Amend. 16, and the income tax acts are not unconstitutional in taxing it as such without apportionment among the states, as required by article 1, § 2, cl. 3, art. 1, § 9, cl. 4.

6. **Internal revenue 🔑7—"Income" from stock sales not limited to sales in business.**

The gain or profit from sales of corporate stock or other personal property which are taxable as income are not limited to those sales by one engaged in buying and selling as a business, but include also the gains from an isolated sale by an individual owner.

In Error to the District Court of the United States for the Northern District of Illinois.

Action by the Merchants' Loan & Trust Company, as trustee of Arthur Ryerson, deceased, against Julius F. Smietanka, formerly United States Collector of Internal Revenue for the First District of the State of Illinois, to recover assessment of income tax paid under protest. Judgment for defendant on sustaining demurrer to the declaration, and plaintiff brings error. Affirmed.

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*Mr. Albert M. Kales, of Chicago, Ill., for plaintiff in error.

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*Mr. Solicitor General Frierson, for defendant in error.

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*Mr. Justice CLARKE delivered the opinion of the Court.

[1] A writ of error brings this case here for review of a judgment of the District Court of the United States for the Northern District of Illinois, sustaining a demurrer to a declaration in assumpsit to recover an assessment of taxes for the year 1917, made under warrant of the Income Tax Act of Congress, approved September 8, 1916 (39 Stat. c. 463, p. 756), as amended by the act approved October 3, 1917 (40 Stat. c. 63, p. 300). Payment was made under protest, and the claim to recover is based upon the contention that the fund taxed was not "income" within the scope of the Sixteenth Amendment to the Constitution of the United States, and that the effect given by the lower court to the act of Congress cited renders it unconstitutional and void. This is sufficient to sustain the writ of error. Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918B, 254.

Arthur Ryerson died in 1912, and the plaintiff in error is trustee under his will of property the net income of which was directed to be paid to his widow during her life and after her death to be used for the benefit of his children, or their representatives, until each child should arrive at 25 years of age, when each should receive his or her share of the trust fund.

The trustee was given the fullest possible dominion over the trust estate. It was made the final judge as to what "net income" of the estate should be, and its determination in this respect was made binding upon all parties interested therein, "except that it is

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my will that stock *dividends and accretions of selling values shall be considered principal and not income."

The widow and four children were living in 1917.

Among the assets which came to the custody of the trustee were 9,522 shares of the capital stock of Joseph T. Ryerson & Son, a corporation. It is averred that the cash value of these shares, on March 1, 1913, was $561,798, and that they were sold for $1,280,996.64, on February 2, 1917. The Commissioner of Internal Revenue treated the difference between the value of the stock on March 1, 1913, and the amount for which it was sold on February 2, 1917, as income for the year 1917, and upon that amount assessed the tax which was paid. No question is made as to the amount of the tax if the collection of it was lawful.

The ground of the protest, and the argument for the plaintiff in error here, is that the sum charged as "income" represented appreciation in the value of the capital assets of the estate which was not "income" within the meaning of the Sixteenth Amendment, and therefore could not constitutionally be taxed, without apportionment, as required by section 2, clause 3, and by section 9, clause 4, of article 1 of the Constitution of the United States.

It is first argued that the increase in value of the stock could not be lawfully taxed under the act of Congress because it was not income to the widow, for she did not receive it in 1917, and never can receive it, that it was not income in that year to the children for they did not then, and may never, receive it, and that it was not income to the trustee, not only because the will creating the trust required that "stock dividends and accretions of selling value shall be considered principal and not income," but also because in the "common understanding" the term "income" does not comprehend such a gain or profit as we have here, which it is contended is really an accretion to capital and therefore not constitutionally taxable under Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570.

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[2] *The provision of the will may be disregarded. It was not within the power of the testator to render the fund nontaxable.

Assuming for the present that there was constitutional power to tax such a gain or profit as is here involved, are the terms of the statute comprehensive enough to include it?

[3] Section 2 (a) of the act of September 8, 1916 (39 Stat. 757), (40 Stat. 300, 307, § 212), applicable to the case, defines the income of "a taxable person" as including "gains, profits, and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property * * * or gains or profits and income derived from any source whatever."

Plainly the gain we are considering was derived from the sale of personal property, and, very certainly the comprehensive last clause "gains or profits and income derived from any source whatever," must also include it, if the trustee was a "taxable person" within the meaning of the act when the assessment was made.

[4] That the trustee was such a "taxable person" is clear from section 1204 (1) (c) of the act of October 3, 1917 (40 Stat. 331), which requires that—

> "Trustees, executors * * * and all persons, corporations, or associations, acting in any fiduciary capacity shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals."

And section 2 (b) of the act of September 8, 1916, supra, specifically declares that the—

> "income received by estates of deceased persons during the period of administration or settlement of the estate, * * * or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent *517 interests, and income held for *future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be."

Further, section 2 (c) clearly shows that it was the purpose of Congress to tax gains, derived from such a sale as we have here, in the manner in which this fund was assessed, by providing that—

> "For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, the fair market price or value of such property as of March 1, 1913, shall be the basis for determining the amount of such gain derived."

Thus, it is the plainly expressed purpose of the act of Congress to treat such a trustee as we have here as a "taxable person" and for the purposes of the act to deal with the income received for others precisely as if the beneficiaries had received it in person.

[5] There remains the question, strenuously argued, whether this gain in four years of over $700,000 on an investment of about $500,000 is "income" within the meaning of the Sixteenth Amendment to the Constitution of the United States.

The question is one of definition, and the answer to it may be found in recent decisions of this Court.

The Corporation Excise Tax Act of August 5, 1909 (36 Stat. 11, 112), was not an income tax law, but a definition of the word "income" was so necessary in its administration that in an early case it was formulated as "A gain derived from capital, from labor, or from both combined." Stratton's Independence v. Howbert, 231 U. S. 399, 415, 34 Sup. Ct. 136, 140 (58 L. Ed. 285).

This definition, frequently approved by this court, received an addition, in its latest *518 income tax decision, which *is especially significant in its application to such a case as we have here, so that it now reads:

> "Income may be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207, 40 Sup. Ct. 189, 193 (64 L. Ed. 521), 9 A. L. R. 1570.

The use made of this definition of "income" in the decision of cases arising under the Corporation Excise Tax Act of August 5, 1909, and under the Income Tax Acts, is, we think, decisive of the case before us. Thus, in two cases arising under the Corporation Excise Tax Act:

In Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061, a coal company, without corporate authority to trade in stocks, purchased shares in another coal mining company in 1902, which it sold in 1911, realizing a profit of $210,000. Over the same objection made in this case, that the fund was merely converted capital, this court held that so much of the profit upon the sale of the stock as accrued subsequent to the effective date of the act was properly treated as income received during 1911, in assessing the tax for that year.

In United States v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 247 U. S. 195, 38 Sup. Ct. 472, 62 L. Ed. 1064, a railroad company purchased shares of stock in another railroad company in 1900, which it sold in 1909, realizing a profit of $814,000. Here, again, over the same objection, this court held that the part of the profit which accrued subsequent to the effective date of the act was properly treated as income received during the year 1909 for the purposes of the act.

Thus, from the price realized from the sale of stock by two investors, as distinguished from dealers, and from a single transaction as distinguished from a course of business, the value of the stock on the effective date of the tax act was deducted, and the resulting gain was treated by this court as "income" by which the tax was measured.

It is obvious that these decisions in prin- *519 ciple rule the *case at bar if the word "income" has the same meaning in the Income Tax Act of 1913 that it had in the Corporation Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in Southern Pacific Co. v. Lowe, 247 U. S. 330, 335, 38 Sup. Ct. 540, 62 L. Ed. 1142, where it was assumed for the purposes of decision that there was no difference in its meaning as used in the act of 1909 and in the Income Tax Act of 1913 (38 Stat. 114). There can be no doubt that the word must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the act of 1913. When to this we add that in Eisner v. Macomber, supra, a case arising under the same Income Tax Act of 1916 which is here involved, the definition of "income" which was applied was adopted from Stratton's Independence v. Howbert, supra, arising under the Corporation Excise

Tax Act of 1909, with the addition that it should include "profit gained through sale or conversion of capital assets," there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court.

In determining the definition of the word "income" thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. Doyle v. Mitchell Brothers Co., 247 U. S. 179, 185, 38 Sup. Ct. 467, 62 L. Ed. 1054; Eisner v. Macomber, 252 U. S. 189, 206, 207, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. Notwithstanding the full argument heard in this case and in the series of cases now under consideration, we continue entirely satisfied with that definition, and, since the fund here taxed was the amount realized from the sale of the stock in 1917, less the
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capital investment *as determined by the trustee as of March 1, 1913, it is palpable that it was a "gain or profit" "produced by" or "derived from" that investment, and that it "proceeded" and was "severed" or rendered severable from it by the sale for cash, and thereby became that "realized gain" which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress. Doyle v. Mitchell Brothers Co. and Eisner v. Macomber, supra.

[6] It is elaborately argued in this case, in No. 609, Eldorado Coal & Mining Co. v. Harry W. Mager, Collector, etc., submitted with it, and in other cases since argued, that the word "income" as used in the Sixteenth Amendment and in the Income Tax Act we are considering does not include the gain from capital realized by a single isolated sale of property, but that only the profits realized from sales by one engaged in buying and selling as a business—a merchant, a real estate agent, or broker—constitute income which may be taxed.

It is sufficient to say of this contention that no such distinction was recognized in the Civil War Income Tax Act of 1867 (14 Stat. 471, 478), or in the act of 1894 (28 Stat. 509, 553), declared unconstitutional on an unrelated ground; that it was not recognized in determining income under the Excise Tax Act of 1909, as the cases cited, supra, show; that it is not to be found, in terms, in any of the income tax provisions of the Internal Revenue Acts of 1913, 1916, 1917, or 1919 (40 Stat. 1057); that the definition of the word "income" as used in the Sixteenth Amendment, which has been developed by this Court, does not recognize any such distinction; that in departmental practice, for now seven years, such a rule has not been applied; and that there is no essential difference in the nature of the transaction or in the relation of the profit to the capital involved, whether the sale or conversion be a single, isolated transaction
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or one of many. *The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the "general understanding" of the meaning of the word "income," fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the amendment.

The opinions of the courts in dealing with the rights of life tenants and remaindermen in gains derived from invested capital, especially in dividends paid by corporations, are of little value in determining such a question as we have here, influenced as such decisions are by the terms of the instruments creating the trusts involved and by the various rules adopted in the various jurisdictions for attaining results thought to be equitable. Here the trustee, acting within its powers, sold the stock, as it might have sold a building, and realized a profit of $700,000, which at once became assets in its possession free for any disposition within the scope of the trust, but for the purposes of taxation to be treated as if the trustee were the sole owner.

Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, much relied upon in argument, was sufficiently distinguished from cases such as we have here in Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 191, 38 Sup. Ct. 470, 62 L. Ed. 1061. The differences in the statutes involved render inapplicable the expressions in the opinion in that case (not necessary to the decision of it) as to distinctions between income and increase of capital.

In Lynch v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087, also much relied upon, it is expressly stated that—

> "According to the fact admitted, there was no increase after that date [March 1, 1913], and therefore no increase subject to the law."

For this reason the questions here discussed and decided were not there presented.

The British income tax decisions are interpretations of statutes so wholly different
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in their wording from the *acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved.

Another assessment on a small gain realized upon a purchase, made in 1914, of bonds which were duly called for redemption and paid in 1917, does not present any questions other than those which we have discussed, and therefore it does not call for separate consideration.

The judgment of the District Court is Affirmed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS, because of prior decisions of the Court, concur in the judgment.

(255 U. S. 522)

ELDORADO COAL & MINING CO. v. MAGER, Collector of Internal Revenue.

(Argued Jan. 12, 1921. Decided March 28, 1921.)

No. 609.

In Error to the District Court of the United States for the Northern District of Illinois.

Action by the Eldorado Coal & Mining Company against Harry W. Mager, Collector of Internal Revenue for the First District of Illinois. Judgment for the defendant, on sustaining a demurrer to the declaration, and plaintiff brings error. Affirmed.

Mr. Herbert Pope, of Chicago, Ill., for plaintiff in error.

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*Mr. Solicitor General Frierson, for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

This case comes into this Court on a writ of error to review a judgment of the District Court of the United States for the Northern District of Illinois, sustaining a demurrer to a declaration in assumpsit to recover an assessment of income and excess profits taxes for the year 1917, under warrant of the Income Tax Act of Congress, approved September 8, 1916 (39 Stat. c. 463, p. 756) as amended by the act approved October 3, 1917 (40 Stat. c. 63, p. 300). Payment was made under protest, and the claim to recover is based upon the same contention dealt with in No. 608, Merchants' Loan & Trust Co. v. Smietanka, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. —, this day decided, that the fund taxed was not "income" within the scope of the Sixteenth Amendment to the Constitution of the United States, and that the effect given by the lower court to the act renders it unconstitutional and void.

The Eldorado Coal & Mining Company is an

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In*diana corporation, which operated a bituminous coal mine and mining plant, which it sold in May, 1917, for cash. The company retained its accounts receivable and prior to September 30, 1917, it distributed among its stockholders, proportionately to their ownership of stocks, the cash received from the sale and the accounts receivable in kind. The corporation, however, was not dissolved nor its charter surrendered, because there were unsettled liabilities against it for federal income taxes and excess profit taxes. Otherwise its affairs were wound up.

It is averred in the declaration that, taking the fair market value as of March 1, 1913, of the capital assets of the company invested and employed in its business, and adding thereto the cost of additions and betterments, and subtracting depreciation and depletion to the date of sale, it appears that there was an appreciation in value of the property after March 1, 1913, of $5,986.02, and it was on this profit realized by the sale that the assessment of $3,073.16 was made which the company paid and in this suit seeks to recover.

It is obvious from this statement of the case that it presents in so nearly the same form precisely the same questions as were considered in No. 608, Merchants' Loan & Trust Co., etc., v. Julius F. Smietanka, Collector, etc., 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. —, this day decided, that further discussion of them is unnecessary, and, on the authority of that case, the judgment of the District Court is Affirmed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS, because of prior decisions of the Court, concur only in the judgment.

(255 U. S. 527)

GOODRICH v. EDWARDS, Collector of Internal Revenue.

(Argued March 10 and 11, 1921. Decided March 28, 1921.)

No. 663.

Internal revenue ⚷7—Income tax not assessable on stock sold at loss for more than 1913 value; "income"; "gain."

Under Income Tax Act 1916, § 2 (c), being Comp. St. § 6336b, providing that for the purpose of ascertaining the gain derived from the sale of property acquired before March 1, 1913, a fair market price or value on that date shall be the basis, and under the definition of "income" as a gain derived from capital, from labor or from both combined, including profits from sale or conversion of capital assets, no income tax can be levied on the sale of stock for a price greater than its value on March 1, 1913, but less than the price paid for the stock before that date, since in such case there was no "gain."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gain; Income.]

In Error to the District Court of the United States for the Southern District of New York.

Assumpsit by David M. Goodrich against Wiliam H. Edwards, United States Collector of Internal Revenue for the Second District of the State of New York to recover income taxes assessed and paid under protest. Judgment for defendant on sustaining demurrer to the complaint, and plaintiff brings error. Reversed in part and affirmed in part.

Mr. William D. Guthrie, of New York City, for plaintiff in error.

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*Mr. Solicitor General Frierson, for defendant in error.

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*Mr. Justice CLARKE delivered the opinion of the Court.

The plaintiff in error sued the defendant, a Collector of Internal Revenue, to recover income taxes assessed in 1920 for the year 1916 and paid under protest to avoid penalties. A demurrer to the complaint was sustained, and the constitutional validity of a law of the United States is so involved that the case is properly here by writ of error. Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254.

Two transactions are involved.

(1) In 1912 the plaintiff in error purchased 1,000 shares of the capital stock of a mining company for which he paid $500. It is averred that the stock was worth $695 on March 1, 1913, and that it was sold in March, 1916, for $13,931.22. The tax which the plaintiff in error seeks to recover was *534 assessed on the difference between the *value of the stock on March 1, 1913, and the amount for which it was sold.

(2) The plaintiff in error being the owner of shares of the capital stock of another corporation, in 1912 exchanged them for stock, in a reorganized company, of the then value of $291,600. It is averred and admitted that on March 1, 1913, the value of this stock was $148,635.50, and that it was sold in 1916 for $269,346.25. Although it is thus apparent that the stock involved was of less value on March 1, 1913, than when it was acquired, and that it was ultimately sold at a loss to the owner, nevertheless the collector assessed the tax on the difference between the value on March 1, 1913, and the amount for which it was sold.

The plaintiff in error seeks to recover the whole of these two assessments.

The same contention is made with respect to each of these payments as was made in No. 608, Merchants' Loan & Trust Co., as Trustee, v. Julius F. Smietanka, Collector of Internal Revenue, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. ——, this day decided, viz. that the amounts realized from the sales of the stocks were in their inherent nature capital as distinguished from income, being an increment in value of the securities while owned and held as an investment, and therefore not taxable under the Revenue Act of 1916 (39 Stat. 756), as amended in 1917 (40 Stat. 300), or under any constitutional law.

With respect to the first payment. It is plain that this assessment was on the profit accruing after March 1. 1913, the effective date of the act, realized to the owner by the sale after deducting his capital investment. The question involved is ruled by No. 608, supra, and the amount was properly taxed.

As to the second payment. The government confesses error in the judgment with respect to this assessment. The stock was sold in the year for which the tax was assessed for $22,253.75 less than its value *535 when it was *acquired, but for $120,710.75 more than its value on March 1, 1913, and the tax was assessed on the latter amount.

The act under which the assessment was made provides that the net income of a taxable person shall include gains, profits, and income derived from * * * sales or dealings in property, whether real or personal * * * or gains or profits and income derived from any source whatever. 39 Stat. 757; 40 Stat. 300, 307.

Section 2 (c) of this same act provides that—

> "For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

And the definition of "income" approved by this Court is:

> "'The gain derived from capital, from labor, or from both combined,' provided it be understood to include profits gained through sale or conversion of capital assets." Eisner v. Macomber, 252 U. S. 189, 207, 40 Sup. Ct. 189, 193 (64 L. Ed. 521, 9 A. L. R. 1570).

It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor, and we therefore agree with the Solicitor General that since no gain was realized on this investment by the plaintiff in error no tax should have been assessed against him.

Section 2 (c) is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property.

It results that the judgment of the District Court as to the first assessment, as we have described it, is affirmed, that as to the second assessment it is reversed, and the *536 case *is remanded to that court for further proceedings in conformity with this opinion.

Reversed in part.

Affirmed in part.

Mr. Justice HOLMES and Mr. Justice BRANDEIS, because of prior decisions of the Court, concur only in the judgment.

(255 U. S. 536)

WALSH, Collector of Internal Revenue, v. BREWSTER.

(Argued March 10 and 11, 1921. Decided March 28, 1921.)

No. 742.

1. Internal revenue ⚷7—Interest on cost before bond interest was paid not included on cost price.

Where a purchase of bonds was made through a syndicate and no interest was received upon the amount paid prior to the allotment of the bonds four years after the payment, interest on the cost price of the bonds until the interest payments began cannot be included as part of the cost, for the purpose of determining the profit from a sale of the bonds upon which the income tax is to be levied.

2. Internal revenue ⚷7—Only "gain" over cost price is taxable as income.

Where the market value of bonds on March 1, 1913, was less than the purchase price, the gain derived from a sale of the bonds on which the income tax can be levied is the difference between the sale price and the original purchase price, not the difference between the sale price and the market value on the stated date.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gain.]

3. Internal revenue ⚷7—Stock dividend is not taxable as "income."

A dividend of corporate stock is not taxable as income of the stockholder.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

In Error to the District Court of the United States for the District of Connecticut.

Action by Frederick F. Brewster against James J. Walsh, Collector of Internal Revenue, to recover income taxes paid under protest to avoid penalties. Judgment for the plaintiff (268 Fed. 207), and defendant brings error. Reversed in part, affirmed in part, and case remanded.

Mr. Solicitor General Frierson, for plaintiff in error.

Mr. William D. Guthrie, of New York City, and Mr. Henry F. Parmelee, of New Haven, Conn., for defendant in error.

*Mr. Justice CLARKE delivered the opinion of the Court.

In this case the defendant in error sued the plaintiff in error, a Collector of Internal Revenue, to recover income taxes for the year 1916, assessed in 1918, and which were paid under protest to avoid penalties. The defendant answered, the case was tried upon an agreed statement of facts, and judgment was rendered in favor of the taxpayer, the defendant in error. The case is properly here by writ of error. Towne v. Eisner, 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372, L. R. A. 1918D, 254.

The defendant in error was not a trader or dealer in stocks or bonds, but occasionally purchased and sold one or the other for the purpose of changing his investments.

Three transactions are involved.

The first relates to bonds of the International Navigation Company, purchased in 1909, for $191,000 and sold in 1916 for the same amount. The market value of these bonds on March 1, 1913, was $151,845, and the tax in dispute was assessed on the difference between this amount and the amount for which they were sold in 1916, viz. $39,155.

The trial court held that this apparent gain was capital assets and not taxable income under the Sixteenth Amendment to the Constitution of the United States, and rendered judgment in favor of the defendant in error for the amount of the tax which he had paid.

The ground upon which this part of the judgment was justified below is held to be erroneous in No. 608, Merchants' Loan & Trust Co., as Trustee, v. Julius F. Smietanka, Collector of Internal Revenue, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. —, this day decided, but, since the owner of the stock did not realize any gain on his original investment by the sale in 1916, the judgment was right in this respect, and under authority of the opinion and judgment in No. 663, Goodrich v. Ed*wards, Collector, 255 U. S. 527, 41 Sup. Ct. 390, 65 L. Ed. —, also rendered this day, this part of the judgment is affirmed.

[1] The second transaction involved the purchase in 1902 and 1903 of bonds of the International Mercantile Marine Company for $231,300, which were sold in 1916 for $276,150. This purchase was made through an underwriting agreement such that the purchaser did not receive any interest upon the amount paid prior to the allotment to him of the bonds in 1906, and he claimed that interest upon the investment for the time which so elapsed should be added as a part of the cost to him of the bonds. But this claim was properly rejected by the trial court under authority of Hays v. Gauley Mountain Coal Co., 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061.

[2] It is stipulated that the market value of these bonds on March 1, 1913, was $164,480, and the collector assessed the tax upon the difference between the selling price and this amount, but since the gain to the taxpayer was only the difference between his investment of $231,300 and the amount realized by the sale, $276,150, under authority of No. 663, Goodrich v. Edwards, Collector, this day decided, he was taxable only on $44,850.

The District Court, however, held that any gain realized by the sale was a mere conversion of capital assets, and was not income which could lawfully be taxed. In this respect the court fell into error. The tax was properly assessed, but only upon the difference between the purchase and the selling price of the bonds as stated.

[3] The third transaction related to stock in the Standard Oil Company of California, received through the same stock dividend involved in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. The District Court, upon authority of that case, properly held that the assessment made and collected upon this dividend should be refunded to the defendant in error.

It results that as to the profit realized upon the second transaction, as indicated in this opinion, the judgment of the District Court is reversed, but as to the other transac*tions it is affirmed for the reasons and upon the grounds herein stated.

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Judgment reversed in part, affirmed in part, and case remanded.

Mr. Justice HOLMES and Mr. Justice BRANDEIS, because of prior decisions of the Court, concur only in the judgment.

(255 U. S. 489)

STATE OF WYOMING et al. v. UNITED STATES.

(Argued Oct. 6 and 7, 1920. Decided March 28, 1921.)

No. 257.

1. Public lands 🔑53—Mineral discovery after lieu land selection, but before approval, does not authorize rejection.

Where the state of Wyoming had accepted the offer made by Congress by Act Feb. 28, 1891, amending Rev. St. §§ 2275, 2276 (Comp. St. §§ 4860, 4861), by waiving its right to lands granted it by Act July 10, 1890, § 4, for the support of common schools, which had been subsequently included within the boundaries of a national forest, and had made proper proofs that the land selected in lieu thereof, was then open to entry and not mineral, it acquired an equitable right to the lands before the approval of the selection by the Secretary of the Interior, so that the selection could not thereafter be rejected by the Secretary, on the ground that oil was subsequently discovered thereon and the land included in a withdrawal of oil lands from entry.

2. Public lands 🔑53—Secretary can only determine whether selection was lawful when made.

The authority of the Secretary of the Interior to approve selection by a state of lands in lieu of those granted to the state for school purposes, the rights to which it waived when they were subsequently included within the boundaries of a national forest, extends only to a determination of whether the selection was lawful at the time it was made.

3. Public lands 🔑71—Railroad land grants determined as of the time of issuance of patent.

The only exception to the rule that the right to public lands is to be determined as of the time at which the selection was made is confined to railroad land grants, by reason of the terms of those grants and the restrictive interpretation to which they were subjected.

4. Public lands 🔑53 — Valid lieu land selections cannot be withdrawn as oil land.

The authority given by Act June 25, 1910 (Comp. St. §§ 4523–4525), to withdraw temporarily from entry oil lands is limited to lands which are public lands when the withdrawal was made, and does not authorize the withdrawal of lands which had been previously selected by the state in lieu of school lands before it was suspected they contained oil.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against H. S. Ridgely and others, in which the State of Wyoming was admitted as a defendant at its own request. Decree of the District Court, dismissing the bill on the merits, was reversed by the Circuit Court of Appeals (262 Fed. 675), and defendants appeal. Reversed.

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*Messrs. John W. Lacey and D. A. Preston, both of Cheyenne, Wyo., for appellants.

Mr. Assistant Attorney General Nebeker, for the United States.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to establish title in it to 80 acres of land and to the proceeds of oil taken therefrom. The District Court rendered a decree dismissing the bill on the merits, which the Circuit Court of Appeals reversed (United States v. Ridgely, 262 Fed. 675), and the defendants bring the case here.

One of the defendants, the state of Wyoming,[1] claims under a lieu selection, made in 1912, and the other defendants under a lease from the state, made in 1916. It is against the selection and the lease that the United States seeks to establish title.

By the Act of July 10, 1890, c. 664, § 4, 26 Stat. 222, Congress granted to the state for the support of common schools certain lands in place (sections 16 and 36 in each township), with exceptions not material here; and by the Act of February 28, 1891, c. 384, 26 Stat. 796, amending §§ 2275, 2276, Rev. Stat. (Comp. St. §§ 4860, 4861), the state was invited and entitled, in the event any of the designated lands in *place after passing under the school grant should be included within a public reservation, to waive its right there-

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[1] The state was not made a party at first, but afterwards at its own request was admitted as a defendant to enable it to defend the lieu selection.

to and select in lieu thereof other lands of equal acreage from unappropriated nonmineral public lands outside the reservation and within the state. See California v. Deseret Water, etc., Co., 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821; Payne v. New Mexico, 255 U. S. 367, 41 Sup. Ct. 333, 65 L. Ed. ——. Other laws of general application (sections 441, 453, 2478, Rev. Stat. [Comp. St. §§ 681, 699, 5120]) required that the selections be made under the direction of the Secretary of the Interior.

In 1907 a tract in place which had passed to the state under the school grant was included within a public reservation, called the Big Horn National Forest. On April 4, 1912, the state—through its Governor, Joseph M. Carey, and its Land Commissioner, S. G. Hopkins—filed in the proper local land office a selection list waiving its right to that tract and selecting in lieu thereof other land of the same area from public lands within the state and outside the forest reserve. The land so selected included the 80 acres now in controversy. At that time the state had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated, and neither known nor believed to be mineral. The list fully conformed to the directions on the subject issued by the Secretary of the Interior and was accompanied by the requisite proofs and the proper fees. Notice of the selection was regularly posted and published, proof thereof was duly made and the state paid the publisher's charge. Thus, as the Circuit Court of Appeals said, "the state did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the government, and everything that was required either by statute or regulation of the Land Department" in selecting the lieu land instead of the relinquished tract.

No objection was called forth by the notice

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and in *regular course the local officers transmitted the list and other papers to the General Land Office with a certificate stating that no adverse filing, entry or claim to the selected land was shown by the records in their office and that the filing of the list was allowed and approved by them. The list remained in the General Land Office awaiting consideration by the Commissioner for upwards of three years. In the meantime, on May 6, 1914, two years after the selection, the selected land, with other lands aggregating more than 88,000 acres, was included in a temporary executive withdrawal as possible oil land under the Act of June 25, 1910, c. 421, 36 Stat. 847 (Comp. St. §§ 4523–4525). On April 29, 1915, the Commissioner, coming to consider the selection, declined to approve it as made and called on the state either to accept a limited—surface right—certification of the selected land or to show that it still was not known or believed to be mineral. The state declined to accede to either alternative and insisted that its rights should be determined as of the time when the waiver and selection were made and that, applying that test, it became invested with the equitable title to the selected land two years prior to the temporary withdrawal and at a time when that land plainly was neither known nor believed to be mineral. The Commissioner thereupon ordered the selection canceled, —not because it was in any respect objectionable when made, but on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and subsequent oil discoveries in that vicinity. The state appealed to the Secretary of the Interior, and, on October 25, 1916, he affirmed the Commissioner's action.

In the meantime, on May 24, 1916, the state had given to the defendant Ridgely a lease permitting him to drill the selected land for oil, and the lease had been assigned to the defendant oil company. There was no oil discovery, nor any drilling, on the selected

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land up *to the time the lease was given; but thereafter the oil company began drilling and at large cost carried the same to discovery and successful production. This was four years after the selection.

The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and that nothing remained to be done by the state to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, and still later was discovered to be mineral land; that is, to be valuable for oil. Or, putting it in another way, the question is whether it was admissible for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the state relinquished the tract in the forest reserve and selected the other in its stead.

[1] In principle it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing. The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the state and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the state which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the state's waiver and selection met the requirements of the congressional proposal and of giving or withholding their approval accordingly.

The power confided to them was not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully *497 exercised; in other words, *their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the state in 1912. If these were valid then—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the state as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. Of course the state's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price.

The conclusion which we deem plain in principle is fully sustained by prior adjudications. In Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 431, 12 Sup. Ct. 877, 878 (36 L. Ed. 762), which presented the question of when under the public land laws a right to the land becomes vested, it was said:

> "When the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the Land Department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties."

And again (145 U. S. 432, 12 Sup. Ct. 879. 36 L. Ed. 762):

> "It is a general rule, in respect to the sales *498 of real estate, *that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

In Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 328, 8 Sup. Ct. 131, 141 (31 L. Ed. 182), a title obtained through preemption cash entries was assailed on the ground that the land was shown by subsequent discoveries to be mineral; but the attack failed; the court saying:

> "A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of sale. The question must be determined according to the facts in existence at the time of the sale."

In United States v. Iron Silver Mining Co., 128 U. S. 673, 683, 9 Sup. Ct. 195, 199 (32 L. Ed. 571), a title acquired through an application for a placer patent was sought to be annulled on the ground that subsequent mining disclosed that the land was lode land; but the title was sustained, the court observing:

> "The subsequent discovery of lodes upon the ground, and their successful working does not affect the good faith of the application. That must be determined by what was known to exist at the time."

Particularly in point is Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050, which related to what is called Baca tract No. 4. Congress had accorded to the heirs of Luis Maria Baca the right to relinquish their claim to a large body of land in New *499 Mexico and to select *instead "an equal quantity of vacant land, not mineral," in not exceeding five tracts in that territory. As here, there was no provision for a patent. The original claim was relinquished and the lieu selection made conformably to directions given by the Land Department, the selected land being represented as vacant and not known to be mineral. Afterwards the selection of a part of tract No. 4 was called in question on the ground that it was shown by subsequent discoveries to be mineral. This court sustained the selection and said (170 U. S. 332, 18 Sup. Ct. 641, 42 L. Ed. 1050):

> "The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it

passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In case of homestead, pre-emption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

In Leonard v. Lennox, 181 Fed. 760, 104 C. C. A. 296, a contention that an application for a nonmineral final entry, even if regularly presented and based on full compliance with the law, should be disallowed and rejected where the land subsequently is discovered *500 to be mineral (coal) was *overruled by the Circuit Court of Appeals of the Eighth Circuit, the court saying (181 Fed. 764, 104 C. C. A. 300):

> "This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them."

The last expression on this subject in this court is found in Payne v. New Mexico, 255 U. S. 367, 41 Sup. Ct. 333, 65 L. Ed. —, where it was held in respect of a state lieu selection like the one in question here that the Commissioner and the Secretary in acting thereon are required to give effect to the conditions existing when it was made, that if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in conditions and that in this regard the statute under which the selection was made does not differ from other land laws offering a conveyance of the title to those who accept and fully comply with their terms.

The Land Department uniformly has ruled that the states acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey—or at the date of the grant where the survey precedes it—regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or *501 affected *by a subsequent mineral discovery. California v. Poley, 4 Copp's L. O. 18; Abraham L. Minor, 9 Land Dec. 408; Rice v. California, 24 Land Dec. 14; United States v. Morrison, 240 U. S. 192, 207, 36 Sup. Ct. 326, 60 L. Ed. 599; United States v. Sweet, 245 U. S. 563, 572, 38 Sup. Ct. 193, 62 L. Ed. 473. And as respects cash entries and entries under the pre-emption, homestead, desert land and kindred laws the Land Department always has ruled that if, when the claimant has done all that he is required to do to entitle him to receive the title, the land is not known to be mineral he acquires a vested right which no subsequent discovery of mineral will divest or disturb. Harnish v. Wallace, 13 Land Dec. 108; Rea v. Stephenson, 15 Land Dec. 37; Reid v. Lavallee, 26 Land Dec. 100, 102; Aspen Consolidated Mining Co. v. Williams, 27 Land Dec. 1, 17; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 240, 34 Sup. Ct. 507, 58 L. Ed. 936. And this rule has been applied by that department, although not uniformly, to selections made in lieu of relinquished lands in public reservations. Thus in Kern Oil Co. v. Clarke, 30 Land Dec. 550, where a lieu selection under the Act of June 4, 1897, c. 2, 30 Stat. 36, was under consideration, the Secretary of the Interior said (page 556):

> "When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether *502 the land is subject to *sale or other disposal, and no change in such conditions, subsequently occurring can impair or in any manner affect his rights."

Again (page 560):

> "These established principles, in the opinion of the department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received."

And again (page 564):

> "It would be strange indeed, if by the latter [1897] act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and

does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the Land Department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty."

[2] That view was repeated and applied in many other departmental decisions dealing with lieu selections. But afterwards the Secretary, conceiving that the decisions of this court in Wisconsin Central R. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, and Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 24 Sup. Ct. 860, 47 L. Ed. 1064, justified *503 him in so doing, ruled that *no right attached under such a selection unless and until it was approved by him and therefore that, even though the selection was lawfully made, he possessed a discretion to reject it and give effect to an intervening change in conditions, as where a new claimant settled upon the land or sought to make entry of it while the selection was pending.

Under this changed ruling the Secretary rejected several selections lawfully made by one Daniels and awarded and patented the land to others. Daniels then brought suits against the patentees charging that by the selections he acquired the equitable title, that his selections were rejected and the patents issued through a misapprehension of the law, and therefore that the patentees took the legal title in trust for him. Ultimately the suits came to this court, and after a full review the changed ruling of the Secretary was disapproved and Daniels' contention sustained. Daniels v. Wagner, 237 U. S. 547, 35 Sup. Ct. 740, 59 L. Ed. 1102, L. R. A. 1916A, 1116, Ann. Cas. 1917A, 40. The substance of the decision was that as the selections were lawful when made "it was the plain duty" of the Secretary to approve them; that the contrary view found no justification in Cosmos Exploration Co. v. Gray Eagle Oil Co., supra; and that the real authority and duty of the Secretary in dealing with such selections were pointed out in Weyerhaeuser v. Hoyt, 219 U. S. 380, 387, 388, 31 Sup. Ct. 300, 303 (55 L. Ed. 258) where it was said:

"The requirement of approval by the Secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in Wisconsin Central Railroad v. Price, 133 U. S. 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority therefore involved not only the power but implied the duty *504 to determine the lawfulness of the selec*tions as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections."

As the Circuit Court of Appeals in the present case, like the Secretary in the other, regarded the decisions in the Wisconsin Central Case and the Cosmos Case as showing that no right attaches under a lieu selection unless and until approved by the Secretary, it is well to point out just what was involved in those cases; for it then will be apparent that there was no purpose in either to go to the length suggested.

The Wisconsin Central Case was a suit to enjoin the collection of a tax levied on land which at the time was covered by a pending indemnity selection under a railroad land grant. The Commissioner of the General Land Office had reported that the company already had received indemnity lands largely in excess of the losses for which it was entitled to indemnity, and the company was disputing that report. Until that controversy was determined it could not be known whether the company was entitled to an approval of the selection. In that situation the United States had such an interest in the land as made it nontaxable. Whether the selection was valid or otherwise was primarily a question for the Secretary of the Interior to determine. Ultimately he held it valid, but not until after the tax was levied—indeed, after the suit was brought. The suit involved the validity of the tax, and nothing more. Its purpose was not to control the action of the Secretary by a writ of mandamus or injunction, nor to determine the title as between the United States and the company or between the company and a grantee of the United States. True, the court, after commenting on the difference between the granted lands in place and the indemnity lands as respects the mode of identification, very broadly stated that an indemnity selection to be effective required the approval of the Secretary; but it was not meant by this that the Secretary arbitrarily *505 could *defeat the right of selection by withholding his approval, nor that if through a mistake of law he rejected a selection which was valid at the time it was made the company would be remediless. There was no occasion to consider those questions, nor could they properly be determined without the presence of parties not then before the court. And that the court did not intend its words to be taken so broadly is illustrated by the fact that it cited with approval the case of Saint Paul & Sioux City R. R. Co. v. Winona & Saint Peter R. R. Co., 112 U. S. 720, 733, 5 Sup. Ct. 334, 341 (28 L. Ed. 872), wherein an indemnity selection lawfully made, but disapproved by the Secretary, was sustained against an adverse certification on the ground that "this erroneous decision of his" did not deprive the selector "of rights which became vested by its selection of those lands."

The Cosmos Case was a suit by a lieu land selector to establish his title as against others who were claiming under placer mining locations. The selection was not accompanied by proof that the land was not then occupied adversely, although that was required. Within the time prescribed by the regulations the mining claimants filed in the Land Office verified protests assailing the regularity and validity of the selection, setting up locations of the selected land made under the placer mining law prior to the selection and alleging that the lands "were not subject to selection" because "the same was mineral land and was included within" the mining locations. The protests were entertained and, with the selection, were pending when the suit was begun, which was shortly after the protests were filed. The suit was brought on the theory that by the selection the selector acquired "the full, complete and equitable title" to the selected land, notwithstanding he had not submitted any proof of nonoccupancy, and that the protests were not such as could be entertained or investigated by the Land Department. That case and another (Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074), *wherein a writ of mandamus was sought against the Secretary by another lieu land selector, were heard and disposed of as related cases, and the decision in one should be read in connection with that in the other. The full substance of the decision in the Cosmos Case is in the following excerpt from the opinion (190 U. S. 315, 24 Sup. Ct. 860, 47 L. Ed. 1064):

> "Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. United States v. Schurz, 102 U. S. 378, 395. The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or in the prayer for relief to consider that question. For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was properly sustained."

There are general expressions in the opinion, which separated from the rest, might be taken as declaring that no right vests under a lieu selection unless the Secretary approves it; but that such a ruling was intended is refuted by the opinion as a whole, and particularly by the statements therein that the power of the Secretary is not to be exercised arbitrarily and that his "decision of any legal question would not, of course, be binding on the courts" should the question properly arise in future litigation. The general expressions were relied upon in Daniels v. Wagner as interpretative of the decision and this court answered:

> "But we are of opinion that this *interpretation of the Cosmos Case cannot be justified."

Besides, it was adjudged in the Daniels Case that a lieu selection which is lawful at the time it is made does invest the selector with equitable rights which he may enforce in an appropriate way where the Secretary through an error of law rejects the selection. And that ruling was reaffirmed and applied in Payne v. Central Pacific Ry. Co., 255 U. S. 228, 41 Sup. Ct. 314, 65 L. Ed. ——, and Payne v. New Mexico, 255 U. S. 367, 41 Sup. Ct. 333, 65 L. Ed. ——.

[3] The only exception to the general rule before stated respecting the time as of which the character of the land—whether mineral or nonmineral—is to be determined is one which in principle and practice is confined to railroad land grants. From the beginning the Land Department, by reason of the terms of those grants and the restrictive interpretation to which they are subjected, uniformly has construed and treated them as requiring that the character of the land be determined as of the time when the patent issues. In 1890 Secretary Noble, in declining to disturb this construction and practice, pointed out the reasons which had led the Department to make a distinction in this regard between those grants and other land laws, and said:

> "This practice, having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned. It has, in effect, become a rule of property." Central Pacific R. R. Co. v. Valentine, 11 L. D. 238, 246.

In 1893 the matter came before this court and the construction and practice of the Land Department were sustained. Barden v. Northern Pacific R. R. Co., 154 U. S. 288, 14

Sup. Ct. 1030, 38 L. Ed. 992. As the opinion in that case shows, the court recognized that the mineral land exception in other land laws simply operates to exclude from sale, etc., "land known at the time to be mineral," and was careful to explain that its decision re- *508 lated to "grants in aid of *railroads" and to "no other grants." The grounds on which the decision was put were: (a) That the railroad land grants, besides being confined in the granting clause to lands "not mineral," contain provisos declaring in words or effect "that all mineral lands be, and the same hereby are, excluded from the operation of this" grant; (b) that such grants, although expressly requiring that the question whether the lands are otherwise excepted be determined as of the time the map of definite location is filed, contain no such provision in respect of the exception of mineral land; (c) that it was well understood that many years would necessarily elapse between the filing of the map and the time when by construction of the road the grantee would be entitled to patents, and as the grants covered great areas, in one instance nearly equal to that of Ohio and New York, it hardly could have been intended to arrest mineral development in those areas in the meantime; (d) that such grants "must be strictly construed," and "if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor"; and (e) that the long prevailing construction and practice of the Land Department ought not to be disturbed. Plainly the decision in that case is without bearing here, save as it recognizes that rights under other land laws are to be tested by a different rule. And this is emphasized by the fact that in Shaw v. Kellogg, supra, where the selection of Baca tract No. 4 was involved, the court distinguished the Barden Case, and applied the general rule before stated. And it is of further significance that this court has recognized that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. Beecher v. Wetherby, 95 U. S. 517, 526, 24 L. Ed. 400; Johanson v. Washington, 190 U. S. 179, 183, 23 Sup. Ct. 825, 47 L. Ed. 1008.

[4] Of the executive withdrawal of the *509 land two years after *the lieu selection was lawfully made, it suffices to say, following the recent decision in Payne v. Central Pacific Ry. Co., 255 U. S. 228, 41 Sup. Ct. 314, 65 L. Ed. —, that the act of 1910, under which the withdrawal was made, is confined to "public lands," that by the selection this land had ceased to be public, and that the act could not be construed to embrace it without working an inadmissible interference with vested rights.

It results that the Secretary erred in matter of law in rejecting the selection and that the District Court rightly entered a decree for the defendants. See Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; United States v. Detroit Timber Co., 200 U. S. 321, 338, 26 Sup. Ct. 282, 50 L. Ed. 499. The decree of the Circuit Court of Appeals is accordingly

Reversed.

(255 U. S. 539)

SOUTHERN IOWA ELECTRIC CO. v. CITY OF CHARITON, IOWA, et al. IOWA ELECTRIC CO. v. CITY OF FAIRFIELD, IOWA, et al. MUSCATINE LIGHTING CO. v. CITY OF MUSCATINE, IOWA et al.

(Argued Jan. 26 and 28, 1921. Decided April 11, 1921.)

Nos. 180, 189, 190.

1. **Electricity 🔑11—Gas 🔑14(1)—Power to regulate rates cannot be exercised to fix confiscatory rates.**

Governmental agencies having authority to fix and enforce reasonable rates to be paid to gas and electric corporations for the services rendered by them cannot fix rates which are so low as to be confiscatory of the property of such corporations.

2. **Electricity 🔑11—Gas 🔑14(1)—Duly authorized contract fixing rates for franchise term is enforceable, though rates become confiscatory.**

Where gas and electric corporations and the governmental agencies dealing with them have power to contract as to rates and exert that power by fixing contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and the question whether the rates are confiscatory becomes immaterial.

3. **Electricity 🔑11—Gas 🔑14(1)—City in Iowa cannot make binding contract fixing rates.**

Under Code Iowa 1897, § 725, empowering cities to require public service companies to furnish service and to regulate the rates therefor, which powers shall not be abridged by ordinance, resolution, or contract, as that section had been construed by the Supreme Court of the state, the city has no authority to make a binding contract establishing rate to be charged by gas and electric companies, and therefore rates specified in the franchise cannot be enforced, when increased operating costs had rendered them confiscatory.

Appeals from the District Court of the United States for the Southern District of Iowa.

Separate suits by the Southern Iowa Electric Company against the City of Chariton, Iowa, and others, by the Iowa Electric Company against the City of Fairfield, Iowa, and others, and by the Muscatine Lighting Company against the City of Muscatine, Iowa, and others, to restrain the enforcement of ordinances fixing maximum rates for electricity or gas. Decrees for defendants in each case (256 Fed. 929), and complainants appeal. Reversed and remanded.

In No. 180:

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*Messrs. Emmet Tinley, of Council Bluffs, Iowa, and William D. McHugh, of Chicago, Ill., for appellant.

Messrs. J. W. Kridebaugh, of Chariton, Iowa, and H. W. Byers, of Harlan, Iowa, for appellees.

In No. 189:

Messrs. John A. Reed and William Chamberlain, both of Cedar Rapids, Iowa, for appellant.

Mr. Ralph H. Munro, of Fairfield, Iowa, for appellees.

In No. 190:

Messrs. William Chamberlain, of Cedar Rapids, Iowa, and Joe R. Lane, of Davenport, Iowa, for appellant.

Mr. Chief Justice WHITE delivered the opinion of the Court.

At the time these suits were begun the appellants were engaged in supplying electricity or gas to the municipal corporations who are the appellees. This service was being rendered by virtue of ordinances conferring franchises to use the city streets during 25 years in two of the cases and 20 years in the other. The ordinances contained a schedule of maximum rates. After they were in effect a few years the three suits which are before us were begun against the cities *541 with the object of preventing the en*forcement of the maximum rates specified in the ordinances, on the ground that such rates were so unreasonably low that their continued enforcement would deprive the corporations of remuneration for the services by them being performed and in fact, if enforced, would result in the confiscation of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the three cases the court granted a temporary injunction restraining the enforcement of the maximum rates and allowed an order permitting, pending the suits, a higher charge.

The cases were submitted upon the pleadings and without the taking of testimony upon issues which presented the contention, that the ordinances were contracts and therefore the maximum rates which they fixed were susceptible of continued enforcement against the corporations, although their operation would be confiscatory. In one opinion, applicable to the three cases, the court stated its reasons for maintaining this view, but directed attention to the fact that no proof had been offered concerning the confiscatory character of the rates, and pointing out that as such subject might become important on appeal, it would be necessary to restore the cases to the docket for proof in that regard unless the situation was remedied by agreement between the parties. Thereupon the pleadings were amended so as to directly present, separately from the other issues in the case, the right of the cities to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. Upon its opinion as to the existence of contracts and the power to make them as previously stated, the court entered decrees enforcing the ordinance rates which are now before us for review because of the constitutional question involved.

[1, 2] Two propositions are indisputable: (a) That although the governmental agencies *542 having authority to deal with *the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892; Knoxville v. Knoxville Water Co., 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371; Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Minnesota Rate Cases, 230 U. S. 352, 434, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; Denver v. Denver Union Water Co., 246 U. S. 178, 194, 38 Sup. Ct. 278, 62 L. Ed. 649; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract and therefore the question of whether such rates are confiscatory becomes immaterial, Freeport Water Co. v. Freeport, 180 U. S. 587, 593, 21 Sup. Ct. 493, 45 L. Ed. 679; Detroit v. Detroit City Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887; Cleveland v. Cleveland City Ry. Co., 194 U. S. 519, 24 Sup. Ct. 756, 48 L. Ed. 1102; Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176; Minneapolis v. Minneapolis Street Ry. Co., 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; Columbus Ry. Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

It follows that as the rates here involved are conceded to be confiscatory they cannot be enforced unless they are secured by a contract obligation. The existence of a binding contract as to the rates upon which the lower court based its conclusion is, therefore, the single issue upon which the controversy depends. Its solution turns, first, upon the question of the power of the parties to contract on the subject, and second, if they had such power, whether they exercised it.

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[3] *As to the first, assuming for the sake of the argument only, that the public service corporations had the contractual power, the issue is: Had the municipal corporations under the law of Iowa such authority? Its possession must have been conferred, if at all, by section 725 of the Iowa Code of 1897 which deals with that subject. That statute came before the Supreme Court of Iowa for consideration in the very recent case of Town of Woodward v. Iowa Railway & Light Co., 178 N. W. 549. That was a suit by the town of Woodward to compel the light company to continue to furnish electric lighting at the rates fixed by the ordinance conferring upon the company its franchise to maintain and operate its plant in the town. The company resisted on the ground that the rates had become confiscatory and were not enforceable. Testimony offered by the company to establish the confiscatory character of the rates was objected to by the town, which asserted that the acceptance by the company of the ordinance bound it by contract to furnish the service at the rates therein prescribed whether or not they were confiscatory, and that the evidence offered was therefore immaterial. The evidence was received, subject to the objection, and the court, finding the rates to be confiscatory, sustained the company's contention and dismissed the bill. Upon appeal by the town, the Supreme Court, affirming the action of the trial court, said:

> "The defendant's franchise in the town of Woodward was granted in June, 1912, by ordinance duly enacted by the city council and duly approved by vote of the electors, as required by section 720 of the Code. Section 6 of the ordinance which granted the franchise specified the rates to be charged by the defendant to consumers. The term of the franchise was 25 years. The essence of the plaintiff's contention is that the enactment of this ordinance (including the franchise and the rates and the approval *544 *of the same by the electors), and the practical acceptance of the same by the utility corporation, constituted a contract binding as such both upon the town and upon the utility corporation. The defendant resists this contention and likewise denies that there is any power conferred by statute upon the city council to enter into contract on the subject of rates. The issue at this point is the controlling one in the case. The question thus at issue is answered by section 725 of the Code of 1897, which provides as follows:
>
> "'Sec. 725. *Regulation of Rates and Service.*—They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, water, light or power and to supply said city or town with water for fire protection and with gas, water, light or power for other necessary public pur-

poses [and to regulate and fix the rent or rates for water, gas, heat and electric light or power], * * * and these powers shall not be abridged by ordinance, resolution or contract.'[1]

"It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise. * * * There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. * * * By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative *545 *power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either ignorantly or corruptly, and utility corporations became empowered through the contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present section 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by section 6 of the ordinance hereinbefore referred to, were not fixed by contract."

Indeed, the doctrine thus expounded was but a reiteration of the rule of the Iowa law laid down in previous cases. City of Tipton v. Tipton Light & Heating Co., 176 Iowa, 224, 157 N. W. 844; Iowa Railway & Light Co. v. Jones Auto Co., 182 Iowa, 982, 164 N. W. 780; Town of Williams v. Iowa Falls Electric Co., 185 Iowa, 493, 170 N. W. 815. And again, more recently, in Ottumwa Railway & Light Co. v. City of Ottumwa, 178 N. W. 905, the court referring to the Town of Woodward Case and to the doctrine therein announced based upon the significance of section 725 of the Code of 1897, thus restated its former conclusion on that subject:

"That statute in positive terms forbids any abridgment of the right to regulate and fix charges of service corporations named in the statute, either by ordinance, resolution, or contract. No one would now contend, in the teeth of the statute prohibition, that there can be a valid contract fixing permanent rates. As to corporations named in that statute we have held repeatedly that there can be no contracting that rates fixed for service shall not be changed. See Tipton v. Light Co., 176 Iowa, 224, 157 N. W. 844; Selkirk v. Gas Co., 176 N. W. 301. And see San Antonio Co. v. City (D. C.) 257 Fed. 467. To like *546 *effect is Iowa Co. v. Jones, 182 Iowa, 982, 164 N. W. 780. And in the last case it is held that the fixing of maximum rates in a franchise ordinance is therefore not a contract that such rates may not be changed before the time stated in such ordinance has lapsed, and that approval by the electors of rates in the franchise is merely an approval of the rates fixed by the franchise, as rates temporarily settled, with the understanding that the same might be changed either upward or downward."

The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law. Covington v. Kentucky, 173 U. S. 231, 241, 19 Sup. Ct. 383, 43 L. Ed. 679; Worcester v. Worcester Street Ry. Co., 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450; Englewood v. Denver & South Platte Ry. Co., 248 U. S. 294, 296, 39 Sup. Ct. 100, 63 L. Ed. 253; Pawhuska v. Pawhuska Oil Co., 250 U. S. 394, 399, 39 Sup. Ct. 526, 63 L. Ed. 1054.

Decrees reversed, and causes remanded for further proceedings in conformity with this opinion.

(256 U. S. 125)

WALL v. CHESAPEAKE & O. RY. CO.

(Argued March 21, 1921. Decided April 11, 1921.)

No. 237.

Courts ⚩396(6)—Federal question, first raised in petition for rehearing overruled by state court, without more, not reviewable by Supreme Court.

A federal question, which could have been presented earlier, but was not raised in the state courts prior to the petition to the state Supreme Court for a rehearing, which was overruled, without more, cannot be considered by the United States Supreme Court.

In Error to the Supreme Court of the State of Illinois.

Action by Sarah Mary Wall, administratrix of Edward Wall, deceased, against the Chesapeake & Ohio Railway Company. A judgment for plaintiff was affirmed by the Appellate Court of Illinois (210 Ill. App. 136), but reversed by the Supreme Court (290 Ill. 227, 125 N. E. 20), and plaintiff brings error. Writ of error dismissed.

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[1] The words in brackets are found in the section, but are not embraced in the provisions quoted by the court, although as shown by the language of the court as to the rate provision they were early taken into view and applied in construing the statute.

Messrs. C. Paul Tallmadge, Almon W. Bulkley, and Clair E. More, all of Chicago, Ill., for plaintiff in error.

Mr. Worth E. Caylor, of Chicago, Ill., for defendant in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

An Illinois statute of 1903 (Laws 1903, p. 217) amended the act of 1853 (Laws 1853, p. 97) which gave a right of action for wrongful death by adding thereto:

> "Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state."

Our jurisdiction is invoked upon the theory that validity of the amending act was challenged below because of conflict with the federal Constitution. But the point was not raised prior to the petition to the Supreme Court for a rehearing which was overruled without more. 290 Ill. 227, 125 N. E. 20. It could have been presented earlier. According to the well-established rule we may not now consider it, and the writ of error must be dismissed. Godchaux Co. v. Estopinal, 251 U. S. 179, 40 Sup. Ct. 116, 64 L. Ed. 213.

Dismissed.

(256 U. S. 131)

In re NATIONAL PARK BANK OF NEW YORK.

(Argued March 15, 1921. Decided April 11, 1921.)

No. 28, Original.

Mandamus 🔑53—Circuit Court of Appeals not ordered to correct, after term, judgment omitting disposition of tract of land in controversy.

Where the Circuit Court of Appeals had rendered a decree on appeal from the District Court, in which it held one conveyance void as a fraud on creditors, but sustained the validity of another conveyance, and a rehearing was overruled, the creditor, seeking to subject the property to the payment of its judgment, cannot, after the expiration of the term at which the decision of the Circuit Court of Appeals was rendered, and after motion for judgment on the mandate which there had been no attempt to stay, have mandamus to compel the Circuit Court of Appeals to reopen its judgment and pass upon the status of a tract involved in the suit, but not included in either of the conveyances whose validity was determined by the Circuit Court of Appeals.

Application by the National Park Bank of New York for a writ of mandamus, directed to the United States Circuit Court of Appeals for the Fifth Circuit, to require that court to render a judgment disposing of a tract of land which it had failed to dispose of in its opinion and judgment. Rule to show cause discharged, and petition dismissed. For opinion of the Circuit Court of Appeals involved see 261 Fed. 817.

Mr. Edwin v. Guinan, of New York City, for petitioner.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The National Park Bank of New York filed in this court a petition for a writ of mandamus directed to the United States Circuit Court of Appeals for the Fifth Circuit. A rule to show cause was granted, 41 Sup. Ct. 317, and the case is now here on the petition and the return.

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*In order to satisfy a judgment against the Reid Cattle Company the bank brought suit against it and the city of Fort Worth, in the federal court for the Northern District of Texas, to have certain lands to which the city held title declared property of the company and subject to the payment of its debts. The lands comprised about 30,000 acres and had been deeded to the city by Baldridge. He had received conveyances of all the lands, except one 640-acre tract, either directly or indirectly from the company; and it was alleged that all the lands, including that tract, had been conveyed to him either in trust for the company or in fraud of its creditors. The District Court, finding that all the lands had been held in trust for the company, and that the city was not a purchaser for value without notice, decreed that all the lands be subjected to payment of the company's debts. Upon appeal by the city the Circuit Court of Appeals found that the lands had not been conveyed in trust for the company; but it affirmed the decree in part and reversed it in part. 261 Fed. 817. The decree was affirmed so far as it related to lands conveyed by the company by deed of August 25, 1914, on the ground that such conveyance was in fraud of creditors. The decree was reversed so far as it related to lands conveyed by deed of the company dated December 7, 1911, on the ground that this conveyance left the company solvent. The opinion and the decree omitted to make specific reference to the 640-acre tract, the legal title to which had never been in the company, but had stood in the name of Davidson and had been conveyed to Baldridge by deed of October 13, 1913.

The decision of the Court of Appeals was rendered December 2, 1919. A motion for a rehearing of the whole case was made, and it contained, among other contentions, a slight reference to the failure to dispose of the Davidson tract. That motion was overruled

January 13, 1920. No attempt was made to *133 stay the mandate which issued *in due course, and was filed in the District Court February 2, 1920. The term of the Circuit Court of Appeals did not end until September 1, 1920, but no further application of any kind was made during that term of court. In November, 1920, after the city filed in the District Court a motion for judgment on the mandate, the bank applied to the Circuit Court of Appeals for permission to file a motion in which it called attention to the failure to pass specifically upon the claim to the Davidson tract, and contended that the decree entered at the preceding term was, for that reason, not final and should be modified. The Circuit Court of Appeals denied leave to file the motion, and this petition for a writ of mandamus was then brought to require the Circuit Court of Appeals to enter a final judgment disposing of the Davidson tract.

It is clear that the rule granted must be discharged. The decree entered by the Circuit Court of Appeals was, in the light of its opinion, a final one, and disposed of all the issues before it. That court was powerless to modify the decree after the expiration of the term at which it was entered. If the omission in the decree had been adequately called to the court's attention during the term it would doubtless have corrected the error complained of, or relief might have been sought in this court by a petition for a writ of certiorari. The bank failed to avail itself of remedies open to it. A petition for writ of mandamus will not be granted under such circumstances. In re D. H. Riddle, 255 U. S. 450, 41 Sup. Ct. 370, 65 L. Ed. —, decided March 21, 1921.

Rule discharged.

Petition dismissed.

(256 U. S. 134)

MISSOURI PAC. RY. CO. v. McGREW COAL CO.

(Argued March 1, 1921. Decided April 11, 1921.)

No. 265.

Courts 🔑394(15)—Whether shipper was damaged by overcharge not reviewable by United States Supreme Court on error to state court.

In a shipper's action under a state statute for overcharges, the objection that the shipper did not pay freight charges and was not damaged raised no substantial federal question, but a question of state law, which the Supreme Court has no jurisdiction to review on writ of error to the state Supreme Court.

In Error to the Supreme Court of the State of Missouri.

Action by the McGrew Coal Company against the Missouri Pacific Railway Company. A judgment for plaintiff was affirmed by the Supreme Court of Missouri (217 S. W. 984), and defendant brings error. Affirmed.

See, also, 40 Sup. Ct. 503.

Messrs. E. J. White and James F. Green, both of St. Louis, Mo., for plaintiff in error.

Mr. E. A. Krauthoff, of Washington, D. C., for defendant in error.

Memorandum opinion by direction of the Court, by Mr. Justice BRANDEIS.

In this action by a shipper brought under the long and short haul statute of Missouri (Rev. St. Mo. 1909, § 3173) a judgment for *135 the over*charges entered by the trial court was affirmed by the highest court of the state.

The case comes here on writ of error, the railroad contending that the statute as construed violates rights secured to it by the federal Constitution. The only federal question which was substantial and properly raised below was decided adversely to the railroad's contention in Missouri Pacific Railway Co. v. McGrew Coal Co., 244 U. S. 191, 37 Sup. Ct. 518, 61 L. Ed. 1075, a case between the same parties and involving transactions precisely similar. The objection now made, that the shipper did not pay freight charges and, therefore, was not damaged, raised no substantial federal question but a question of state law which we have no jurisdiction to review. See Osborne v. Gray, 241 U. S. 16, 20, 36 Sup. Ct. 486, 60 L. Ed. 865.

Affirmed.

(256 U. S. 129)

MILLER & LUX, Inc., v. SACRAMENTO & SAN JOAQUIN DRAINAGE DIST.

(Argued March 9 and 10, 1921. Decided. April 11, 1921.)

No. 347.

1. Courts 🔑394(10)—Question of validity of statute creating drainage district held too unsubstantial to support writ of error to state court.

The claim that Act Cal. Aug. 10, 1913 (St. 1913, p. 252), creating a drainage district, conflicted with Const. Amend. 14, by denying a landowner an opportunity to show that its lands would receive no special or direct benefits from the proposed work, had become too unsubstantial in May, 1920, when the writ was sued out, to support a writ of error from the United States Supreme Court, under Act Sept. 6, 1916, defining the court's jurisdiction on writs of error.

2. Drains 🔑71—State may establish drainage district and tax all the lands, though some do not receive direct benefits.

In the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax all the lands therein for local improvements, though some of them will not receive direct benefits.

In Error to the Supreme Court of the State of California.

Proceeding by Miller & Lux, Incorporated, against the Sacramento & San Joaquin Drainage District. A judgment affirming an assessment was affirmed by the Supreme Court of California (187 Pac. 1041), and plaintiff brings error and applies for certiorari. Writ of error dismissed, and petition for certiorari denied.

Mr. Edward F. Treadwell, of San Francisco, Cal., for plaintiff in error.

Mr. Charles S. Peery, of San Francisco, Cal., for defendant in error.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

This cause is here upon writ of error to the Supreme Court of the state of California. 187 Pac. 1041. There is also an application for certiorari, but under the settled practice no adequate grounds therefor are shown.

[1, 2] By the Act of August 10, 1913 (Stats. 1913, p. 252), the Legislature of California undertook to create the Sacramento & San Joaquin drainage district, including 1,725,553 acres along the general course of the Sacramento and San Joaquin rivers, and particularly an extensive area south of Stockton. The Reclamation Board, appointed as directed by the statute, levied a tax of $250,000 for general preliminary expenses incidental to the project and appointed assessors to apportion the same. Certain of plaintiff in error's lands lying south of Stockton were assessed at five cents per acre, and to annul this assessment it began the present proceeding. In support of the writ of error reliance is placed upon the contention that, as construed by the state courts, the act of 1913 denies plaintiff in error opportunity to show that its lands will receive no special or direct benefits from the proposed works, and therefore conflicts with the Fourteenth Amendment. But we think that when the writ was sued out (May, 1920) this claim had already become too unsubstantial to support our jurisdiction as defined by the Act of September 6, 1916, c. 448, 39 Stats. 726. Since Houck v. Little River Drainage District (1915) 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, the doctrine has been definitely settled that in the absence of flagrant abuse or purely arbitrary action a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits.

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The allegations of the original *complaint are wholly insufficient to raise the issue in respect of arbitrary legislative action presented by Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190.

The petition for certiorari is denied and the writ of error is dismissed.

(256 U. S. 35)

BALDWIN CO. et al. v. R. S. HOWARD CO.

BALDWIN CO. v. SAME.

(Argued Jan. 14, 1921. Decided April 11, 1921.)

Nos. 139, 113.

1. Courts ⚿388—Decision of Court of Appeals of District of Columbia in proceeding for cancellation of trade-mark registration not reviewable as "final judgment."

Under Trade-Mark Act, § 13 (Comp. St. § 9498), authorizing proceedings to cancel the registration of trade-marks and authorizing appeals to the Commissioner of Patents, section 9 (section 9494), authorizing appeals to the Court of Appeals of the District of Columbia under the rules governing appeals in patent cases, Rev. St. § 4914 (Comp. St. § 9459), providing, relative to appeals in patent cases, that the court shall return a certificate of its proceeding and decision to the Commissioner, but that no opinion or decision of the court shall preclude any person from contesting the validity of the patent in any court, and section 4915 (section 9460), providing a remedy by bill in equity where a patent is refused, the decision of the Court of Appeals in a proceeding to cancel the registration of a trade-mark is not a "final judgment," reviewable in the Supreme Court on certiorari or appeal under Judicial Code, §§ 250, 251 (Comp. St. §§ 1227, 1228).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Courts ⚿388—Inadvertent allowance of certiorari does not establish jurisdiction.

The Supreme Court's inadvertent allowance of a writ of certiorari in a proceeding to register a trade-mark, in which no question of jurisdiction was considered, does not establish the jurisdiction of the court.

Appeal from the Court of Appeals of the District of Columbia.

On Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Proceeding instituted in the Patent Office by the R. S. Howard Company against the Baldwin Company and another to cancel the certificate of registration of a trade-mark. The decision of the Commissioner of Patents was reversed by the Court of Appeals of the District of Columbia (48 App. D. C. 437), and the defendants appeal, and petition for writ of certiorari. Appeal dismissed, and writ of certiorari denied.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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*Messrs. Lawrence Maxwell, of Cincinnati, Ohio, and John E. Cross, of Baltimore, Md., for Baldwin Co.

Mr. Samuel S. Watson, of New York City, for R. S. Howard Co.

Mr. Justice DAY delivered the opinion of the Court.

No. 139 is here upon an appeal from a decision of the Court of Appeals of the District of Columbia reversing the decision of the Commissioner of Patents.

No. 113 is an application for a writ of certiorari to review the same decision of the Court of Appeals of the District of Columbia. The case is reported in 48 App. D. C. 437.

The Commissioner of Patents refused to cancel the certificates of registration of a trade-mark consisting of the word "Howard" registered by the Baldwin Company, October 17, 1905, and made a like ruling refusing to cancel the certificate of registration of the word "Howard" with the initials "V. G. P. Co.," arranged in monogram, registered March 8, 1898, which marks were registered as trade-marks for pianos. The appeals were heard together in the District Court of Appeals upon the appeal of the Howard Company.

Proceedings were brought in the Patent Office by the Howard Company against the *37 Baldwin Company to *cancel the certificates of registration. It appears that a suit was begun in the District Court of the United States for the Southern District of New York by the Baldwin Company against the Howard Company while the cancellation proceedings were pending, which resulted in a decree in favor of the Baldwin Company restraining the Howard Company from making or selling pianos bearing the word "Howard," but permitting it to use the marks "R. S. Howard Company" and "Robert S. Howard Company." 233 Fed. 439. This decree was affirmed by the Circuit Court of Appeals for the Second Circuit. 238 Fed. 154, 151 C. C. A. 230.

The Baldwin Company filed in the Patent Office a certified copy of the record in the federal courts in New York, and in the Patent Office the Examiner of Interferences and the Commissioner of Patents, on appeal to him, held that the adjudication in the New York courts was a bar to the claim of the R. S. Howard Company to cancel the certificates of registration of the trade-mark "Howard," and dismissed the petition of the Howard Company; thereupon appeal was taken from the decision of the Commissioner to the Court of Appeals of the District. That court reversed the decision of the Commissioner of Patents, and directed the clerk to certify its decision as required by law.

The application in the Patent Office to cancel the trade-marks was under section 13 of the Trade-Mark Act of February 20, 1905, 33 Stat. 728, which provides:

> "Sec. 13. That whenever any person shall deem himself injured by the registration of a trade-mark in the Patent Office he may at any time apply to the Commissioner of Patents to cancel the registration thereof. The Commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question and who shall give notice thereof to the registrant. If it appear after a hearing before the *38 *examiner that the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner shall so decide, the Commissioner shall cancel the registration. Appeal may be taken to the Commissioner in person from the decision of Examiner of Interferences." Comp. St. § 9498.

The appeal from the decision of the Commissioner to the Court of Appeals of the District was under section 9 of the act, which provides:

> "Sec. 9. That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable." Comp. St. § 9494.

A motion is made to dismiss the appeal. No specific provision is made for an appeal from the decision of the District of Columbia Court of Appeals reviewing the decision of the Commissioner of Patents, but the decision is to be certified to the Commissioner to govern further proceedings in the case. Section 4914, Rev. Stats.; U. S. Comp. Stats. § 9459.

[1] If the decision of the Court of Appeals of the District of Columbia is not final, then the motion to dismiss the appeal should be sustained, and we have no authority to grant a writ of certiorari. Judicial Code, §§ 250, 251 (Comp. St. §§ 1227, 1228).

The nature of proceedings of the character now under consideration was considered in Frasch v. Moore, 211 U. S. 1, 29 Sup. Ct. 6, 53 L. Ed. 65, in which the opinion of *39 Chief Justice Alvey, speaking *for the Court of Appeals of the District of Columbia in Rousseau v. Brown, 21 App. D. C. 73, 80, explaining the nature of this statutory proceeding and affirming that it did not authorize a judgment, but only the return by the

Court of Appeals of a certificate to the Commissioner of Patents, to be there entered of record to govern further proceedings in the case, was fully approved.

In Atkins v. Moore, 212 U. S. 285, 29 Sup. Ct. 390, 53 L. Ed. 515, application for registration of a trade-mark was refused by the Examiner, which action was approved by the Commissioner, and affirmed on appeal by the Court of Appeals of the District of Columbia, an appeal and writ of error were allowed, both of which were dismissed in this court. The previous decisions of this court were reviewed by Chief Justice Fuller, speaking for the court, and in concluding the opinion he said:

> "In the light of the various details of the Act of February 20, 1905, and of the specific provisions of section 9, we were of opinion [Gaines v. Knecht, 212 U. S. 561] that proceedings under the act were governed by the same rules of practice and procedure as in the instance of patents, and the writ of error was accordingly dismissed. The same result must follow in the present case.
>
> "Under section 4914 of the Revised Statutes no opinion or decision of the Court of Appeals on appeal from the Commissioner precludes 'any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question,' and by section 4915 a remedy by bill in equity is given where a patent is refused, and we regard these provisions as applicable in trade-mark cases under section 9 of the Act of February 20, 1905."

We are of opinion that the principle there announced controls this case. No provision is made which permits this statutory proceeding to be carried beyond the decision of the Court of Appeals of the District of Columbia, the decision of which court is directed to be certified to the Commissioner of
*40
Patents. It is in no sense a final *judgment reviewable here upon writ of certiorari or appeal.

[2] It is true that in Estate of Beckwith v. Commissioner of Patents, 252 U. S. 538, 40 Sup. Ct. 414, 64 L. Ed. 705, this court allowed a writ of certiorari from a decision of the Court of Appeals of the District of Columbia, affirming a decision of the Commissioner of Patents, in an application to register a trade-mark. No question of the jurisdiction of the court was considered in that case, and an inadvertent allowance of the writ of certiorari does not establish the jurisdiction of the court. Fritch, Inc., v. United States, 248 U. S. 458, 463, 39 Sup. Ct. 158, 63 L. Ed. 359.

It follows that the appeal must be dismissed, and the petition for a writ of certiorari denied.

So ordered.

(256 U. S. 40)

AMERICAN STEEL FOUNDRIES v. WHITEHEAD, Com'r of Patents.

(Argued Jan. 12 and 13, 1921. Decided April 11, 1921.)

No. 131.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Proceeding instituted in the Patent Office by American Steel Foundries for the registration of a trade-mark. A decision of the Commissioner of Patents refusing registration was affirmed by the Court of Appeals of the District of Columbia (49 App. D. C. 16, 258 F. 160), and the applicant brings certiorari. Cause dismissed.

See, also, 41 S. Ct. 12.

Mr. George L. Wilkinson, of Chicago, Ill., for petitioner.
*41
*Mr. Nathan Heard, of Boston, Mass., for Simplex Electric Heating Co.

Mr. Justice DAY delivered the opinion of the Court.

In this case a writ of certiorari was granted by this court on October 13, 1919, 250 U. S. 655, 40 Sup. Ct. 10, 63 L. Ed. 1192. The case involves an application for the registration of a trade-mark, which was refused by the Examiner in the Patent Office, which decision was affirmed by the Commissioner of Patents and his decision was affirmed by the Court of Appeals of the District of Columbia. 49 App. D. C. 16, 258 Fed. 160. This case is ruled by Nos. 139 and 113, just decided. Baldwin Co. v. Howard Co., 256 U. S. 35, 41 Sup. Ct. 405, 65 L. Ed. ——. As the writ of certiorari in this case, for the reasons stated in the opinion in No. 139, was improvidently granted, it follows that the cause must be dismissed for want of jurisdiction; and it is

So ordered.

(256 U. S. 126)

BANK OF MINDEN et al. v. CLEMENT.

(Submitted March 21, 1921. Decided April 11, 1921.)

No. 238.

1. **Exemptions 🔑50(1)—Life insurance policies held subject to claims of creditors.**

When one takes out policies of insurance on his life, payable to his executors, administrators, or assigns, they become his property subject to the claims of his creditors.

2. **Constitutional law 🔑180—Exemptions 🔑50(1)—Statute exempting insurance policies from liability to debts held to impair obligation of existing contracts.**

Act La. No. 189 of 1914, exempting from debts of the insured proceeds of insurance on his life when payable to his estate, violates Const. art. 1, § 10, prohibiting laws impairing the obligation of contracts, as applied to antecedent debts.

Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Louisiana.

Proceeding to account by Mrs. Louie Clement, administratrix of the succession of O. P. Clement, deceased, in which the Bank of Minden and others contested the account. A judgment in favor of the contestants was reversed by the Supreme Court of Louisiana (146 La. 385, 83 South. 664), and they bring error. Reversed and remanded.

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*Mr. Hampden Story, of Shreveport, La., for plaintiffs in error.

Mr. J. D. Wilkinson, of Shreveport, La., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

By Act No. 189 of 1914 the Louisiana Legislature undertook to exempt from debts of the assured the avails of insurance upon his life when payable to his estate.

Before passage of that act and while indebted to plaintiffs in error banks by notes which were renewed from time to time until his death, O. P. Clements took out two policies upon his life with loss payable to his executors, administrators or assigns. He died in 1917 and his administratrix collected the stipulated sums amounting to $4,433.33. The succession was insolvent, and the banks sought to subject the insurance money to their claims, maintaining that if construed and applied so as to exempt such funds the act of 1914 would impair the obligations of their contracts and violate section 10, article 1, federal Constitution. The Supreme Court of the state held that acceptance of the renewal notes did not operate as novations, but that the statute protected the insurance money without violating the federal Constitution since the exemption "impaired the obligation of the pre-existing contract very slightly and remotely." 146 La. 385, 83 South. 664.

Section 10, article 1, of the Constitution—"No state shall * * * pass any * * * law impairing the obligation of contracts"—has been much considered by this court and often applied to preserve the integrity of contractual obligations.

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[1] *When the deceased took out the policies of insurance upon his life they became his property, subject to claims of his creditors. N. Y. Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 597, 6 Sup. Ct. 877, 29 L. Ed. 997; Central National Bank v. Hume, 128 U. S. 195, 204, 9 Sup. Ct. 41, 32 L. Ed. 370; Burlingham v. Crouse, 228 U. S. 459, 471, 472, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; In re Coleman, 136 Fed. 818, 69 C. C. A. 496; In re Bonvillain (D. C.) 232 Fed. 372; Blinn v. Dame, 207 Mass. 159, 93 N. E. 601, 20 Ann. Cas. 1184; In re Heilbron, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Rice v. Smith, 72 Miss. 42, 16 South. 417; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Joyce on Insurance, § 2341.

In Sturges v. Crowninshield, 4 Wheat. 197, 198 (4 L. Ed. 529), opinion by Mr. Chief Justice Marshall, it was said:

> "What is the obligation of a contract and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. * * * Any law which releases a part of this obligation must, in the literal sense of the word, impair it. * * * But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."

And in Planters' Bank v. Sharp, 6 How. 327, 12 L. Ed. 447, opinion by Mr. Justice Woodbury:

> "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

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Ogden v. Saunders, 12 Wheat. 213, 257, 6 L. Ed. 606; *McCracken v. Hayward, 2 How. 608, 612, 11 L. Ed. 397; Edwards v. Kearzey, 96 U. S. 594, 600, 24 L. Ed. 793.

[2] So far as the statute of 1914 undertook to exempt the policies and their pro-

ceeds from antecedent debts it came into conflict with the federal Constitution. See Lessley v. Phipps, 49 Miss. 790; Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388; Rice v. Smith, 72 Miss. 42, 16 South. 417; In re Heilbron, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Skinner v. Holt, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878; Homestead Cases, 22 Grat. (Va.) 266, 12 Am. Rep. 507.

The judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice CLARKE dissents.

(256 U. S. 113)

ECONOMY LIGHT & POWER CO. v. UNITED STATES.

(Argued Dec. 17, 1921. Decided April 11, 1921.)

No. 104.

1. Navigable waters 🔑1(3)—Existing obstructions capable of being abated do not affect navigability.

That artificial obstructions exist in a stream, capable of being abated by due exercise of public authority, does not prevent the stream from being regarded as navigable in law, or take away the authority of Congress to prohibit added obstructions, if, supposing them to be abated, it be navigable in fact in its natural state.

2. Navigable waters 🔑1(6)—Desplaines and other rivers held common highways, under Ordinance of 1787 and subsequent legislation.

The trade route between Lake Michigan and the Mississippi river by way of the Chicago, Desplaines, and Illinois rivers, and the carrying places between them constituted one of the routes of commerce intended to be maintained as common highways under Ordinance of July 13, 1787, art. 4, and subsequent legislation (Act Aug. 7, 1789; Act May 18, 1796, § 9 [Comp. St. § 4918]; Act May 7, 1800, § 2; Act March 26, 1804, § 6; Act Feb. 3, 1809, § 2; Act April 18, 1818, § 4; and Resolution Dec. 3, 1818).

3. Navigable waters 🔑1(2)—Ordinance of 1787 did not make rivers navigable, unless such in fact.

Ordinance of July 13, 1787, art. 4, providing that the navigable waters leading into the Mississippi and St. Lawrence should be common highways and forever free, did not make streams navigable in law unless so in fact, but declared the public rights therein so far as they were navigable in fact.

4. Navigable waters 🔑1(2)—States 🔑9—Ordinance of 1787 superseded as to internal affairs by admission of state, but not repealable by state as to navigable waters.

To the extent that it pertained to internal affairs within the present state of Illinois, the Ordinance of July 13, 1787, was superseded by the admission of the state of Illinois into the Union; but, so far as it established public rights of highway in navigable waters capable of bearing interstate commerce, it could not be repealed by one of the states.

5. Navigable waters 🔑2—Congress may exercise its power by general or special laws.

Congress may exercise its authority over navigable waters through general as well as special laws; its power in either case being supreme.

6. Navigable waters 🔑1(3)—Test of "navigability" stated.

The test of "navigability" is whether the stream in its natural state is used or capable of being used as a highway for commerce over which trade and travel is or may be conducted in the customary modes of trade and travel on water, and navigability is not destroyed by natural obstructions or portages, or because navigation is not open at all seasons of the year or at all stages of the water.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

7. Judgment 🔑828(1)—Judgment of state court not res judicata against United States, which was not a party.

A decision of a state Supreme Court in a suit to which the United States was not a party, and in which a writ of error from the United States Supreme Court was dismissed, that a river was not navigable, is not res judicata in a suit by the United States to enjoin the construction of a dam therein.

8. Courts 🔑365—State decision as to navigability not followed.

A decision of a state Supreme Court that a river was not navigable is not conclusive on a federal court having different evidence before it.

9. Navigable waters 🔑1(3)—River navigable in natural state within statute as to dams, though not now capable of use.

A river, having actual navigable capacity in its natural state and capable of carrying interstate commerce, is within the power of Congress to preserve for purposes of future transportation, and is within Act March 3, 1899, § 9 (Comp. St. § 9971), prohibiting dams, etc., in navigable waters without the consent of Congress and the approval of the plans, though it be not at present used for such commerce, and be incapable of such use according to present methods, by reason of changed conditions or artificial obstructions.

10. Constitutional law 🔑68(1)—Abandonment of navigable river as such is matter for Congress.

If a river, which, after practical service as a highway of commerce for a century and a half, has fallen into disuse partly through changes in the course of trade, or methods of navigation, or changes in its own condition, and partly as the result of artificial obstructions, and has not been used for almost 100 years, is to be abandoned as a highway of commerce, it is for Congress, and not for the courts, to so declare.

IT. Navigable waters ⚷22(1)—Refusal of Secretary of War to act held not approval of plans for dam.

Where one constructing a dam in a river made no application to the Secretary of War for approval of its plans, but informally sought assurance that no permit was necessary, assuring him that the river was not navigable, the Secretary's refusal to act, because he had no jurisdiction, was not equivalent to an approval, under Act March 3, 1899, § 9 (Comp. St. § 9971), or even to an official inquiry into the navigability of the river.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the United States against the Economy Light & Power Company. A decree granting an injunction was affirmed by the Circuit Court of Appeals (256 Fed. 792, 168 C. C. A. 138), and defendant appeals. Affirmed.

*Mr. Frank H. Scott, of Chicago, Ill., for appellant.

Mr. Clarence N. Goodwin, of Chicago, Ill., for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit brought by the United States against appellant in the District Court for the Northern District of Illinois, Eastern Division, for an injunction to restrain defendant from constructing a dam in the Desplaines river at a point in Grundy county, Ill., without the consent of Congress or authority of the Legislature of the state, and without approval of the location and plans by the Chief of Engineers and the Secretary of War of the United States. Relief was prayed upon two grounds: (1) That the river bed where the dam was being constructed was the property of the United States; (2) that the Desplaines river was a navigable waterway of the United States, and the proposed construction of a dam therein was in violation of the Act of Congress of March 3, 1899 (chapter 425, § 9, 30 Stat. 1121, 1151 [Comp. St. § 9971]). The first ground was overruled by the District Court and disregarded by the Circuit Court of Appeals. We need not consider it further. The second ground was sustained by the District Court, and its final decree

granting an injunction was *affirmed by the Circuit Court of Appeals. 256 Fed. 792, 168 C. C. A. 138. The present appeal followed.

Section 7 of Act of September 19, 1890 (chapter 907, 26 Stat. 426, 454), makes it unlawful to build any dam or other structure in any navigable river or other waters of the United States, so as to obstruct or impair navigation, without permission of the Secretary of War. Section 9 of the Act of March 3, 1899 (30 Stat. 1151), declares:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any * * * navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. * * *"

There is no contention that the consent of Congress for the building of the proposed dam has been obtained, that its construction has been authorized by the Legislature of the state of Illinois, or that the location and plans have been submitted to and approved by the Chief of Engineers and the Secretary of War. The substantial defense is that the Desplaines river, at the site of the proposed dam, which is below the city of Joliet and just above the point where the Desplaines joins the Kankakee to form the Illinois river, is not navigable in fact and not within the description "navigable river, or other navigable water of the United States," as employed in the act of 1899.

*The District Court found that there was no evidence of actual navigation within the memory of living men, and that there would be no present interference with navigation by the building of the proposed dam. The Circuit Court of Appeals did not disturb this finding. 256 Fed. 792, 798, 168 C. C. A. 138. But both courts found that in its natural state the river was navigable in fact, and that it was actually used for the purposes of navigation and trading in the customary way, and with the kinds of craft ordinarily in use for that purpose on rivers of the United States, from early fur-trading days (about 1675) down to the end of the first quarter of the nineteenth century. Details are given in the opinion of the Circuit Court of Appeals, and need not be repeated. Suffice it to say that there was a well-known route by water, called the Chicago-Desplaines-Illinois route, running up the Chicago river from its mouth on Lake Michigan to a point on the west fork of the south branch; thence westerly by water or portage, according to the season, to Mud Lake, about two miles; thence to the Desplaines near Riverside, two miles; thence down the Desplaines to the confluence of that river with the Kankakee, where they form the Illinois river; thence down the Illinois to its junction with the Mississippi. During the period mentioned the fur trade was a leading branch of commerce in the western territory, and it was regularly conducted upon the Desplaines river. Supplies in large quantity and variety, needed by the early settlers, also were transported over this route between Chicago and St. Louis and other points. Canoes and other boats of various kinds were employed, having light draft, but capable of carrying several tons each, and manned by crews of six or eight men. The route was navigated by the American Fur Company regularly during a period of years down to about 1825, after which it was disused, because the trade had receded to interior portions of Illinois that could be

reached *more conveniently with horses. Later, changes occurred in the river, due to the drainage of a swamp in the region of the portage, the clearing away of forests, affecting the rainfall and the distribution of the run-off, and thus shortening the duration of the higher stages of water; the construction (under state authority) of the Illinois & Michigan Canal in 1848 and its deepening in 1866 to 1871, which diverted a part of the hill drainage towards the Chicago river; and the construction of the Sanitary and Ship Canal in 1892 to 1894.

But, in spite of these changes, the Circuit Court of Appeals finds (256 Fed. 804, 168 C. C. A. 138) that the Desplaines river is a continuous stretch of water from Riverside (at the Chicago divide) to its mouth; and although there is a rapid, and in places shallow water, with boulders and obstructions, yet these things do not affect its navigable capacity; that the same is true of the upper part of the Illinois river, above the head of steamboat navigation; and that both streams are navigable and are within the act of 1899.

[1] Since about the year 1835 a number of dams have been built in the Desplaines, without authority from the United States, and one or more of them still remain; besides, a considerable number of bridges of various kinds span the river. The fact, however, that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. The authority of Congress to prohibit added obstructions is not taken away by the fact that it has omitted to take action in previous cases.

The public interest in navigable streams of this character in Illinois and neighboring states, and the federal authority over such as are capable of serving commerce among the states, does not arise from custom or implica*tion, but has a very definite origin. By article 4 of the compact in the Ordinance of July 13, 1787, for the government of the territory northwest of the river Ohio, it was declared:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 Stat. 51, 52, note; Rev. Stat. U. S. (1878 Ed.) pp. 13, 16.

This was under the Confederation; but the first Congress under the new Constitution expressed a design to have it continue in full effect, in the Act of August 7, 1789 (chapter 8, 1 Stat. 50). A purpose to preserve the rights of public highway in the navigable rivers was again manifested in section 9 of Act of May 18, 1796 (chapter 29, 1 Stat. 464, 468 [Comp. St. § 4918]). The territory of Indiana (including what is now Illinois) was set apart and organized by Act of May 7, 1800, which in section 2 reiterated that purpose (chapter 41, 2 Stat. 58, 59); and in an act providing for the disposal of the public lands therein (Act of March 26, 1804, c. 35, § 6, 2 Stat. 277, 279, 280), it was again declared "that all the navigable rivers, creeks, and waters, within the Indiana Territory, shall be deemed to be and remain public highways." Illinois was set apart and a separate territorial government established therein by Act of February 3, 1809 (chapter 13, 2 Stat. 514). By section 2, the government was to be "in all respects similar" to that provided by the Ordinance of 1787 and the Act of August 7, 1789, and the inhabitants were to enjoy all the rights, privileges, and conditions granted by the Ordinance. An act to enable the people of Illinois to form a state government, approved April 18, 1818 (chapter 67, 3 Stat. 428), contained a proviso (section 4, p. 430) that such government should not be repugnant to the Ordinance of 1787. The state constitution declared its purpose to *be consistent with the Ordinance, and the resolution of Congress declaring admission of the state into the Union (Res. Dec. 3, 1818, 3 Stat. 536) acknowledged that the constitution and state government were "in conformity to the principles of the articles of compact" in the Ordinance of 1787.

[2, 3] There can be no doubt that the waters of the Chicago-Desplaines-Illinois route "and the carrying places between the same" constituted one of the routes of commerce intended by the Ordinance, and the subsequent acts referred to, to be maintained as common highways. It did not make them navigable in law unless they were navigable in fact, but declared the public rights therein so far as they were navigable in fact; and it is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation more than 80 years before this court decided

The Daniel Ball, 10 Wall. 557, 563, 19 L. Ed. 999; and more than 60 years before The Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 455, 13 L. Ed. 1058.

[4] To the extent that it pertained to internal affairs, the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the state of Illinois into the Union "on an equal footing with the original states in all respects whatever." Permoli v. First Municipality, 3 How. 589. 610 (11 L. Ed. 739); Van Brocklin v. State of Tennessee, 117 U. S. 151, 159, 6 Sup. Ct. 670, 29 L. Ed. 845; Hawkins v. Bleakly, 243 U. S. 210, 217, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637. But, so far as it established public rights of highway in navigable waters capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the ex-

clusive power *of Congress to regulate commerce with the Indian tribes. Pollard's Lessee v. Hagan, 3 How. 212, 229, 230, 11 L. Ed. 565; Ex parte Webb, 225 U. S. 663, 683, 690, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Sandoval, 231 U. S. 28, 38, 34 Sup. Ct. 1, 58 L. Ed. 107.

[5] Nothing inconsistent with this was decided in Escanaba Co. v. Chicago, 107 U. S. 678, 688, 689, 2 Sup. Ct. 185, 27 L. Ed. 442; Huse v. Glover, 119 U. S. 543, 546, 7 Sup. Ct. 313, 30 L. Ed. 487; Sands v. Manistee River Imp. Co., 123 U. S. 288, 295, 296, 8 Sup. Ct. 113, 31 L. Ed. 149; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 8–11, 8 Sup Ct. 811, 31 L. Ed. 629. Those cases simply hold, in effect, that a state formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other states of the Union; that is to say, until Congress intervenes, the power of the state, locally exerted, is plenary. Nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the states may have done, from assuming entire control in the matter. In short, that the rule laid down in Willson v. Black Bird Creek Marsh Co., 2 Pet. 245, 252, 7 L. Ed. 412, and Gilman v. Philadelphia, 3 Wall. 713, 731, 18 L. Ed. 96, applies to states formed out of the Northwest Territory as well as to others. This is not questioned. But, as was recognized in the Gilman Case (page 731), Congress may exercise its authority through general as well as through special laws, its power in either case being supreme. The act of 1899 (30 Stat. 1151), upon which the present bill is founded, is a due assertion of the authority of Congress over all navigable waters within its jurisdiction; and it must be accorded due weight as such.

[6] The Circuit Court of Appeals, in passing upon the question of navigability, correctly applied the test laid down by this court in The Daniel Ball, 10 Wall. 557, 563, 19 L. Ed. 999, and The Montello, 20 Wall. 430, 440–443, 22 L. Ed. 391; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway

for commerce, over which *trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages: nor need the navigation be open at all seasons of the year, or at all stages of the water.

In The Montello, supra, the question was whether Fox river, in the state of Wisconsin, was a navigable water of the United States within the meaning of acts of Congress. Originally there were rapids and falls in the river, but these had been obviated by locks, canals, and dams, so as to furnish an uninterrupted water communication for steam vessels of a considerable capacity. It was argued (20 Wall. 440, 22 L. Ed. 391) that although since these improvements the river might be considered as a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore not navigable under the decision in The Daniel Ball, supra. The court, accepting navigability in the natural state of the river as the correct test, proceeded to show that, before the improvements resulting in an unbroken navigation, and when a few portages were necessary, a large and successful interstate commerce had been carried through the river by means of Durham boats; and, speaking by Mr. Justice Davis, proceeded to say (20 Wall. 441, 22 L. Ed. 391) that, even aside from the Ordinance of 1787:

> "The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce
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> affords the true criterion of the *navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

Proceeding to say (20 Wall. 442, 22 L. Ed. 391) that notwithstanding the fact that before the improvements there were obstructions to an unbroken navigation, which rendered the navigation difficult and prevented the adoption of modern agencies, commerce was successfully carried on, the court pointed out (20 Wall. 442, 22 L. Ed. 391) that the Ordinance of 1787 recognized "carrying places" as a part of a navigable waterway.

[7, 8] Our attention is called to the fact that in People v. Economy Power Co., 241 Ill. 290, 320–338, 89 N. E. 760, the Supreme Court of Illinois held that the Desplaines in its natural condition is not a navigable stream; and it is intimated that we ought to follow that decision. A writ of error brought to review it was dismissed by us because no federal question was involved. 234 U. S. 497, 510, 524, 34 Sup. Ct. 973, 58 L. Ed. 1429. Of course, the decision does not render the matter res judicata, as the United States was not a party. The District Court in the present case treated it as not persuasive, because it appeared that evidence was wanting which is present here; and we cannot say that the court below erred in not following it.

[9, 10] We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. And we agree that the provisions of section 9 of the Act of 1899 (30 Stat. 1151) apply to such a stream. The act in terms applies to "any *124 * * * navigable river, or other *navigable water of the United States"; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the time of its passage, or now are, actually open for use. The Desplaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation. Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the act of 1899, and, in the present case at least, nothing remains but to give effect to it.

[11] It is contended that, supposing the Desplaines is navigable, the purpose of the act of 1899 was in effect accomplished because appellant or its predecessor, before proceeding with the enterprise, submitted the plans for the proposed dam to the War Department, and that department "in substance gave its approval," although it did not formally approve the plans because it did not consider the Desplaines river a navigable water of the United States. It appears, however, that there was no application for an approval under the act of 1899, and the Department was not called upon to exercise its jurisdiction under that act. There was an informal hearing before the Secretary, at *125 which the representatives of *appellant, assuring him that the Desplaines was not a navigable stream either in law or in fact, and that the department had no jurisdiction over it, asked not for a permit, but in effect for an assurance that no permit was necessary. The Secretary declined to act because, as the river was not navigable, he had no jurisdiction. We cannot regard this as equivalent to an approval, either in form or effect, or even as an official inquiry into the navigability of the river.

Decree affirmed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

(256 U. S. 11)

UNITED STATES v. L. P. & J. A. SMITH.

(Argued March 22 and 23, 1921. Decided April 11, 1921.)

No. 253.

United States 🔑70(2)—Contractor to remove loose material held entitled to extra compensation for rock work.

A firm which had contracted with the government to remove clay, gravel, sand, and boulders from a navigable stream is entitled to extra compensation for the removal of a bed of limestone rock, notwithstanding provisions making the decision of the engineer officer in charge as to the quality and quantity of the work final, and requiring his instructions to be observed by the contractor and the order of the engineer to remove the rock under the contract.

Appeal from the Court of Claims.

Claim by L. P. & J. A. Smith against the United States. From a judgment of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Court of Claims in favor of the claimants (54 Ct. Cl. 119), the United States appeals. Affirmed.

See, also, 40 Sup. Ct. 585.

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*Mr. Assistant Attorney General Davis and Mr. Wilford Hearn, of Washington, D. C., for the United States.

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*Messrs. John E. Morley, of Cleveland, Ohio, Rufus S. Day, of Washington, D. C., and Roscoe M. Ewing, of Cleveland, Ohio, for appellees.

Mr. Justice McKENNA delivered the opinion of the Court.

April 14, 1919, the Court of Claims rendered a judgment against the United States in favor of L. P. & J. A. Smith (appellees and we shall so refer to them) for the sum of $119,304.27. To review that judgment this appeal is prosecuted.

The appellees were a partnership doing business at the times herein stated under the firm name of L. P. & J. A. Smith.

In response to an advertisement and after the submission of proposals for work at the mouth of the Detroit river, a contract in writing was entered into December 31, 1892, by O. M. Poe, Colonel, Corps of Engineers, U. S. Army, and appellees, by which the latter agreed to excavate a ship channel 20 and 21 feet deep, located in section 8 of the Detroit river, in accordance with specifications attached to the contract and made a part thereof. They were to receive in full compensation for their work the sum of 18 cents per cubic yard of excavation, scow measure.

The material to be removed was specified to consist "of sand, gravel, and boulders, all in unknown quantities."

In the season of 1894 there was discovered a natural bed of limestone rock within the boundaries of the excavation called for by the contract, which was not provided for by the contract. For the removal of this limestone the United States advertised for bids.

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*The L. P. & J. A. Smith Company, a corporation of Ohio, and a successor in interest to L. P. & J. A. Smith, bid on the work. The bid was accepted and a contract was entered into November 9, 1894, by which that company agreed to remove the rock and other material at the price of $2.24 per cubic yard of excavation, bank measure. The contract was completed on or about June 16, 1895.

The contract of December 31, 1892, was extended from time to time by Col. Lydecker, the engineer in charge of the work, he having succeeded Colonel Poe, to July 1, 1897. In that year he ordered appellees to work at particular spots toward the northerly end of section 8, at certain designated shoals which had been excavated under the contract of November 9, 1894, with the L. P. & J. A. Smith Company.

And certain other officers, one an assistant engineer, another a subinspector, in charge of the work, insisted upon locating for appellees the points where dredging was to be done.[1]

The material or a large part of the material to be removed from those points was limestone rock or limestone bed rock. Appellees protested and asked for the fixing of an extra price for doing the work. This was refused and they were told that if they did not remove the same they would be declared defaulting contractors; that the work would be taken from them, done and charged to them, and be paid for from the retained percentages for work already performed, and if the percentages were not sufficient for that purpose they, appellees, and their bondsmen, would be proceeded against. No other officer or officers so told appellees or insisted that all the material to be removed was clay, gravel and boulders.[1]

A large part of the material arbitrarily stated to be clay, gravel, sand and boulders, *16 was in fact limestone *rock and limestone bed rock, and was not the material specified in the contract.

The quantity of material excavated as thus required, and that required by the contract, the findings estimate in detail and the cost of its excavation, in the sum of $116,760.61, from which was deducted the sum of $5,174.64 that had been paid appellees, leaving due to them $111,585.97. It is found besides that delays caused by the engineer in charge resulted in a loss to the appellees of $7,718.30. For these two sums judgment was rendered.

The Court of Claims in a brief memorandum summarized the elements of liability against the United States, concluding as follows:

> "We think the right of plaintiffs [the appellees] to recover the price for the work done by them is indisputable."

The United States adduces against the conclusion certain provisions of the specifications, the latter being, as we have seen, part of the contract.

They are too long to quote or even summarize. They are to the effect that the decision of the engineer officer in charge as to quality and quantity of work was final and that his instructions were required to be observed by the contractor. And further that modifications of the work in character and quality, whether of labor or material, were to be agreed to in writing and unless so agreed to or expressly required in writing no claim should be made therefor.

The contention overlooks the view of the contract entertained by Colonel Lydecker and the uselessness of soliciting or expecting any change by him. His conduct, to use counsel's description, "though perhaps without malice or bad faith in the tortious sense," was repellant of appeal or of any alternative but submission with its consequences. And we think, against the explicit declaration of the contract of the material to be excavated and its price. The contract provided, in response *17 to advertise*ments and in fulfillment of bids, for the excavation of a ship channel 20 and 21 feet deep and that "the material to be removed consists of clay, sand, gravel, and boulders, all in unknown proportions." To these explicit provisions, and their contractual force we may add the judgment and conduct of Colonel Poe, the first engineer officer in charge of the work. He realized immediately when a bed of limestone rock was encountered it was not the material stated in the contract and without hesitation entered into another contract concerning it, and at a price of significant contrast—18 cents per cubic yard, scow measure, being the price of the first contract, $2.24 per cubic yard of excavation, bank measure, being the price of the second contract.

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[1] Additional finding upon the mandate of this court.

We think the case is within the principle of Hollerback v. United States, 233 U. S. 165, 34 Sup. Ct. 553, 58 L. Ed. 898, Christie v. United States, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933, United States v. Spearin, 248 U. S. 132, 39 Sup. Ct. 59, 63 L. Ed. 166, and United States v. Atlantic Dredging Co., 253 U. S. 1, 40 Sup. Ct. 423, 64 L. Ed. 735.

We concur, therefore, with the declaration of the Court of Claims that "the right" of the appellees "to recover the price for the work done by them is indisputable," including the loss to them while waiting for the engineer "to locate their work."

Judgment affirmed.

Mr. Justice DAY and Mr. Justice McREYNOLDS took no part in the decision.

(256 U. S. 46)

GALBRAITH v. VALLELY.

(Argued March 18, 1921. Decided April 11, 1921.)

No. 234.

Bankruptcy 🔑288(3)—Assignee for creditors, retaining fees and disbursements, is "adverse claimant," and summary proceedings will not lie.

An assignee for the benefit of creditors, who turned over to a trustee in bankruptcy the property of the bankrupt in his possession, retaining only an amount claimed by him for fees and disbursements, was an "adverse claimant" of the moneys retained, and could not be proceeded against summarily in the bankruptcy court, over his protest duly made, but was entitled to have his claim determined in a judicial proceeding suitable to that purpose.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Adverse Claimant.]

Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Summary proceeding in the bankruptcy court by John Vallely, trustee in bankruptcy of Conrad C. Reiswig, bankrupt, against John P. Galbraith. An order of the District Court (Vallely v. Galbraith, 253 Fed. 390), reversing a decision of the referee, was affirmed by the Circuit Court of Appeals (261 Fed. 670), and Galbraith brings certiorari. Reversed.

See, also, 252 U. S. 576, 40 Sup. Ct. 344, 64 L. Ed. 724.

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*Mr. Fred B. Dodge, of Minneapolis, Minn., for petitioner.

Francis J. Murphy, of Minot, N. D., for respondent.

Mr. Justice DAY delivered the opinion of the Court.

This is a writ of certiorari to review a decision of the Circuit Court of Appeals for the Eighth Circuit affirming an order of the District Judge for the District of North Dakota in a bankruptcy proceeding. The pertinent facts are: On August 15, 1917, one Conrad C. Reiswig executed a trust deed for the benefit of his creditors to John P. Galbraith, assignee and the petitioner herein. The assigned stock of merchandise was sold. Various proceedings and meetings of creditors were had, not necessary to recite. On December 22, 1917, upon the petition of creditors Reiswig was duly adjudged a bankrupt, and Vallely, respondent herein, is his trustee in bankruptcy. Galbraith appeared in the bankruptcy proceedings and filed an account, claiming therein the right to retain a certain sum for fees and disbursements under the assignment, and paid over to the trustee in bankruptcy the other moneys which he had acquired. Thereupon the trustee in bankruptcy filed a petition with the referee in bankruptcy asking, in a summary proceeding, for an order upon Galbraith to show cause why he should not pay over the sum *48 of $1,474.10, retained as fees and ex*penses as trustee under the assignment. The referee in bankruptcy made an order that Galbraith forthwith pay over that sum to the trustee in bankruptcy or show cause why he should not do so. Galbraith appeared and set up that the order of the referee in the summary proceeding was without authority as he was an adverse claimant to the moneys referred to in the order, and that the court had no jurisdiction in a summary proceeding to hear and determine the questions involved. Without waiving objection, and subject to the right of Galbraith to assert his objection to the proceedings, testimony was taken concerning the money expended and retained by the assignee prior to the bankruptcy proceedings, for administering the estate. Among other things it was stipulated that as to the particular money expended by the assignee, he was an adverse claimant. The referee delivered an opinion passing upon the amount of expenditures and compensation, but held that Galbraith was an adverse claimant within the rule declared by this court in Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, and that, therefore, the bankruptcy court was without jurisdiction to proceed in a summary manner, and discharged the order. The decision of the referee was reversed by the District Judge. 253 Fed. 390. The Circuit Court of Appeals affirmed the order of the District Court, 261 Fed. 670, and the case is here upon writ of certiorari.

We think the referee was right in holding that the case was governed by Louisville Trust Co. v. Comingor, supra. In that case a general assignment for the benefit of creditors was made within four months of the bankruptcy proceeding, the assignment was therefore an act of bankruptcy. A receiver was appointed in the bankruptcy court. The assignee turned over the proceeds of sale of the property, retaining his fees as assignee and his disbursements to counsel. A summary proceeding was begun in the District Court ordering the assignee to show cause

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*why he should not pay to the receiver the amounts retained. This order was made against the objection of the assignee that the court had no authority to proceed in that manner. This court held that the assignee was an adverse claimant as to these amounts, and that the District Court was without jurisdiction to determine the controversy in a summary proceeding. This case has been repeatedly cited as determinative of the law and practice in similar cases.[1]

The Circuit Court of Appeals made no reference to the Comingor Case and held the case was ruled by Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; but that case did not present the question here involved. In that case there had been an assignment prior to the bankruptcy proceedings, and the question presented was whether a claim for professional services rendered in the course of a general assignment before the bankruptcy was entitled to be paid as a preferential claim out of the estate in the hands of the trustee in bankruptcy when the adjudication of bankruptcy had been made within four months after the making of the assignment, and the assignment set aside as in contravention of the bankruptcy law. It was held that the claim for compensation could be allowed so far as the services were shown to be beneficial to the estate.

In Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, also cited in the opinion of the Circuit Court of Appeals, it was held that books and records of a corporation, upon adjudication in bankruptcy, passed to the trustee, and belonged in the custody of the bankruptcy court, there being no adverse claim to them.

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Upon that state of facts it was *held that, on a rule to show cause the court could properly make an order compelling the delivery of the books to the trustee. In the opinion in that case, Louisville Trust Co. v. Comingor, supra, and other cases are cited for the purpose of showing that a different rule would prevail when an adverse claimant set up a right to be heard in other than a summary proceeding.

It may be, as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical administration of the estate in bankruptcy. But the right to recover in such instances, only in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this court. The principle of the Comingor Case has never been departed from in this court. It establishes the right of an assignee for the benefit of creditors, to the extent that he asserts rights to expenses incurred and compensation earned under an assignment in good faith before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceeding suitable to that purpose, and not by summary proceedings where punishment for contempt is the means of enforcing the order. We see no occasion to depart from this practice. There was no waiver by the assignee of his rights in this respect. He made no attempt to retain the body of the estate as against the trustee in bankruptcy. As to his disbursements and compensation while acting as assignee, he asserted an adverse claim. Under the settled rule of this court he could not be proceeded against summarily for such disbursements and compensation over his protest duly made against that method of procedure.

In our view the courts below erred in deciding otherwise, and the order of the Circuit Court of Appeals is accordingly

Reversed.

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[1] See full consideration of the subject by the Circuit Court of Appeals of the Eighth Circuit, Judges Sanborn, Van Devanter, and Reed, in In re Rathman, 183 Fed. 913, 106 C. C. A. 253; Collier on Bankruptcy (11th Ed.) 525, 528, and cases cited in notes; Black on Bankruptcy, 974; 2 Remington on Bankruptcy (2d Ed.) § 1612; 1 Loveland on Bankruptcy (2d Ed.) 129.

(256 U. S. 1)

CHASE v. UNITED STATES.

(Argued March 21 and 22, 1921. Decided April 11, 1921.)

No. 242.

1. **Indians 🔑13—Member of Omaha Tribe, born since 1893, held to have no vested contractual right to allotment under treaties and statutes.**

Under the treaties of March 16, 1854, and March 6, 1865, with the Omaha Tribe whereby certain lands were ceded to the United States and others were to be allotted in severalty, and Act Aug. 7, 1882, and Act March 3, 1893, providing for allotments to Indians then living or thereafter born during a trust period of 25 years, an Indian born subsequent to the passage of the last-mentioned act had no vested contractual right to an allotment, preventing Congress from making a different disposition of the unallotted lands.

2. **Indians 🔑13—Discretion of Secretary as to allotment of sale of lands held exercised against applicant by denial of allotment.**

If under Act May 11, 1912, providing for the survey and sale of unallotted lands on the Omaha Indian Reservation, the Secretary of the Interior had a discretion as to allotting lands to an Indian born subsequent to passage of Act Aug. 7, 1882, and Act March 3, 1893, such discretion was exercised against the Indian by denying his right to an allotment.

3. **Indians 🔑13—Statutes requiring future allotments held repealed by statute for survey and sale of unallotted lands.**

Act May 11, 1912, providing for the survey and sale of unallotted lands on the Omaha Indian Reservation, supersedes Act Aug. 7, 1882, and Act March 3, 1893, so far as they provided for the allotment of such unallotted lands to Indians subsequently born, though it contains no repealing words.

4. **Appeal and error 🔑1201(6)—After reversal it was within power of courts to permit new defense to be relied on.**

In a suit to establish the right of an Omaha Indian to an allotment of lands, it was within the power of the District Court and the Circuit Court of Appeals, after reversal of a judgment on a trial on which the government relied on a particular statute as a defense, to permit it to abandon such defense and set up a later statute as a defense.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, against the United States. A decree dismissing the bill was affirmed by the Circuit Court of Appeals (261 Fed. 833), and plaintiff appeals. Affirmed.

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*Mr. John Lee Webster, of Omaha, Neb. (Mr. Hiram Chase, of Pender, Neb., of counsel), for appellant.

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*Messrs. Asst. Atty. Gen. Garnett and H. L. Underwood, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Mr. O. C. Anderson, of West Point, Neb. (Mr. Charles J. Kappler, of Washington, D. C., of counsel), for Omaha Tribe of Indians, by special leave.

Mr. Justice McKENNA delivered the opinion of the Court.

Suit to adjudge Hiram Chase, Jr., a member of the Omaha Tribe of Indians and to have a right to select 80 acres for an allotment out of the lands of the Omaha Reservation, the selection having been denied by the Secretary of the Interior.

The right of selection depends upon the effect of certain treaties between the Omaha Tribe and the United States and certain acts of Congress.

The treaties were made in 1854 and 1865 (10 Stat. 1043; 14 Stat. 667), and by them the Indians ceded certain lands to the United States and certain other lands were retained constituting the reservation with which this suit is concerned and of which the lands sought to be allotted are a part.

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*It was expressed in the treaty of 1865 to be the desire of the Indians to abolish the tenure in common by which they held their lands and to acquire tracts in severalty of 160 acres to heads of families and 40 acres to each male person of 18 years and upwards; and it was provided that the whole of the lands so assigned or unassigned should constitute and be known as the Omaha Reservation.

The assignments were to be approved by the Secretary of the Interior, be evidenced by certificates, and be final and conclusive.

In execution of the purposes of the treaty Congress passed an act in 1882 (22 Stat. 341) by which the Secretary was authorized to allot the portion of the reservation lying east of the Sioux City & Nebraska Railroad in severalty to a head of a family a quarter section (160 acres), to each single person over 18 one-eighth of a section, to each orphan child under 18 one-eighth of a section, and to each other person under that age one-sixteenth of a section. The issue of patents was provided for, the lands to be held in trust for 25 years for the sole use and benefit of the respective allottees; and it was provided that the residue of the lands should be patented to the tribe, but held in trust for 25 years, then to be conveyed in fee discharged of the trust. From these lands, however, it was provided the allotments should be made and patented to each Omaha child who might be born prior to the expiration of the 25-year trust period.

Under the act and prior to July 11, 1884, allotments were made to 954 members of the tribe and patents issued therefor. No patent was issued to the tribe as provided.

By the Indian Appropriation Act passed March 3, 1893 (27 Stat. 630), and expressing itself to be an amendment to the act of 1882, the Secretary of the Interior was authorized with consent of the Indian tribe to allot in severalty—

> "* * * to each Indian woman and child of said *6 tribe born since allotments of land were *made in severalty to the members thereof under the provisions of said act [1882], and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands. * * *"

Hiram Chase was not born until after the act of 1893 was passed, and the question is whether he is entitled to an allotment under it. The government contends to the negative, basing the contention upon an act passed May 11, 1912 (37 Stat. 111), which, it is the further contention, repealed the act of 1893, and cut off the right of allotment.

The District Court yielded to the contention and dismissed the bill, and its decree was affirmed by the Circuit Court of Appeals. 261 Fed. 833.

Against this action of the courts appellant asserts error, and insists that it and the contention of the government are based on an underestimate of his rights and upon a wrong construction of the act of 1893.

[1] First, as to his rights. The contention is that appellant had a vested right to an allotment "under the treaties and acts of Congress as they existed at the time when" the allotment was "selected and claimed," and this whether the act of 1912 repealed the act of 1893, or was subordinate to or complementary of its provisions. In support of the contention appellant recites the various provisions of the treaty of 1865 and the acts of 1882 and 1893, and insists that they are clear and direct investments of irrevocable rights in pursuance of "a contractual obligation based upon ample consideration." In specification the treaty of 1854 is adduced as having "ceded to the United States a portion of the reservation described in article I" and "by article VI individual Indians were to re*7 ceive allot*ments of land." This purpose, is the further contention, was executed by the treaty of 1865 by which the Indians "did cede, sell, and convey to the United States" a part of their reservation, and among other provisions there was one, expressed in article IV of the treaty, for allotments to be "for the exclusive use * * * of themselves [the Indians] their heirs and descendants."

Of the obligations thus incurred, it is the insistence, section 8 of the act of 1882 was the fulfillment, and at the expiration of the trust period the reservation (residue) was to be conveyed to the tribe "in fee discharged of the trust and free of all charges or incumbrances whatsoever" and that, therefore, the act of 1912 which directed the sale of the unallotted lands of the reservation was in contravention of the treaties and the rights to allotments thereunder and under the acts of Congress of 1882 and 1893, supra.

The contention is one that has often been made in this court and rejected as often as made. Gritts v. Fisher, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183. In those cases the relation of the individual Indian to the tribal property is explained, and also the power of Congress over that property and the tribes. In the recent case of United States v. Chase, 245 U. S. 89, 38 Sup. Ct. 24, 62 L. Ed. 168, we had occasion to consider the reservation here involved and the effect of article IV of the treaty of 1865 relied on by the appellant, and decided that its purpose was to do no "more than individualize the existing tribal right of occupancy," and that it left "the fee in the United States" and left "the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests."

The case dealt with assignments under ar*8 ticle IV, but its principle necessarily applies to a mere right under the act of 1882. Lone Wolf v. Hitchcock, 187 U. S. 557, 23 Sup. Ct. 216, 47 L. Ed. 299; Sizemore v. Brady, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308; Cherokee Intermarriage Cases, 203 U. S. 76, 27 Sup. Ct. 29, 51 L. Ed. 96; Wallace v. Adams, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547; Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

[2, 3] The next contention of appellant is that he acquired a vested right under the acts of 1882 and 1893, assuming the latter act did not repeal the other, and we are brought to the act of 1912. By the act the Secretary is—

> "authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of 40 acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisement, to sell and convey, in quantities not to exceed 160 acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the state of Nebraska, except such tracts as are hereinafter specifically reserved: Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land

shall be sold at less than the appraised value thereof. * * *"

There is provision for the reservation from sale of certain tracts with which this case is not otherwise concerned except as it shows complete delegation of administration to the Secretary. Appellant's contention is that the act is neither directory nor mandatory; it is permissive only and has been, it is said, so construed by the Secretary. There are cases, however, that decide that an officer "authorized" is an officer commanded in a matter of public concern.[1] Besides, there are words of direction in the act and they
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are necessary to its purposes. But if it *may be assumed there is a discretion in the Secretary he has exercised it against the appellant by denying his right to an allotment, presumably in reservation of the land for sale as provided in the act. And a sale is provided for—a sale of the unallotted lands mentioned in section 8 of the act of 1882, and all of them. We agree, therefore, with the Circuit Court of Appeals that it (the act of 1912) "covers so completely the subject of the disposition" of those lands "that it must be held to have repealed that portion of the act of 1882 which authorized allotments to Omaha children during the trust period." And, again quoting the Court of Appeals:

> "The Secretary of the Interior, of course, could not allot the unallotted lands under the act of 1882, and also sell them under the act of 1912; nor could he allot the unallotted lands and at the same time make the reservations which he is commanded to make by section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question."

It supersedes, therefore, that act though it contains no repealing words. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; Paquete Habana, 175 U. S. 677, 685, 20 Sup. Ct. 290, 44 L. Ed. 320.

[4] This appeal is a review of the second trial of the case. In the first trial the District Court on motion of the United States dismissed the bill. Upon appeal the Circuit Court of Appeals reversed the District Court and remanded the case to that court "with instructions to permit the defendant (United States) to answer, if so advised." 238 Fed. 894, 152 C. C. A. 28.

Upon the return of the case the United States set up as a defense the act of 1912 presenting the questions here involved.

Appellant contends that the United States—

> "having relied at the first trial upon the single proposition that the Act of 1893 repealed the Act of 1882 and thereby cut off the right of
> *10
> these Indian claimants to allotments, and *having failed in that defense, cannot, upon the second trial, abandon that defense and insist that the Act of May 11, 1912, repealed the Act of 1882."

The proposition has a relevant and conclusive application when a judgment of a former action is pleaded but limited application when urged in the same suit, it expresses a practice only and useful as such, but not a limitation of power. Messinger v. Anderson, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152.

The District Court and the Circuit Court of Appeals having the power and exercising it entertained the defense of the act of 1912, estimated it and decided it conclusive against appellant's right to an allotment. As we have seen there was no error in that ruling, and the decree of the Circuit Court of Appeals is

Affirmed.

(256 U. S. 10)

GILPIN v. UNITED STATES.

(Argued March 21 and 22, 1921. Decided April 11, 1921.)

No. 243.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Mary Gilpin, a minor, by her next friend, Samuel Gilpin, against the United States. A decree for defendant was affirmed by the Circuit Court of Appeals (261 Fed. 841), and plaintiff appeals. Affirmed.

Mr. John Lee Webster, of Omaha, Neb. (Mr. Hiram Chase, of Pender, Neb., of counsel), for appellants.

Messrs. Asst. Atty. Gen. Garnett and H. L. Underwood, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.
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*Mr. O. C. Anderson, of West Point, Neb. (Mr. Charles J. Kappler, of Washington, D. C., of counsel), for Omaha Tribe of Indians, by special leave.

Mr. Justice McKENNA delivered the opinion of the Court.

This case was argued and submitted with the Chase Case (No. 242) 256 U. S. 1, 41 Sup. Ct. 417, 65 L. Ed. —. It is a suit by Mary Gilpin, by her next friend, to have adjudged to her a right to an allotment of lands in the Omaha Reservation, she being an Omaha Indian. The right is based on the same treaties and acts of Congress as those passed upon in the Chase Case, and the effect of the Act of May 11, 1912 (37 Stat. 111) repealing the acts—that of 1882 and that of 1893.

The decree of the District Court was adverse to her right and this decree was affirmed by the Circuit Court of Appeals. 261 Fed. 841.

For the reasons stated in the opinion in the Chase Case, the decree of the Circuit Court of Appeals is

Affirmed.

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[1] Anne Arundel County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557; Flynn v. Canton Co., 40 Md. 312, 319, 17 Am. Rep. 603; Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; Rankin v. Buckman, 9 Or. 253, 262; Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; State of Maryland v. Miller, 194 Fed. 775, 114 C. C. A. 495; United States v. Cornell Steamboat Co., 137 Fed. 455, 69 C. C. A. 603.

(256 U. S. 70)

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES, Intervener).

(Argued Dec. 14 and 15, 1920. Decided April 11, 1921.)

No. 23, Original.

1. **Judgment 🔑717 — Decision of question in issue is conclusive in subsequent suit between same parties on different cause.**

A question of fact or law, put in issue and determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris, is conclusively settled by the final judgment or decree therein, so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action.

2. **Courts 🔑379—Supreme Court has original jurisdiction of suit by United States to establish state boundary.**

The United States Supreme Court had jurisdiction over the subject-matter of an original suit by the United States against Texas to determine the boundary between the state and the territory of Oklahoma and had jurisdiction over the parties, where the suit was brought in behalf of the United States pursuant to Act of May 2, 1890, § 25, and both parties filed pleadings, introduced evidence, and participated in the hearing.

3. **Judgment 🔑702 — State is in privity with United States as to boundary question decided before statehood.**

The State of Oklahoma, which has succeeded to the governmental jurisdiction formerly held by the United States over the territory from which the state was formed, is in privity with the United States with respect to such territory, so that a decree in a former suit between the United States and Texas regarding the boundary of the territory is binding on both states in a subsequent suit between them.

4. **Judgment 🔑526—Questions decided in former suit determined from record and proceedings therein.**

The questions involved and determined in a former suit between the same parties or their privies are to be determined by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court, where there is no suggestion it is a proper case for resort to extrinsic evidence.

5. **Judgment 🔑719—Pleadings in former suit held to have raised issue of boundary location.**

Bill in a former suit between the United States and the state of Texas, primarily to determine the ownership of a tract between two forks of the Red river, where that river formed part of the boundary line, but which recited the article of the treaty between the United States and Spain, defining the boundary line, and concluded with a prayer that the state of Texas be made a defendant thereto for the purpose of determining and settling the true boundary line between the United States and the state of Texas and of determining which fork of the Red river constitutes the true boundary line, raised the issue of the location of the boundary line as the south bank of the stream under the treaty, as well as the issue of which fork formed the boundary.

6. **States 🔑13 — Statute authorizing suit by United States to determine title to tract held not to prevent government from raising issue as to state boundary location.**

Act May 2, 1890, § 25, authorizing suit by the United States against the state of Texas to determine the title to the tract lying beween the north and south forks of the Red river, did not prevent the United States from asking in that suit to have determined the true boundary line of the tract so pointed out.

7. **States 🔑13—Decree in former suit held to have decided location of state boundary.**

Where the record in a former suit between the United States and the state of Texas and the proceedings therein showed that the treaty fixing the boundary between Texas and the United States at the south bank of the Red river, and the correspondence showing a controversy as to whether the boundary should be the main channel or the south bank, in which the United States prevailed, were introduced in evidence and referred to in the briefs of both parties, and that the question was discussed in the opinion of the court and made the subject of a finding, which was carried into the decree, that the line along the south bank of the Red river was the boundary, the decree is conclusive as to the exact location of the boundary in the subsequent suit between the same parties or their privies.

On Bill to Settle Boundary Line, Etc.

Original suit by the State of Oklahoma against the State of Texas to determine the location of a boundary line, in which the United States intervened, claiming an interest as trustee of Indian allottees, and seeking the same relief. Decree rendered, locating the boundary line as claimed by complainant and intervener.

See, also, 41 Sup. Ct. 319.

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*Mr. Leslie C. Garnett, of Washington, D. C., for the United States.

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*Messrs. C. M. Cureton, of Austin, Tex., and Thomas Watt Gregory, of Washington, D. C., for State of Texas.

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*Messrs. Joseph Weldon Bailey, of Austin, Tex., and A. H. Carrigan, of Wichita Falls, Tex., for landowners.

Mr. S. P. Freeling, of Oklahoma City, Okl., for State of Oklahoma.

Mr. Justice PITNEY delivered the opinion of the Court.

This is a suit in equity in our original jurisdiction, brought by the state of Oklahoma against the state of Texas, to establish

the true boundary line between those states where it follows the course of the Red river from the 100th degree of west longitude to the easterly boundary of Oklahoma. The bill avers that by the third article of a treaty concluded February 22, 1819, and ratified and proclaimed February 22, 1821 (8 Stat. 252), between the United States of America and the King of Spain, who had sovereignty over the territory now known as Texas, but then a part of Mexico, the boundary *82 line *between the two countries where formed by the Red river was established as following the south bank of that stream; that after Mexico had become independent, and on January 12, 1828, a treaty was concluded, and on April 5, 1832, ratified and proclaimed, between the United States of America and the United Mexican States by which the validity of the Treaty of 1819 was confirmed (8 Stat. 372); that in the year 1837 Texas was recognized as an independent republic, no longer under the power and jurisdiction of Mexico, and on April 25, 1838, a treaty was concluded, and in the same year ratified and proclaimed, between the United States and the Republic of Texas, by which the boundary as thus established was accepted by that Republic as binding (8 Stat. 511); and that under joint resolutions of Congress dated respectively March 1 and December 29, 1845 (5 Stat. 797; 9 Stat. 108), Texas was admitted into the Union as a state, with "the territory properly included within and rightfully belonging to the Republic of Texas." That by act of Congress approved May 2, 1890, a temporary government was provided for a part of the territory adjoining said boundary on the north, now comprised in the state of Oklahoma, under the name of the territory of Oklahoma (chapter 182, 26 Stat. 81), and that by section 29 (page 93) the remaining part was designated as the Indian Territory; but that by section 25 (page 92), in view of the existence of a controversy between the United States and the state of Texas as to the ownership of what was known as Greer county, described as "the tract of land lying between the North and South forks of the Red river where the Indian Territory and the state of Texas adjoin, east of the one hundredth degree of longitude," it was provided that the act should not apply to that county until the title thereto had been adjudicated and determined to be in the United States; and, in order to provide for a speedy and final judicial determination of the controversy, the Attorney *83 General *was authorized and directed to commence in the name and behalf of the United States and prosecute to a final determination a suit in equity in this court against the state of Texas; that accordingly, at the October term, 1895 (1890), the Attorney General of the United States filed in this court an original bill against the state of Texas to determine whether the territory embraced within the then county of Greer was in the state of Texas or within the territory and exclusive jurisdiction of the United States; that after a full hearing of said cause this court found, decided, and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the North fork of Red river, and north of a line following westward, as prescribed by the Treaty of 1819, the course, and along the south bank, both of Red river and of the river now known as the Prairie Dog Town fork or South fork of Red river until such line meets the 100th meridian of longitude, constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and was not within the limits nor under the jurisdiction of that state, but was subject to the exclusive jurisdiction of the United States of America (162 U. S. 1, 90, 91, 16 Sup. Ct. 725, 40 L. Ed. 867), and that afterwards, under act of Congress approved June 16, 1906 (chapter 3335, 34 Stat. 267), the inhabitants of the area constituting the territory of Oklahoma (including said Greer county) and the Indian Territory were admitted into the Union as the state of Oklahoma.

The state of Texas appeared in the present suit, and filed an answer, denying that the Treaty of 1819 fixed the boundary at the South bank of the Red river; asserting, on the contrary, that the treaty, by its legal meaning and effect, fixed it in the middle of the main channel of that river; denying that the effect of the decree in the case of United States v. Texas was to determine that the *84 south *bank of Red river, or of the Prairie Dog Town fork or South fork of that river, constituted the boundary between the United States and Texas at any point; and setting up a counterclaim and other matters not necessary to be here repeated.

The United States, by leave of the court, intervened, and by its petition of intervention set up an interest as trustee of Indian allottees with respect to certain portions of the bed of the Red river and as owner in its own right of a large part of the bed and of numerous islands therein; and supported the contentions of the state of Oklahoma as to the location of the boundary line by the true construction of the Treaty of 1819 and as to the effect of the final decree in United States v. Texas.

At the same time it was brought to the attention of the court that because of the recent discovery and development of oil and gas deposits in the bed of the river adjacent to Wichita county, Tex., serious conflicts had arisen between parties claiming title from the state of Texas and others claiming title from the state of Oklahoma or under the mineral laws of the United States; and that there was danger of the exhaustion of the deposits of oil and gas pending the determination of the questions at issue between the parties to the cause, and danger of armed conflict between rival claimants under them; and thereupon, on motion of the United States, concurred in by the state of Oklahoma and consented to by the state of Texas, as to lands claimed in its proprietary capacity, we appointed a receiver to take possession of that part of the river bed lying between mid-channel and the south bank, and within the disputed oil field.

Pending the receivership, by order of June 7, 1920, made pursuant to the suggestion of the parties, we set the cause down for hearing at the present term upon two questions of law, with leave to take testimony pertinent to the purpose. 253 U. S. 471, 40 Sup. Ct. 580, 64 L. Ed. 1015.

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*The testimony was taken and returned, a hearing has been had, and the matter is now to be decided.

The questions are as follows:

"(1) Is the decree of this court in United States v. Texas, 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867, final and conclusive upon the parties to this cause in so far as it declares that the Treaty of 1819 between the United States and Spain fixed the boundary along the south bank of Red river? (2) If said decree is not conclusive, then did the Treaty of 1819, construed in the light of pertinent public documents and acts, fix the boundary along the mid-channel of Red river or along the south bank of said river?"

The first is a question of res judicata, and, obviously, if it is answered in the affirmative, the second becomes immaterial.

[1] The general principle, applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 49, 18 Sup. Ct. 18, 42 L. Ed. 355, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited on page 49 of 168 U. S., on page 27 of 18 Sup. Ct. (42 L. Ed. 355):

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of *all matters properly put in issue and actually determined by them."

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In order to aid us in ascertaining whether the question of boundary location now at issue was settled by the decision and decree in the Greer County Case, the parties have stipulated that the entire record in that case, including pleadings, stipulations, testimony, briefs, and documents of every character, now on file in this court, and the orders and decrees of the court therein, are to be considered in evidence for all purposes. They have been examined and considered accordingly.

[2] The jurisdiction of the court over the subject-matter of that suit—its original jurisdiction over a suit in equity brought by the United States against one of the states to determine the boundary between such state and a territory of the United States—was put at issue by a demurrer to the bill of complaint in that case, and decided in favor of the jurisdiction, United States v. Texas, 143 U. S. 621, 641, et seq., 12 Sup. Ct. 488, 36 L. Ed. 285. It was set at rest when followed by the making of a final decree, United States v. Texas, 162 U. S. 1, 90, 91, 16 Sup. Ct. 725, 40 L. Ed. 867.

That the court had jurisdiction over the parties is obvious from the fact that the suit was brought in behalf of the United States pursuant to an act of Congress (Act of May 2, 1890, c. 182, § 25; 26 Stat. 81, 92), that a bill of complaint and an amended bill were filed, to each of which the state of Texas demurred, and also answered, and that the United States filed a replication (162 U. S. 21–23, 16 Sup. Ct. 725, 40 L. Ed. 867), and both parties introduced evidence and participated in the hearing.

[3] There is identity of parties between the former suit and the present one, so far as concerns the proprietary interest now set up by the United States. As to governmental jurisdiction, the state of Oklahoma has succeeded in part to the position formerly held by the United States, and therefore is in privity with it.

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*The former decision was based upon final hearing, on issue joined between the parties and upon evidence taken by both; and, as stated, it resulted in a final decree (162 U. S. 90, 91, 16 Sup. Ct. 725, 40 L. Ed. 867).

Therefore it remains only to consider whether the "right, question, or fact" now in controversy—the location of the boundary line with respect to the course of the Red river, and whether by the true construction of the Treaty of 1819 its location is along the south bank or in mid-channel—was put in issue and directly determined in the former case. That the final decree purports to determine it is obvious from a reading of the language employed (162 U. S. 90, 16 Sup. Ct. 754, 40 L. Ed. 867):

> "That the territory east of the 100th meridian of longitude, west and south of the river now known as the north fork of Red river, and north of *a line following westward, as pre-*

scribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red river and of the river now known as the Prairie Dog Town fork or South fork of Red river until such line meets the 100th meridian of longitude—which territory is sometimes called Greer county—constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that state into the Union, and is not within the limits nor under the jurisdiction of that state, but is subject to the exclusive jurisdiction of the United States of America."

The literal meaning of this is not seriously disputed; but it is insisted that, so far as it describes the boundary line of the treaty as following the south bank of the river, it was outside the issues litigated, and hence is not conclusive upon the parties to this cause—in effect, that in construing the decree the words "along the south bank" should be excluded from consideration. Clearly, the inclusion of those words amounted to a decision that the correctness of that particular definition of the boundary *was within the issues in the cause. But we concede that, in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not res judicata.

[4] What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court; there being no suggestion that this is a proper case for resorting to extrinsic evidence. Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 688, et seq., 15 Sup. Ct. 733, 39 L. Ed. 859; Baker v. Cummings, 181 U. S. 117, 124–130, 21 Sup. Ct. 578, 45 L. Ed. 776; National Foundry, etc., v. Oconto Water Supply Co., 183 U. S. 216, 234, 22 Sup. Ct. 111, 46 L. Ed. 157.

[5] The Act of May 2, 1890 (26 Stat. 81, 92), briefly recited the existence of a controversy between the United States and the state of Texas as to the ownership of the land known as Greer county, and directed the Attorney General to bring suit in this court in order that the rightful title to that land might be finally determined. Referring to this, and to the history and nature of the controversy, it is contended that the pleadings should be so construed as to confine the issue to the identification of one of the forks of the Red river with the Red river of the treaty. It is true that the principal matter in dispute was the claim of the United States to ownership of the tract of land lying between the forks and bounded on the west by the 100th meridian. But the bill and the amended bill, after reciting article 3 of the treaty defining the boundary line between the United States and Spain, by which both parties to the cause were bound, and recounting the history of the controversy, concluded with a prayer that the bill might be filed and Texas made a defendant thereto, "to the end and for the purpose of *determining and settling the true boundary line* between the United States and the state of Texas, and to determine and put at rest questions which now exist as to whether the Prairie Dog Town fork or the North fork of Red river, as aforesaid, constitutes the true boundary line of the Treaty of 1819"; and that upon final hearing a decree might be entered, establishing complainant's rights as set up in the bill; and there was a prayer for general relief. The contention now made is based upon an unduly narrow interpretation of the act and of the pleading. Granting that the substantial controversy related to the ownership of and jurisdiction over the tract lying between the forks, it was essential to a complete and precise disposition of that controversy that the court should define with certainty the bounds of the tract. If it were to be awarded to the state of Texas, an accurate definition of its northerly boundary was essential; if to the United States, like accuracy in defining its southerly boundary was called for; in either case, the line to be defined was "the true boundary line between the United States and the state of Texas." And if, as suggested, the river is to be regarded as navigable (upon which we express no opinion), so that a boundary line separating national territory from that of the state, if described as following the river, without more, would by implication follow the middle of the main navigable channel, as in a case between adjoining states (Iowa v. Illinois, 147 U. S. 1, 13, 13 Sup. Ct. 239, 37 L. Ed. 55; Arkansas v. Tennessee, 246 U. S. 158, 171, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258), so much the more was specific mention of the bank essential to an accurate description of the tract in issue, if the bank was the true line instead of mid-channel. And if at the termination of the suit, the line were left undefined, a ground of further controversy would remain; and it is as foreign to correct *practice as to the principles of equity that a final decree should be pregnant with further litigation.

[6] Even less substantial is the suggestion that the language of section 25 of the Act of 1890 (26 Stat. 92) authorizing suit to determine the title to the tract "*lying between* the North and South forks of the Red river," etc., and the use of that phrase in the amended bill had the effect of excluding from the issue land south of the middle of the south fork. Upon so narrow an interpretation, the controversy might as well be confined to the

upland between the forks, leaving the United States without claim to any part of the bed of the stream, if the south fork proved to be the river of the treaty. Of course, the phrase merely pointed out the tract in dispute, without attempting to delimit it.

[7] The contention that the evidence and the arguments in the Greer County Case raised no controversy as to whether the boundary followed the mid-channel or the south bank of the river is not well founded. The Treaty of 1819, and a mass of historical and other data bearing upon its proper interpretation, were before the court. It appeared that the treaty was negotiated at Washington between the Spanish Minister, Don Luis de Onis, and the United States Secretary of State, John Quincy Adams; M. de Neuville, the French Minister, acting at times as an intermediary. The state of Texas itself introduced authenticated extracts from the instructions of the Spanish Minister, and excerpts from correspondence between him and Mr. Adams, from which latter it appeared that the question whether the boundary should follow the middle of the Sabine and Red rivers, or the westerly bank of the former and the southerly bank of the latter, was one of the points under discussion; the Spanish Minister proposing the middle lines, Mr. Adams the banks.

Furthermore, in the principal brief for the state of Texas, reference was made to entries in Mr. Adams' diary, found in his Memoirs, vol. 4, pp. 233–280, in *91 con*nection with which the brief declared:

> "An objection was long persisted in by Spain that instead of the banks of the rivers named being boundaries the middle of the river should be the dividing line [Adams, supra]. This objection was at last abandoned," etc.

The diary itself, in the pages thus referred to, abounds in statements to the effect that the representative of Spain, during the course of the negotiation, insisted that the middle of the rivers should be taken for the boundary, Mr. Adams firmly insisting upon "the western and southern banks," and at last prevailing. J. Q. Adams' Memoirs, vol. 4, pp. 255, 256, 261, 264, 266, 267, 270. It is true these references were made by counsel for Texas principally with the object of showing the important part that the Melish Map (mentioned in the treaty) played in the negotiations; but it is impossible to escape the conclusion that both counsel and the court understood that the question whether the boundary line, where it followed the Sabine and Red rivers, should be so located as to establish the United States as owner of the rivers or so as to divide the ownership between the United States and Spain, figured to an important extent in the negotiations, was disposed of by the treaty, and hence was vital to the correct location of the boundary line as between the litigants. If the point was not controverted, it was only because counsel for Texas in effect conceded that the treaty line ran along the south bank of the Red river. It may have seemed, at that time, a matter of no great moment.

Finally, the precise matter was discussed in the opinion of the court, and was made the subject of a finding which was carried into the final decree. In the course of an outline of the diplomatic correspondence and negotiations that preceded the making of the treaty, the court said (162 U. S. 27, 16 Sup. Ct. 729 [40 L. Ed. 867]):

> "The Spanish Minister required that 'the boundary between the two countries shall be the middle of the rivers, and that the navigation of the said rivers *92 *shall be common to both countries.' Mr. Adams replied that the United States had always intended that 'the property of the river should belong to them,' and he insisted on that point 'as an essential condition, as the means of avoiding all collision, and as a principle adopted henceforth by the United States in its treaties with its neighbors.' He agreed, however, 'that the navigation of the said rivers to the sea shall be common to both people' "—citing Annals of Congress, Appendix, 15th Cong., 2d Sess., 2120, 2021, 2123.

The opinion then proceeded to set forth (162 U. S. 27–29, 16 Sup. Ct. 729 [40 L. Ed. 867]) the third and fourth articles of the treaty, in the former of which occurs the language that Mr. Adams had insisted upon as carrying out the purposes of the United States that "the property of the river should belong to them"; and at a later point the opinion declared (162 U. S. 37, 16 Sup. Ct. 733 [40 L. Ed. 867]):

> "The two governments certainly intended that the line should be run from the Gulf along the western bank of the Sabine river, and after it reached Red river that it should follow the course of that river, leaving both rivers within the United States."

And, having decided the case in favor of the United States, the court embodied in the final decree a description of the boundary line, in terms quoted above.

To sum it up, we find that the question of the true location of the boundary between the territory of the United States and Texas where it followed the Red river bordering upon Greer county, and the question whether the boundary followed the middle or the south bank of the river, were within the issues made by the pleadings, and so recognized by both parties, as well as by the court; that, by the concession of both, the location was to be determined according to the true effect and meaning of the Treaty of 1819; that in elucidation of the matter the treaty, and much historical evidence of the negotiations that led up to it, were introduced, discussed by counsel in argument, and referred to in the opinion of the court; *93 *and that the point was directly determined by the court and the determination made a part of its final decree. By every test that properly can be applied, the matter is res judicata.

And, of course it not only concludes the parties with respect to that part of the boundary which borders upon what was called Greer county, but settles the construction of article 3 of the Treaty of 1819 as to the entire course of the Red river where it marks the boundary between the territory then owned by the United States and that of the state of Texas.

Having reached this conclusion upon the first of the two questions proposed for decision, it is unnecessary to consider the second, which is whether the treaty, by proper construction, fixes the boundary along the mid-channel or the south bank. The matter being res judicata, as the result of the decree in the former suit, it is of no consequence whether it was correctly decided or not. We say this without intending to intimate the least doubt about the propriety of that decision.

The parties may submit within 30 days a proper form of decree for carrying this decision into effect.

It is so ordered.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

(256 U. S. 41)

STATE OF MINNESOTA ex rel. WHIPPLE v. MARTINSON, Sheriff.

(Argued March 17, 1921. Decided April 11, 1921.)

No. 224.

1. Poisons 🔑2 — State can regulate sale of habit-forming drugs.

A state, in the exercise of its police power, has authority to regulate the administration, sale, prescription, and use of dangerous and habit-forming drugs in the interest of public health and welfare.

2. Poisons 🔑2—State statute held not to conflict with Harrison Anti-Narcotic Act.

Laws Minn. 1915, c. 260, § 2 (Gen. St. Supp. 1917, § 8965—2), prohibiting a physician from furnishing drugs to habitual users, though authorizing him to give prescriptions therefor in good faith, does not interfere with the enforcement of the Harrison Anti-Narcotic Act (Comp. St. §§ 6287g–6287q), though the federal act permits the physician to dispense the drugs directly.

In Error to the Supreme Court of the State of Minnesota.

Habeas corpus by the State of Minnesota, on the relation of C. D. Whipple, against Oscar Martinson, Sheriff of Hennepin County, Minn. An order discharging the writ was affirmed by the Supreme Court of Minnesota (144 Minn. 206, 174 N. W. 823), and relator brings error. Affirmed.

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*Messrs. Thomas E. Latimer and Charles Burke Elliott, both of Minneapolis, Minn., for plaintiff in error.

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*Messrs. James E. Markham and Clifford L. Hilton, both of St. Paul, Minn., for defendants in error.

Mr. Justice DAY delivered the opinion of the Court.

The relator was convicted of a violation of a statute of the state of Minnesota providing against the evils resulting from traffic in certain habit-forming narcotic drugs, and regulating the administration, sale, and possession thereof. Laws Minn. 1915, c. 260 (Gen. St. Minn. Supp. 1917, §§ 8965—1 to 8965—5).

The Minnesota statute in section 1 (section 8965—1) forbids the sale of morphine and certain other narcotic drugs, with the provision that licensed pharmacists may fill orders for the same to a consumer pursuant to the written prescription of a physician, which must be dated on the day on which it is signed, and bear the signature and address of the physician, and the name of the person for whose use it is intended. It must be serially numbered, dated and filed in the prescription file of the compounder, and retained there for two years, open for inspection by the authorities. Prescriptions may be filled but once, and no copy may be given, except to an officer of the law, and the drug must be delivered in a container labeled

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with the serial number of *the prescription, with the date when filled and the name of the person for whose use the medicine is intended, the name of the physician, and the name and address of the dispenser. The administration, sale, or disposal of the drugs by a legally licensed physician is permitted when made to a patient on whom he is in professional attendance. The physician must subscribe the name and address of the patient, the date of the sale or disposal, and the amount of the drug transferred, which must be delivered in a container labeled as required by the statute.

Section 2 (section 8965—2) provides:

> "It shall be unlawful for any physician or dentist to furnish to or prescribe, for the use of any habitual user of the same, any of the substances enumerated in section 1 of this act: Provided that the provisions of this section shall not be construed to prevent any legally licensed physician from prescribing in good faith, for the use of any patient under his care, for the treatment of a drug habit, such substances as he may deem necessary for such treatment; provided that such prescriptions are given in good faith for the treatment of such habit."

The trial court construed this section of the statute as making it unlawful for a physician to furnish the drugs to habitual users out of stocks kept on hand by himself. And such was the offense of which the relator was convicted.

This construction of the section, and the conviction and sentence were sustained by the Supreme Court of Minnesota. State v. Whipple, 143 Minn. 403, 173 N. W. 801. Thereupon the relator sued out a writ of habeas corpus in the district court of Hennepin county, Minn., which writ was discharged, and the order was affirmed on appeal to the Supreme Court of Minnesota. 144 Minn. 206, 174 N. W. 823. The case was then brought here to review this judgment of the state court upon writ of error.

The grounds of attack upon the statute *45 are based upon *an alleged deprivation of federal rights, it being contended: First, that the statute exceeds the authority of the state in the exertion of its police power, in that it undertakes to regulate a lawful business in the manner prescribed in the statute, in violation of the Fourteenth Amendment; second, that the statute conflicts with the terms and provisions of the federal Harrison Anti-Narcotic Drug Act, 38 Stat. 785 (Comp. St. §§ 6287g–6287q), and is therefore beyond the power of the state to enact.

[1] There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs, such as are named in the statute. The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.

[2] As to the alleged inconsistency between the state statute and the Harrison Anti-Narcotic Drug Act, the state court held that there was no substantial conflict between the two enactments. The validity of the Harrison Act was sustained by this court in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, as a valid exercise of the authority of Congress under the power conferred by the Constitution to levy excise taxes. The provisions of the statute regulating the sale, dispensing or prescribing of drugs were held to bear a reasonable relation to the collection of the taxes provided for, and to be valid although the statute affected the conduct of a business which was subject to regulation by the police power of the state.

It may be granted that the state has no power to enact laws which will render nugatory a law of Congress enacted to collect revenue under authority of constitutional enactments. See Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. But we agree with *46 the state *court that there is nothing in this statute which prevents enforcement of the revenue act in question. It is true that the provisions regulating the sale, dispensation, and disposition of the prohibited drugs are somewhat different in the two acts. The prohibitory measures of the federal statute do not apply to the disposition and dispensation of drugs by physicians registered under the act in the regular course of professional practice provided records are kept for official inspection. Under the state law physicians can only furnish prescriptions to addicts, and may not dispense the drugs to such persons at pleasure from stocks of their own.

There is certainly nothing in this state enactment, as construed by the Supreme Court of Minnesota, which interferes with the enforcement of the federal revenue law, and we agree with the state court that there is no conflict between the enactments such as will prevent the state from enforcing its own law upon the subject.

It follows that the judgment of the Supreme Court of Minnesota must be

Affirmed.

(256 U. S. 18)

SILVER KING COALITION MINES CO. v. CONKLING MINING CO.

(Decided April 11, 1921.)

No. 158.

1. Mines and minerals 🔑31(2) — Locating claim across strike does not defeat extralateral rights.

Where a claim is located so that the vein crosses the claim, instead of running lengthwise, as in the typical case, the locator does not thereby lose his extralateral rights on the dip of the vein beyond his end lines, under Rev. St. § 2322 (Comp. St. § 4618); but what he intended for his side lines are treated as his end lines, and he is entitled to the dip between vertical planes through those lines.

2. Mines and minerals 🔑38(18) — Evidence held not to show vein crossing side line was not discovery vein.

Where the vein in which extralateral rights were claimed crossed the location, but there was no evidence there were two veins, and experts testified there were not, a finding by the Circuit Court of Appeals that plaintiff had not established the fact that the vein crossing his location was his discovery vein, so as to entitle him to consider his side lines as end lines and to claim extralateral rights therein, must be reversed.

3. Mines and minerals 🔑31(2)—Distance of discovery shaft from strike of vein held immaterial.

The fact that the discovery shafts were 400 feet distant from the apex of a vein crossing the claim, so that, if the end lines be taken as the side lines, either the apex of the vein or the discovery must be outside the claim, is immaterial, where at the time of location there was no requirement making a discovery shaft essential to a valid location, and in view of the presumption that the locator discovered the vein in controversy.

4. Mines and minerals 🔑38(18) — Evidence held to sustain finding ore deposit was part of vein apexing on another claim.

Evidence that the vein apexing on a claim was composed of bedded deposits at different horizons connected with the fissure *held* to sustain a finding that a similar deposit outside the lines of the claim, from which ore was removed by another, was within the vein apexing on the claim.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

On petition for rehearing. Leave to file petition granted, decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

For former opinion, see 255 U. S. 151, 41 Sup. Ct. 310, 65 L. Ed. —.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the respondent to establish its right to a large body of ore found within the lines of the respondent's patent as it construed that document. The main contest concerned the southwesterly 135.5 feet of the patent as laid out by courses and distances, from which was taken the main body of the ore. At the argument the petitioner's statement was that "practically all the ore in controversy was taken from within this 135.5 foot strip." *25 *The decision with regard to that strip was in favor of the petitioner and as it seemed possible that the respondent would not be able to establish that any appreciable amount of ore was taken from the land belonging to it, and that it might not care to attempt the proof, the questions raised with regard to such ore if any were left undecided according to the usual practice. But the respondent points out that the petitioner has admitted that a small amount of ore, not exceeding $20,047.50 in value, did come from the respondent's land and presses for a decision concerning its right to that. The motion is put in the form of a petition for rehearing; but the main thing asked and the only thing for which we see any reason is that we decide the questions argued, but left open by us. That we proceed to do. Nothing that has been decided will be reopened, but leave to file the petition is granted to that single end.

It is not disputed by the respondent, the Conkling Mining Company, that a fissure on its strike crosses the parallel side lines of the petitioner's claims and on its dip passes beneath the Conkling mining claim in the immediate vicinity of the ore body in dispute and between vertical planes drawn through the parallel side lines of the petitioner's claims and continued in their own direction. What is disputed is that this ore body is any part of the vein referred to, known as the Crescent Fissure, and that, if it is, the petitioner has any right to treat the end lines of its claims as side lines and to pursue the vein under ground beyond the vertical planes drawn through those lines.

[1] We take up the last question first. The typical case supposed by Rev. Sts. § 2322 (Comp. St. § 4618) is that of a claim laid out lengthwise along the strike of a vein. In that case the end lines of the location will limit the extralateral right. But that case is only the simplest illustration of a principle. The general purpose is to give *26 a right to all of the vein *included in the surface lines, if there is only one, provided the apex is within the location. It often must happen that the strike of the vein is not known but must be conjectured at the time of discovery, and that the location is across instead of along the vein. This has been obvious always and therefore it would be wrong to interpret the words "end lines" narrowly, as meaning the shorter ones in every instance. Those are the end lines that cut across the strike of the vein if it crosses the location. We see no sufficient reason for thinking that because the discoverer has not claimed as long a portion of the strike as he might have, he should be deprived of even his diminished lateral rights. It has been the accepted opinion of this Court for many years that where as here the strike of the vein crosses the location at right angles its dip may be followed extralaterally, whatever the direction in which the length of the location may run. If across the strike as here, the side lines, as it commonly is expressed, become the end lines. Subsequent locators know as well as the original ones that the determining fact is the direction of the strike not the first discoverer's guess. Flagstaff Silver Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; King v. Amy & Silversmith Consolidated Mining Co., 152 U. S. 222, 228, 14 Sup. Ct. 510, 38 L. Ed. 419. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U. S. 55, 90, 91, 18 Sup. Ct. 895, 43 L. Ed. 72; Jim Butler Tonopah Mining Co. v. West End Consolidated Mining Co., 247 U. S. 450, 453, 38 Sup. Ct. 574, 62 L. Ed. 1207.

[2] But it is said that when the end lines are determined they are end lines for all purposes even if there are different veins running in different directions having their apexes within the claim. Walrath v. Cham-

pion Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170. And it is argued that there is a presumption that has not been overcome that there was a discovery vein running parallel with the side lines; that this determined the end lines and that therefore the petitioner got no extralateral rights in *27 the Crescent Fissure. The Cir*cuit Court of Appeals, approaching the petitioner's claim as a claim of an exceptional privilege, seems to have attached a weightier burden of proof to it than we are disposed to do. They were not satisfied that the discovery vein which determined what the end lines should be was not some other vein than the Crescent Fissure. But we see no substantial evidence that there was another vein. We have the distinct testimony of experts that there was no such and we agree with the view of the District Judge sustaining the petitioner's extralateral rights. Whether there are other answers to the contention we need not decide. See Jim Butler Tonopah Mining Co. v. West End Consolidated Mining Co., 247 U. S. 450, 454, 38 Sup. Ct. 574, 62 L. Ed. 1207, et seq.

[3] It is urged that if the end lines be taken as the side lines then the discovery shafts being four hundred feet distant from the apex of the Crescent Fissure left either the vein or the discovery outside the location with the side lines limited as they should be. But at that time there was no requirement making a discovery shaft essential to a valid location. And in any event our conclusion being that the petitioner must be presumed to have discovered the Crescent Fissure, however it may have been done, the distance of the shafts does not affect the case.

[4] The only question that remains is whether the ore within the respondent's lines formed part of the Crescent Fissure vein. The Circuit Court of Appeals in view of its opinion upon the last point made no decision upon this. But the experienced District Judge after careful consideration was of the opinion that the ore belonged to the vein. We see nothing to convince us that he was wrong. The position of the respondent is that the ore in controversy is a distinct bedded deposit. But as the District Judge remarks, similar deposits are found at many different horizons, connected with the fissure and similar in composition to the ore in the fissure. The deposit in question was like the others. Whether we consider *28 merely the *practical fact of the continuously occurring deposits along the course of the vein or the theory of their origin which seems to us the most probable, we believe the District Judge to have been right.

Decree of Circuit Court of Appeals reversed.

Decree of District Court affirmed.

(255 U. S. 547)

CITY OF SAN ANTONIO et al. v. SAN ANTONIO PUBLIC SERVICE CO.

(Argued March 23 and 24, 1921. Decided April 11, 1921.)

No. 263.

1. Courts 🔑508(2)—Federal court has jurisdiction to restrain enforcement of confiscatory street railway rate.

The United States courts have jurisdiction to restrain the enforcement of a regulation fixing rates for street railway fares which were admittedly confiscatory.

2. Carriers 🔑2—State Constitution held to forbid ordinance fixing street railroad fares as a binding contract.

Const. Tex. art. 1, § 17, prohibiting any irrevocable or uncontrollable grant of special privileges or franchise, prohibits an ordinance fixing street railroad fares from operating as a binding contract establishing those fares.

3. Constitutional law 🔑23—Constitutional amendment as to city's authority to contract for rates not operative on pre-existing franchises.

If the amendment to the Constitution of Texas in 1912, authorizing cities to adopt new charters (Const. art. 11, § 5), freed such cities from the restriction against binding street railway franchises concerning the rate of fare, that provision is irrelevant, where the franchise in question was adopted before the amendment.

4. Carriers 🔑12(9)—Company not bound by rate which city can regulate.

Where the city is not bound by the provision fixing street railroad fares, but is authorized to regulate such fares, it is bound to exercise such regulation so as not to confiscate the private property of the street railroad company, and therefore the provision in the franchise ordinance fixing the fares cannot be construed as a condition binding on the company, but not on the city.

5. Carriers 🔑12(9)—Consent to consolidation of other companies with street railroad company held not to establish contract rate.

An ordinance giving the city's consent to the consolidation of gas and electric companies with the street railroad company, which imposed on consolidated company all the limitations and duties imposed on either of the constituent companies, does not make the five-cent street railroad fare, fixed by the street railway ordinance, binding as a contract rate, especially where it had theretofore been held that the rate was not a contract rate, but could be modified by the city, and the ordinance expressly reserved the right of the city to regulate the rates for gas and electric services.

6. Corporations 🔑391—Contract limitations on power to regulate rates of public service corporations not to be implied to sustain confiscation.

Limitations by contract on the power of the government to regulate the rates to be charged by a public service corporation are not to be implied for the purpose of sustaining the confiscation of private property.

Appeal from the District Court of the United States for the Western District of Texas.

Suit by the San Antonio Public Service Company against the City of San Antonio and others. Decree for complainant (San Antonio Public Service Co. v. San Antonio, 257 Fed. 467), and defendants appeal directly to the Supreme Court. Affirmed.

*548

*Mr. R. J. McMillan, of San Antonio, Tex., for appellants.

Mr. S. J. Brooks, of San Antonio, Tex., for appellee.

Mr. Chief Justice WHITE delivered the opinion of the Court.

The decree below enjoined the city of San Antonio from enforcing a five-cent fare against the Public Service Company, operating street railway lines in that city, on the ground that the right to enforce such rate was not secured to the city by contract, and such enforcement was beyond the power of the city, because of the confiscation of the property of the railway company which would result, in violation of the Fourteenth Amendment to the Constitution of the United States.

The consideration we must give the subject will be clarified by outlining the origin and development of the controversy.

In March, 1899, the city of San Antonio by ordinance extended to July 1, 1940, "the rights, privileges and franchises heretofore *549 granted to and existing in the San *Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company, and the San Antonio Edison Company." The ordinance provided, among other things, that the two companies last named, which operated street railways in the city, "shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In April, 1900, all the property of the two railway companies was sold under a decree of a state court to the San Antonio Traction Company, and that company, with the approval of the city, thereafter controlled and carried on both lines.

In 1903 the state enacted a half-fare law (Laws 1903, c. 116), making it the duty of the Traction Company to carry school children and students for half fare, and subsequently an ordinance was passed by the city in furtherance of this law. The company refusing to carry out this legislation, on the ground that it impaired the obligation of its contract as to rate of fare resulting from the ordinance of 1899, in violation of the Constitutions of the state and of the United States, a suit by mandamus to compel it to do so was begun by an individual, and from a ruling adverse to the company's contention the case was taken to the Court of Civil Appeals. That court held that it was unnecessary to consider whether the rate requirement was a contract, because, as it was adopted long after the provision of the state Constitution (article 1, § 17) that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof," it was necessarily to that extent restricted, and therefore left the state free, within the limits of the restriction, to exert the authority to regulate. As a result, the half-fare law was upheld, obviously upon the conclusion *550 that it was within the power *to regulate as restricted by the constitutional provision. San Antonio Traction Co. v. Altgelt (Tex. Civ. App.) 81 S. W. 106.

Because of the federal question the case was brought to this court and the decree was affirmed substantially on the ground which had controlled the decision below. In addition, however, the court was careful to point out that the state Constitution prohibited a rate regulation which was confiscatory, but that, in view of the absence of all averment that the rate in question was confiscatory, it was unnecessary to deal with that subject. San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491.

Presumably under the power to regulate as thus established the city thereafter passed, and the Traction Company carried out, an ordinance imposing the duty of free transportation of policemen and firemen.

In 1912 the state Constitution was amended, so as to authorize cities having more than 5,000 inhabitants, by vote of their electors, to amend their charters or adopt new ones, subject to the limitation that the charters should not contain any provision inconsistent with the Constitution or general laws of the state. Const. Tex. art. 11, § 5.

In the meantime the two companies, gas and electric, dealt with in the ordinance of 1899, were consolidated and became the San Antonio Gas & Electric Company, and in 1917 appellee, the San Antonio Public Service Company, petitioned the city government to consent to its acquisition of all the rights and property of the San Antonio Traction Company and of the San Antonio Gas & Electric Company, thus proposing to bring under one control the four corporations dealt with in the ordinance of 1899. The city consented by an ordinance which expressly subjected the Public Service Company to all the limitations, duties and obligations which rested upon the Traction Company and the Gas & Electric Company. The ordinance further provided that:

"In accepting the provisions of this ordinance *551 **the *San Antonio Public Service Company agrees that the city shall hereafter have the** right to pass all ordinances not in direct conflict with the laws of this state fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants."

This was followed by provisions requiring the keeping of such accounts by the Public Service Company in its gas and electric departments as would enable the city to exercise the power to fix rates as to gas and electricity. The ordinance having been accepted by the Public Service Company, the consolidation was accomplished.

At and for a long time prior to the consolidation the penal code of the city contained a provision, accompanied by a penalty for its violation, forbidding, except during certain hours of the night, the charging of more than a five-cent fare within the city limits. Shortly after the approval of the consolidation, another ordinance was passed forbidding and penalizing any person, firm or corporation, enjoying franchises within the city limits, or their agents or employees, from charging more than the rate then charged and collected, without obtaining the permission of the city. In conformity with this last-mentioned ordinance the Public Service Company, in August, 1918, applied to the city for permission to increase its rate of fare from five to six cents, based upon the ground that although the five-cent fare was remunerative at the time it was fixed, it had, by the increase in cost of operation in practically every department, become wholly insufficient for that purpose and could not be continued without confiscating the property of the company. After a hearing the city, by an ordinance reciting that as the company was bound by the 40-year franchise granted in 1899 to charge five-cent fare, the city did not feel authorized nor called upon to set it aside, and furthermore that the hearing had *552 shown no necessity for *the change in rate asked, refused the company's request, at the same time prohibiting, under a penalty which was stated, any person, firm, or corporation operating any street railway within or partly within the city from charging more than a five-cent fare.

Thereupon the company commenced this suit by filing its bill to enjoin the city from enforcing the five-cent fare ordinance. The bill, after alleging the adequacy of the rate of five cents when originally fixed in 1899, contained the amplest averments concerning its present confiscatory character. The prayer was for a temporary injunction restraining the enforcement of the five-cent fare ordinances and from interfering with the company in putting in a seven-cent fare instead, and from enforcing the ordinances which forbade a change of fare. It was prayed that, if the company was not permitted to put in effect the seven-cent fare, the court would itself establish that rate, or such other as it might find necessary to enable the company to pay its operating expenses and to earn a reasonable sum on its investment, and that a permanent injunction securing the results prayed be awarded.

The city moved to dismiss the bill for want of jurisdiction because it presented no substantial federal question, as it showed on its face that the parties were bound by the five-cent fare provision of the franchise ordinance as a contract subject to be enforced even though the rate was confiscatory, and moreover because the bill otherwise stated no ground for equitable relief. The court overruled the motion. It reviewed the history of the case and decided that, in view of the controversy as to contract growing out of the enforcement of the half-fare law terminated by the ruling of this court in the Altgelt Case, as well as of all the subsequent dealings between the parties, the existence of a contract as to the five-cent fare was not established and hence the attempt to enforce it, because of the confiscation to result, gave *533 a cause of *action under the Constitution of the United States. San Antonio Public Service Co. v. San Antonio (D. C.) 257 Fed. 467.

The city then answered, reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation. It further asserted an estoppel to deny the contract arising from various acts of the city and the corporation or its predecessors from the time of the ordinance in 1899 to the bringing of the suit in 1918. Moreover, disputing the confiscatory character of the five-cent fare, it claimed the right to compel its continued exaction in virtue of its general governmental authority to regulate the fares of street railway companies.

The case was referred to a master to report on the facts and the law. Before the master a hearing was had, followed by an elaborate report on both subjects. As the action of the court overruling the exception to its jurisdiction had adversely disposed of the question of the existence of the contract concerning the five-cent fare, the master put that subject out of view and therefore reported only on the facts as to the confiscatory character of the five-cent rate and of the power of the court, under the assumption that it was confiscatory, to restrain its enforcement.

A few words from the report will suffice to make manifest the conclusion of the master. He said:

"The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed 20 years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for the court to exercise a power it does not possess. * * * A rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

*Although the Public Service Company excepted to the conclusion of law thus stated and to some of the separate conclusions of fact made by the master, no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted confiscatory character of the rate, upon the question of contract, and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling, the court declared that it had jurisdiction to prevent the admitted confiscation which would result from the five-cent rate. Concluding, however, that as the court was not a primary rate-making authority, it would not fix a reasonable rate to replace the five-cent rate, the enforcement of which would be enjoined, and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven-cent fare for the five-cent fare, and besides enjoined the city from enforcing the various ordinances complained of in the bill, prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever, because of a change in conditions, the five-cent fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half-fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which had been upheld in the Altgelt Case, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

[1] *That, in view of the admitted fact of confiscation, the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that, as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

[2] Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five-cent rate was a contract. That it was not, and could not be, we are of opinion is the necessary result of the provision of section 17, article 1, of the state Constitution, existing in 1899, prohibiting "any irrevocable or uncontrollable grant of special privileges," etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the Altgelt Case, to the effect that, if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate.

[3] But it is urged that as, by the amendment to the state Constitution of 1912, the city was endowed with authority broad enough to enable it to contract in granting a street railway franchise concerning the rate of fare to be charged, disenthralled from the limitation of section 17, article 1, of the state Constitution, it follows that the franchise ordinance must after that date be viewed as such a contract and treated accordingly. But as no contract between the

*city and the Traction Company, made after the constitutional amendment in 1912 concerning the fare in question, is referred to, it is plain that, even if the proposition as to power of the city after 1912 be, for the sake of the argument, conceded, it is irrelevant to the case we are considering.

[4] And this is true, also, of the suggestion, made in argument, that, although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition, resulting from the granting of the franchise, which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But, besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the

rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists, and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power.

[5] Further, however, it is urged that, as at the time of the consolidation in 1917 the *557 powers of the city were not *limited by the constitutional provision referred to, the necessary effect of the obligations which the Public Service Company came under was to convert the five-cent fare ordinance into a contract conferring the right to enforce it, even though confiscatory. But that question rests upon mere implications, as no express provision to that effect is pointed out. Moreover, its entire want of merit, not only results from that fact, but from the unwarranted character of the implications upon which it is based. They proceed upon assumptions that, because the city exacted as a condition for consenting to the consolidation, that the existing obligations and duties of the corporations should be preserved, a contract as to the five-cent fare arose. The error of the proposition in all its aspects is equally apparent from a broader view, since from the date of the final decision in the Altgelt Case up to the time when the contention as to confiscation resulting from the changed conditions arose, the acts and dealings of the parties unmistakably indicated the purpose to exert the authority derived from the power to regulate, to the exclusion of the limitations resulting from the right of contract which had been unsuccessfully asserted by the Traction Company in the Altgelt litigation. This deduction arises not only from the exertion by the city, after the finality of the Altgelt litigation, of the power to compel the carrying of policemen and firemen without charge, but also from the general limitations expressed in ordinances making no reference whatever to contract rights, and asserting the right of the city to give or not to give consent to a change of rate.

In fact, the city ordinance expressing the consent to the consolidation makes this clear, since having, in the second section, imposed upon the Public Service Company "all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time," yet expressly, in the third section, it *558 *stipulated for the right of the city to regulate the charges for the gas and electric services, and imposed upon the Public Service Company the duty of keeping the accounts as to such services in such a manner as to enable this to be done. Light is necessarily thrown on the purpose of this provision by considering that the right of the Public Service Company to assert that the maximum rates fixed by the ordinance of 1899 in favor of the gas and electric companies were contracts limiting the power of the city to regulate, had not been determined adversely to those companies, as had been done as to the Traction Company by the Altgelt Case—a view the force of which will be felt by recalling that by the amendment to the city's charter which we have stated the constitutional limitation which led to the deflection of the contract clause in the Altgelt Case was no longer applicable.

[6] The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176, and cases cited; Milwaukee Electric Railway Co. v. Wisconsin R. R. Commission, 238 U. S. 174, 180, 35 Sup. Ct. 820, 59 L. Ed. 1254.

Affirmed.

(256 U. S. 94)

OWNBEY v. MORGAN et al.

(Argued Nov. 18, 1920. Decided April 11, 1921.)

No. 99.

1. Constitutional law 🔑312—Garnishment 🔑121½, New, vol. 10A Key-No. Series—Statute requiring security from nonresident, sued by foreign attachment, as condition of right to appear and defend, does not deny due process.

Rev. Code Del. 1915, § 4123, requiring a nonresident defendant, sued by foreign attachment, to give security to the value of the property attached as a condition of the right to appear and defend, which provision was substituted in 1877 for a provision adopted at an early date requiring special bail, as required by the statutes of various other states based on an old custom of the city of London, does not deprive such defendant of his property without due process of law, in violation of the Fourteenth Amendment, even though in a particular case defendant is unable to give such security.

2. Constitutional law 🔑207(3)—State may grant protection of foreign attachment to creditors who are citizens of other states.

Under Const. art. 4, § 2, a state is at liberty, if not under a duty, to secure to creditors of nonresident owners of property, who are citizens of other states, the same protection by foreign attachment that it accords to its own citizens.

3. Action 🔑66—Control of process and proceedings, so as not to produce hardship, is not matter of right.

The summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce hardship is a matter of grace or discretion, and not of right, where the proceedings have been regular, and is characterized by the imposition of terms on the party to whom concession is made.

4. Constitutional law 🔑305—Control of process and proceedings, so as not to produce hardship, not essential to due process.

While a liberal exercise by courts of law of their summary and equitable jurisdiction so to control their own process and proceedings as not to produce hardship is to be commended, it is not essential to due process of law.

5. Constitutional law 🔑251—Due process does not require ideal system for administration of justice.

The due process clause of the Fourteenth Amendment does not impose on the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall.

6. Constitutional law 🔑251—Due process clause restrains state action within bounds consistent with liberty and private property.

The due process clause of the Fourteenth Amendment restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings.

7. Constitutional law 🔑249—Statute requiring security from individual nonresident defendants as condition of right to appear in attachment suit does not deny equal protection.

Rev. Code Del. 1915, § 4123, requiring an individual nonresident defendant, sued by foreign attachment, to give security to the value of the property attached as a condition of the right to appear and defend, does not deny the equal protection of the laws, in violation of the Fourteenth Amendment, even assuming that section 4143, requires no such security from corporate defendants, where this difference in treatment was originally resorted to because corporations could not put in special bail or be surrendered thereunder, as was required in the case of individual defendants.

8. Constitutional law 🔑206(1)—Statute requiring security from nonresident defendant in attachment action held not to abridge privileges or immunities of United States citizens.

Rev. Code Del. 1915, § 4123, requiring nonresident defendants, sued by foreign attachment, to give security as a condition of the right to appear and defend, does not abridge any privileges and immunities of such defendants as citizens of the United States in violation of the Fourteenth Amendment.

9. Constitutional law 🔑206(1)—Only privileges and immunities of federal origin are protected by Fourteenth Amendment.

Const. U. S. Amend. 14, § 1, forbidding states to abridge the privileges and immunities of citizens of the United States, refers only to privileges and immunities owing their existence to the federal government, its national character, its Constitution, or its laws.

The Chief Justice and Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Delaware.

Action by John Pierpont Morgan and others, as executors of John Pierpont Morgan, deceased, against James A. Ownbey. A judgment for plaintiffs was affirmed by the Supreme Court of Delaware (7 Boyce, 297, 105 A. 838), and defendant brings error. Affirmed.

Mr. Louis Marshall, of New York City, for plaintiff in error.

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*Messrs. Willard Saulsbury, of Wilmington, Del., and Harlan F. Stone, of New York City, for defendants in error.

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*Mr. Justice PITNEY delivered the opinion of the Court.

This writ of error brings under review a judgment of the Supreme Court of the state of Delaware, affirming a judgment of the Superior Court in a proceeding brought by defendants in error by foreign attachment against the property of plaintiff in error pursuant to the statutes of that state.

Proceedings were commenced in the Superior Court *99 *December 23, 1915, by the filing of an affidavit entitled in the cause, made by one Joyce, a credible person, and setting forth that defendant Ownbey resided out of the state and was justly indebted to plaintiffs in a sum exceeding $50. Thereupon a writ of foreign attachment was issued to the sheriff of New Castle county, which plaintiffs caused to be indorsed with a memorandum to the effect that special bail was required in the sum of $200,000, and under which the sheriff attached 33,324⅓ shares of stock (par value $5 each) held and owned by defendant in the Wootten Land & Fuel Company, a Delaware corporation, and made a proper return. Plaintiffs filed a declaration demanding recovery of $200,000, counting upon a combination of the common money counts in assumpsit. Whether such pleading was required or even permitted by the statutes is questionable; but this is not material for present purposes. Not long afterwards, defendant, by attorneys, without giving security, went through the form of entering a general appearance, and filed pleas of non assumpsit, the statute of limitations, and payment. Plaintiffs' attorneys moved to strike out the appearance and pleas on the ground that special bail or security as required by the statute in suits instituted by attachment had not been given. To this motion defendant filed a written response setting up that the Wootten Land & Fuel Company, although a Delaware corporation, was engaged in coal mining and all its other activities and business in the states of Colorado and New Mexico, where it had large and valuable property; that defendant was a resident of Colorado, and the stock in said company attached in this case constituted substantially all his property; that the company was in the hands of a receiver, and because of this the market value of the shares attached was temporarily destroyed, so that they were unavailable for use in obtaining the required bail or security to procure *100 the discharge of the *shares from attachment, and that it was impossible for defendant to secure bail or security in the sum of $200,000, or any adequate sum, for the release of the shares so attached; that defendant had a good defense, in that there was no indebtedness upon any account or in any sum due from him to plaintiffs; that by the true construction of the Delaware statutes the entry of bail or security for the discharge of the property attached was not a necessary prerequisite to the entry of defendant's appearance, and such appearance might be made without disturbing the seizure of property under the writ or its security for any judgment finally entered; and that if the statutes could not be so construed as to permit appearance and defense in a case begun by foreign attachment without the entry of bail or security for the discharge of the property seized, they were unconstitutional under the first section of the Fourteenth Amendment, in that (a) they abridged the privileges and immunities of citizens of the United States; (b) deprived defendants in cases brought under them of property without due process of law; and (c) denied to such defendants the equal protection of the laws.

Upon motion of plaintiffs this response and the attempted appearance and pleas of defendant were struck out upon the ground that special bail or security as required by the statute had not been given by defendant or any person for him; the court in banc holding that in a foreign attachment suit against an individual there could be no appearance without entering "special bail," that the requirement to that effect was not arbitrary or unreasonable, and the statute was not unconstitutional. Morgan v. Ownbey, 29 Del. (6 Boyce) 379, 398–406, 100 Atl. 411.

Thereupon judgment in favor of plaintiffs and against defendant for want of appearance was ordered, collectible only from the property attached, the amount to be ascertained by inquisition at bar. The inquisition afterwards proceeded, and resulted in the *101 finding of damages *to the amount of $200,168.57, for which final judgment was entered.

Defendant repeatedly asked that the proceedings be opened and he be permitted to appear and disprove or avoid plaintiffs' debt or claim, saying that shortly after the issuance of the writ of attachment, and as soon as advised thereof, he had proceeded to Delaware, retained counsel, and used every possible effort to secure bail in the sum of $200,000, offering the attached stock as collateral security to indemnify a surety, but because the property of the Wootten Company was in the hands of a receiver he had found it impossible to obtain any surety; and that he was not at present nor was he at the time of the issuance of the writ of foreign attachment indebted to plaintiffs in any sum whatever, but had a just and legal defense to the whole of the alleged cause of action. These applications were denied, upon opinions of the court in banc (29 Del. [6 Boyce] 417, 434–436, 100 Atl. 411), and the Superior Court ordered the shares of stock in question sold in order to satisfy the debt, interest, and costs.

The Supreme Court affirmed the judgment (7 Boyce, 297, 105 Atl. 838, 849), and the case comes here upon the contention that the statutes of Delaware, as thus construed and applied, are repugnant to the first section of the Fourteenth Amendment.

The statutes are found in the Delaware Revised Code of 1915, and the provisions bearing upon the controversy are set forth in the margin.[1]

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[1] *The principal contention is based upon the "due process of law" clause of the Fourteenth Amendment. It is said the essential element of due process—the right to appear and be heard in defense of the action—is lacking. But the statute in plain terms gives

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to defendant the *opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process. And this must be determined not alone

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with reference *to a case of peculiar hardship arising out of exceptional circumstances, but with respect to the general effect and operation of the system of procedure established by the statutes.

The act concerning foreign attachments has been upon the statute books of Delaware since early colonial days. Like the attachment acts of other states, it traces its origin to the custom of London, under which a creditor might attach money or goods of the defendant either in plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court. The subject is treated at large in Bohun's Privilegia Londini (3d Ed. 1723) p. 253 et seq. See also Bac. Abr. (Bouv. Ed.), tit. Customs of London (H); Com. Dig. (4th Ed.) tit. Attachment, Foreign (A); Pulling, Laws & Customs of London (2d Ed.) 187 et seq.; Serg. Attach. Appendix, p. 205 et seq. As is said in Drake on Attachment, § 3:

"This custom, notwithstanding its local and limited character, was doubtless known to our ancestors, when they sought a new home on the

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[1] 4142. Sec. 25. A writ of foreign attachment may be issued against any person not an inhabitant of this state, * * * upon affidavit made by the plaintiff, or some other credible person, and filed with the prothonotary, that the defendant resides out of the state, and is justly indebted to the said plaintiff in a sum exceeding fifty dollars. * * *

4145. Sec. 28. The said writ shall be framed, directed, executed and returned,, and like proceedings had, as in the case of a domestic attachment, except as to the appointment of auditors and distribution among creditors; for every plaintiff in a foreign attachment shall have the benefit of his own discovery, and, after judgment, may proceed, by order of sale, fieri facias, capias ad satisfaciendum or otherwise, as on other judgments.

Provided, that before receiving any sum under such judgment, the plaintiff shall enter into recognizance as required by section 18 preceding.

4135. Sec. 18. Provided, that before any creditor shall receive any dividend, or share, so distributed, he shall, with sufficient surety, enter into recognizance to the debtor, before the prothonotary, in a sufficient sum, to secure the repayment of the same or any part thereof, if the said debtor shall, within one year thereafter, appear in the said court and disprove or avoid such debt, or such part thereof.

The proceeding for this purpose may be by motion to the court, and an issue framed and tried before the same.

4123. Sec. 6. If the defendant in the attachment, or any sufficient person for him, will, at any time before judgment, appear and give security to the satisfaction of the plaintiff in such cause, or to the satisfaction of the court, and to all actions brought against such defendant, to the value of the property, rights, credits and monies attached, and the costs, then the garnishees and all property attached shall be discharged. The security may be taken thus: "On the —— day of ——, 19—, A. B. becomes security in the sum of —— that C. D. shall answer the demand of E. F. in this suit, and shall satisfy any judgment to the extent of the value of the property attached, that may be recovered against him therein;" which entry, on the appearance docket, shall be signed by the security, and shall be an obligation of record of the same force and effect, and subject to the same remedy by an action of debt, as any other obligation for the payment of money may be.

4137. Sec. 20. Judgment shall be given for the plaintiff in the attachment the second term after issuing the writ, unless the defendant shall enter special bail as aforesaid; whereupon, the court shall make an order that the sheriff shall sell the property attached, on due notice, and pay the proceeds (deducting legal costs and charges) to the auditors for distribution.

4143. Sec. 26. A writ of foreign attachment may be issued out of the Superior Court of this state against any corporation, aggregate or sole, not created by or existing under the laws of this state, upon affidavit made by the plaintiff or any other credible person, and filed with the prothonotary of said court, that the defendant is a corporation not created by, or existing under the laws of this state, and is justly indebted to the said plaintiff in a sum of money, to be specified in said affidavit, and which shall exceed fifty dollars.

The said writ shall be framed, directed, executed and returned, and like proceedings had as in the case of a foreign attachment issued under the next foregoing section, except that attachments to be issued under this section shall be dissolved only in the manner hereinafter provided.

In any attachments to be issued under this section, judgment shall be given for the plaintiff at the second term after the issuing of the writ, unless the defendant shall have caused an appearance by attorney to be entered, in which case the like proceedings shall be had, as in suits commenced against a corporation by summons: Provided, however, if the defendant in the attachment or any sufficient person for him, shall, at any time before judgment, give security for the payment of any judgment that may be recovered in said proceedings with costs, then the garnishees and all the property attached, shall be discharged, and the attachment dissolved, and like proceedings be had as in other cases of foreign attachment, in which the attachment has been dissolved by special bail. * * *

4150. Sec. 33. The shares of any person in an incorporated company, with all the rights thereto belonging, shall be subject to attachment as provided by sections 95 to 99, inclusive, of chapter sixty-five. [The reference is to Rev. Code, §§ 2009-2013, which prescribe the method of attaching stock, selling it under such attachment, and passing title thereto.]

1986. Sec. 72. For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this state, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this state, whether organized under this chapter or otherwise, shall be regarded as in this state.

Western continent, and its essential principle, brought hither by them, has, in varied forms, become incorporated into the legal systems of all our states. * * * Our circumstances as a nation have tended peculiarly to give importance to a remedy of this character. The division of our extended domain into many different states, each limitedly sovereign within its territory, inhabited by a people enjoying unrestrained privilege of transit from place to place in each state, and from state to state, taken in connection with the universal and unexampled expansion of credit, and the prevalent abolishment of imprisonment for debt, would naturally, and of necessity, lead to the establishment, and, as experience has demonstrated, the enlargement and extension, of remedies acting upon the property of debtors."

By the custom a defendant could not appear *105 or raise *an issue about the debt claimed without entering special bail, or else surrendering his body. Andrews v. Clerke, Carth. 25, 26. Hence it naturally came about that the American colonies and states, in adopting foreign attachment as a remedy for collecting debts due from nonresident or absconding debtors, in many instances made it a part of the procedure that if defendant desired to enter an appearance and contest plaintiff's demand he must first give substantial security, usually in the form of special bail. Besides Delaware, this was true of New Jersey (Pat. L. p. 296, § 7; Id., p. 298, § 16; Watson v. Noblett, 65 N. J. Law, 506, 508, 47 Atl. 438); Pennsylvania (McClenachan v. McCarty, 1 Dall, 375, 378, 1 L. Ed. 183); Maryland (Campbell v. Morris, 3 Har. & McH. 535, 552, 553); Virginia (Tiernans v. Schley, 2 Leigh, 25, 29); North Carolina (Britt v. Patterson, 31 N. C. 197, 200; Alexander v. Taylor, 62 N. C. 36, 38); South Carolina (Acock v. Linn, Harp. 368, 369, 370; Fife v. Clarke, 3 McCord, 347, 352; Callender v. Duncan, 2 Bailey, 454); Tennessee (Boyd v. Buckingham, 10 Humph. 434, 437); and Ohio (1 Chase's Stat. 462, § 15, cited by counsel in Voorhees v. Bank of United States, 10 Pet. 449, 453, 9 L. Ed. 490).

As to the legislation in Delaware, where the system is authoritatively deduced from the Custom of London (Reybold v. Parker, 6 Houst. 544, 555; Reynolds v. Howell, 1 Marv. 52, 59; Fowler v. Dickson, 24 Del. [1 Boyce] 113, 119, 74 Atl. 601), not stopping to trace early colonial laws mentioned in Reybold v. Parker, supra (6 Houst. 553), we find that an act providing for proceedings by attachment against nonresident as well as against absconding debtors was passed by the Assembly of the Delaware Counties and the Province of Pennsylvania March 24, 1770 (Del. Laws 1753–1777, pp. 165, 174); was supplemented by acts of the Legislature of the state of Delaware of January 31, 1817 (Del. Laws 1817, p. 232, c. 133), and January 27, 1823 (Del. Laws 1822–1824, p. 261, c. 162), *106 and found *its way, without change material to the present purpose, into Delaware Revised Code of 1852, as chapter 104. By section 3 (Code, § 2266) a defendant desiring to enter appearance was required to put in special bail to the value of the property attached.

In 1856 it was held by the Superior Court that the act did not extend to foreign corporations; and this because a corporation could not put in special bail or be surrendered to bail when it appeared, and, in the absence of provision for the security to be given, it must be held that the statute did not contemplate or include the case of such a corporation. Vogle v. New Granada Canal Co., 1 Houst. 294, 299. To remedy this, a supplement was enacted March 2, 1857 (11 Del. Laws, 482, c. 424), providing that the writ might be issued against a foreign corporation and like proceedings be had thereon as in other cases, except that the attachment should be dissolved only by defendant bringing into court the sum of money specified as the plaintiff's demand in the affidavit on which the writ was issued, or giving security for the payment of any judgment recovered; but that an appearance might be entered for defendant without bringing in the money or giving the security mentioned, in which case the writ should continue to bind the property attached. An amendment passed March 17, 1875 (15 Del. Laws, 305, 306, cc. 181, 182), eliminated the express provision for appearance without dissolving the attachment, and amended the provision as to the form of security to be given, leaving the section to stand as it appears in Rev. Code Del. 1915, § 4143 (section 26), quoted in the margin, supra. Notwithstanding this amendment, it seems to be thought that in attachment against a foreign corporation the entry of security is still not a prerequisite to appearance, and necessary only if it be desired to discharge the garnishees and the property attached (2 Woolley, Del. Prac. § 1293), and in favor of plaintiff in error we shall so assume.

*107

*Meantime, the provision requiring a nonresident individual to enter special bail as a condition of making appearance remained as before until March 6, 1877, when the Legislature substituted a provision requiring security to be given to the satisfaction of the plaintiff or of the court to the value of the property attached and costs, conditioned that defendant answer the plaintiff's demand and satisfy any judgment recovered, to the extent of the value of the property attached. 15 Del. Laws, 612, c. 473. In this form it is found in Rev. Code Del. 1915, § 4123 (section 6), quoted in the margin, supra.

It will be seen that from the beginning the giving of security, either in the form of special bail or a substituted undertaking for the payment of the judgment, has been made a condition precedent to the entering of appearance and making defense upon the merits by a nonresident individual defendant whose property was taken under foreign attachment. In the present case the court in banc called attention to the hardship occasionally arising from this, and suggested that the Legislature provide a remedy. Morgan v. Ownbey, 29 Del. (6 Boyce) 435, 100 Atl. 411. There followed an amendatory act of March 23, 1917 (29 Del. Laws, 844, c. 258), permitting an appearance and defense without the giving of special security, but leaving the lien upon the property attached to remain as security pro tanto, which was made to apply, subject to conditions, to all suits instituted (as this one was) after January 1, 1915. Whether plaintiff in error was at liberty to avail himself of this statute we are not advised; and for present purposes it will be disregarded.

The courts of Delaware at all times have laid emphasis upon the difference between the original character of a suit by foreign attachment, treating it as an ex parte proceeding quasi in rem, looking to a judgment of condemnation against the property attached and having the incidental object of compelling defendant's appearance, *108 *on the one hand, and the action in personam, with its appropriate incidents, that resulted from an appearance by defendant accompanied by the giving of security, on the other. Wells v. Shreve's Administrator (1861) 2 Houst. 329, 369-370; Frankel v. Satterfield (1890) 9 Houst. 201, 209, 19 Atl. 898; Nat. Bank of W. & B. v. Furtick (1895) 2 Marv. 35, 51, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99. Recognizing the fundamental character of this distinction, and regarding the foreign attachment in Delaware as wholly statutory, the courts have not felt at liberty, in the absence of legislation, to give to the proceeding a hybrid character by permitting an appearance without security other than the property attached, leaving this to answer pro tanto the plaintiff's demand.

The requirement of special bail as a condition of appearance was long familiar in bailable actions at common law and in admiralty proceedings. In requiring such bail from a nonresident defendant whose goods had been seized and who desired to be heard to contest the plaintiff's demand, Delaware did but follow familiar precedents and analogies, besides conforming to the custom. It is not contended that the substitution, by the 1877 amendment, of a bond conditioned for payment of the judgment to the extent of the value of the property attached, in lieu of the special bail formerly required on entering appearance, made a substantial difference rendering the new requirement any more obnoxious to the due process clause than the earlier. It is the imposing of any condition whatever upon the right to be heard that is complained of.

Hence the question is whether the state in thus adopting a time-honored method of procedure and preserving as a part of it a time-honored requirement of security, and in adhering logically to the ancient distinction between a proceeding quasi in rem and an action in personam, to the extent of refraining, until the amendment of 1917, from enacting legislation recognizing the peculiar appeal *109 *of a defendant who may have no resources or credit aside from the property attached, must be regarded as having deprived such a defendant of his property without due process of law, in contravention of the Fourteenth Amendment. In our opinion, the question must be answered in the negative.

In Murray's Lessee v. Hoboken Land & Imp. Co., 18 How. 272, 276, 280, 15 L. Ed. 372, which arose under the due process clause of the Fifth Amendment, the court, by Mr. Justice Curtis, declared (18 How. 276, 277, 15 L. Ed. 372):

> "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. * * * To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

[2] In Pennoyer v. Neff, 95 U. S. 714, 722-724, 24 L. Ed. 565, it was shown that the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each state over persons and property within its borders; and although emphasis was there laid upon the authority and duty of a state to protect its own citizens in their claims against nonresident owners of property situate within the state, it is clear that, by virtue of the "privileges and immunities" clause of section 2 of article 4 of the Constitution, each state is at liberty, if not under a duty, to accord the same privilege of protection to creditors *110 *who are citizens of other states that it accords to its own citizens. Blake v. McClung, 172 U. S. 239, 248 et seq., 19 Sup. Ct. 165, 43 L. Ed. 432.

[3, 4] The record before us shows no judgment entered against plaintiff in error in personam, but only one for carrying into effect a lien imposed upon his interest in property within the jurisdiction of the state for the purpose of satisfying a demand made against him as a nonresident debtor, and established to the satisfaction of the court. And an analysis of his contentions shows that the real complaint was and is, not that there was any departure, arbitrary or otherwise, from the

due and orderly course of procedure provided by the statutes of Delaware long before the case arose, but rather that the courts of the state declined to recognize the peculiar hardship of his case as sufficient ground for relaxing in his behalf the established legal procedure. His appeal in effect was to the summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce hardship. This is a recognized extraordinary jurisdiction of common-law courts, distinguishable from their ordinary or formal jurisdiction. It has been much developed since the separation of the American colonies from England. But where the proceedings have been regular, it is exercised as a matter of grace or discretion, not as of right, and is characterized by the imposition of terms on the party to whom concession is made. Smith's Action at Law (4th Ed. 1851) pp. 22–27; Stewart's Blackstone (1854) vol. 3, pp. 334–338. A liberal exercise of this summary and equitable jurisdiction, in the interest of substantial justice and in relaxation of the rigors of strict legal practice, is to be commended; but it cannot be said to be essential to due process of law, in the constitutional sense.

[5, 6] The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with *111 *provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings. But a property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed ex necessitate to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding quasi in rem into an action in personam; ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law when applied to a defendant who, through exceptional misfortune, is unable to furnish the necessary security; certainly not where such defendant, as is the case now presented, so far as the record shows, has acquired the property right and absented himself from the state after the practice was established, and hence with notice that his property situate there would be subject to disposition under foreign attachment by the very method that afterwards was pursued, and that he would have no *112 right to *enter appearance and make defense except upon giving security.

However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment.

We conclude that the statutes under consideration were not in conflict with the due process provision of the Fourteenth Amendment.

[7] Under the equal protection clause it is contended that there is unwarranted discrimination in debarring an individual from appearing and making defense without first giving special security, while a foreign corporation may appear and answer without giving any security, except for the lien of the process upon the property attached. But, as we have seen, the difference in treatment was resorted to because from their nature corporations could not put special bail or be surrendered thereunder. This was a reasonable ground for separating defendants into two classes—individuals and corporations; and it was natural that in subsequent legislation the classes should be separately treated, as was done. There is here no denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment.

[8, 9] The objection that the acts abridge *113 the privileges and *immunities of citizens of the United States, within the meaning of the same amendment, is not pressed, and plainly is untenable. As has been pointed out repeatedly, the privileges and immunities referred to in the amendment are only such as owe their existence to the federal government, its national character, its Constitution, or its laws. Maxwell v. Bugbee, 250 U. S. 525, 537–538, 40 Sup. Ct. 2, 63 L. Ed. 1124,

and cases cited. The privileges and immunities of plaintiff in error alleged to be abridged by the statutes in question have no such federal origin.

The judgment under review is
Affirmed.

Mr. Justice McREYNOLDS concurs in the result.

The CHIEF JUSTICE and Mr. Justice CLARKE dissent.

(256 U. S. 51)

UNITED STATES v. NORTHERN PAC. RY. CO.

(Argued Oct. 7, 1920. Decided April 11, 1921.)

No. 325.

1. **Constitutional law 🔑277(1)—Public lands 🔑70—Land grant to railroad is contract protected by due process of law clause.**

The grant of lands to a railroad company by Act July 2, 1864, as modified by resolution of May 31, 1870, to induce the construction of a railroad, becomes a contract on its acceptance by the railroad company and the completion of the line, and the rights thereunder are then within the protection of the due process of law clause of the Constitution.

2. **Public lands 🔑81(1)—Railroad must stand losses of indemnity lands under settlement before selection.**

The railroad company, to which lands were granted by Act July 2, 1864, section 6 of which provided that all lands in the indemnity limits should remain subject to pre-emption and homestead laws until selected, must stand the loss where the indemnity lands were reduced by pre-emption and homestead claims before selection to a quantity insufficient to indemnify the railroad for losses within the original limits.

3. **Public lands 🔑82 — Selection by railroad unnecessary where indemnity lands are insufficient.**

Selection of indemnity lands by a railroad company is unnecessary to give the railroad a right to such lands as against the government, where the total amount remaining open to selection within the indemnity limits is less than the quantity the railroad is entitled to select.

4. **Public lands 🔑82—Specification of losses, for which indemnity selections are made, unnecessary, where losses exceed lands.**

The requirement of the Land Department that a railroad in selecting indemnity lands must specify the loss of lands for which selection is made was adopted to prevent duplicate selections for the same loss, and does not apply where the total amount of land available for selection is less than the quantity the railroad is entitled to select.

5. **Public lands 🔑81(3)—Government cannot withdraw indemnity lands necessary to supply deficiencies in railroad grant.**

The government cannot for its own use withdraw from selection lands within indemnity limits of a railroad land grant, where the amount of land within such limits remaining available for selection by the railroad was less than the amount it was entitled to select.

6. **Appeal and error 🔑1177(6) — Railroad held entitled to reversal to ascertain whether indemnity lands were insufficient at time of withdrawal.**

In a suit to cancel a patent to a railroad of indemnity lands selected by it, which was issued through oversight of a withdrawal of those lands before patent, where the agreed statement of facts did not specify whether at the time the lands were withdrawn the amount of land then available for selection within the indemnity limits was equal to the quantity the railroad was entitled to select, though it was shown that it was insufficient at the time of suit, the case must be reversed for determination of that question, either by the court below or by the officials of the Land Office.

Appeal from the Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against the Northern Pacific Railway Company to cancel a patent to lands. A decree for defendant was affirmed in the Circuit Court of Appeals (264 Fed. 898), and the United States appeals. Reversed and remanded, with directions.

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*Mr. Assistant Attorney General Nebeker, for the United States.

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*Mr. Charles Donnelly, of St. Paul, Minn., for appellee.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to cancel a patent issued to the railway company for 5,681.76 acres of land in Montana, the asserted ground for such relief being that the land officers issued the patent through inadvertence and mistake. The company prevailed in the District Court and in the Circuit Court of Appeals, 264 Fed. 898, and the United States brought the case here.

The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.

The grant was made for the declared purpose of "aiding in the construction" of a proposed line of railroad from Lake Superior *59 to Puget Sound and Portland, Or., *and "to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores" over such line. It was expressed in present terms—"there be, and hereby is, granted"—and was of "every alternate section of public land, not mineral designated by odd numbers" within prescribed place limits on each side of the line excepting such sections or parts of sections as should be found to have been otherwise disposed of, appropriated or claimed, or occupied by homestead settlers, or pre-empted, prior to the definite location of the line. Nelson v. Northern Pacific Ry. Co., 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406. As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be "selected by said company," under the direction of the Secretary of the Interior, from unoccupied, unappropriated, nonmineral lands in odd-numbered sections within prescribed indemnity limits. The line of the road was to be definitely located by filing a map or maps thereof in the General Land Office, and the road when constructed was to be "subject to the use of the United States, for postal, military, naval, and all government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation." As each consecutive 25 miles of road was constructed and made ready for the service contemplated, the same was to be examined by commissioners selected by the President, and, if they reported that the same was completed in all respects as required, patents were to be issued to the company for the lands opposite to and coterminous with the completed section. The President was to cause the lands along "the entire line" to be surveyed for 40 miles in width on both sides "after the general route shall be fixed, and as fast as shall be required by the construction of said road"; the granted sections within the place limits were to be withheld from sale, entry and pre-emption, except as *60 against pre-emption and *homestead occupants whose settlement preceded the definite location of the line; all lands within the indemnity limits were to be and remain subject to the operation of the pre-emption and homestead laws, save as the odd-numbered sections should be taken out of the operation of those laws by indemnity selections made to supply losses within the place limits (Hewitt v. Schultz, 180 U. S. 139, 147–149, 155, 156, 21 Sup. Ct. 309, 45 L. Ed. 463; Weyerhaeuser v. Hoyt, 219 U. S. 380, 387, 388, 31 Sup. Ct. 300, 55 L. Ed. 258); and the price of the even-numbered sections retained by the United States in the place limits was to be increased to double the usual minimum. If the company accepted the terms on which the grant was made, it was required to signify its acceptance in writing under its corporate seal within two years.

The company duly accepted the terms of the grant, filed appropriate maps of the general route, afterwards definitely located the line in the mode prescribed, and constructed and completed the road from Ashland, Wis., on Lake Superior, to Tacoma, Wash., on Puget Sound, and thence to Portland, Or., its full length being more than 2,000 miles. The definite location was completed in 1884 and the construction in 1887. The road as completed was examined and favorably reported by the commissioners and accepted by the President. Reports of Commissioner of Railroads—for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; Doherty v. Northern Pacific Ry. Co., 177 U. S. 421, 20 Sup. Ct. 677, 44 L. Ed. 830; United States v. Northern Pacific R. R. Co., 95 Fed. 864, 37 C. C. A. 290; Id., 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836; United States v. Northern Pacific R. R. Co., 193 U. S. 1, 24 Sup. Ct. 330, 48 L. Ed. 593.

The losses to the grant in the place limits through other disposals, homestead settlements and the like prior to the definite location of the line, and through the exclusion of lands found to be mineral, amounted to several million acres. To supply these losses it was necessary to resort to the indemnity limits, as was contemplated and provided in the granting act and resolution. In the *61 asserted exercise of this right the company selected the lands in question. The particular losses on account of which the selection was made were such as to support it, the selection was made in conformity with the directions given by the Secretary of the Interior, and the lands selected were subject to selection unless rendered otherwise by a temporary executive withdrawal made about a year before. The local land officers accepted and approved the selection list and in transmitting it to the General Land Office called attention to the withdrawal. But when the Commissioner and the Secretary approved the selection and caused the patent to issue they overlooked the withdrawal and so did not consider or pass on its bearing on the company's right to select the lands. Five years later the matter was called to their attention and they caused this suit to be brought.

The lands in question were not surveyed in the field until near 1905 and the plat of survey was not filed in the local land office until April 5, 1905. This indemnity selection was made later in the same day. On several occasions prior to 1904 the company had endeavored to select lands in the indemnity limits while they were as yet unsurveyed, or before the plat of the survey was filed in the local land office; but the Secretary of the Interior had refused to consider such selections and had directed that none be received until after the land was surveyed and the plat filed. Thus this selection was made as soon as was admissible under the Secretary's directions. The temporary executive withdrawal of the lands was made January 29, 1904, before they were surveyed, and was intended to prevent the acquisition of any claim to them pending an inquiry into the desirability of adding them, along with other lands, to an existing forest reserve. On March 7, 1906, they were added to the reserve by an executive proclamation.

In its defense to the suit the company *62 takes the posi*tion that the temporary withdrawal did not affect its right to select the lands and therefore that the United States was not prejudiced by the fact that the Commissioner and the Secretary overlooked the withdrawal when the selection was approved and the patent issued. In support of this position the company points to the stipulation on which the case was heard in the District Court wherein—following a reference to the Act of March 3, 1887, c. 376, 24 Stat. 556 (Comp. St. §§ 4895–4900), directing the Secretary "to immediately adjust" this and other railroad land grants, and to a special report of the Commissioner, made in 1906, purporting to show that the adjustment of this grant pursuant to that act had progressed to a point where it was disclosed there was a net deficiency in the grant of 4,092,472.09 acres—it is said:

> "The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the Land Department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains; but the plaintiff does not admit that the correct measure of the grant is the aggregate area of all odd-numbered sections within the primary or place limits, or that any definite quantity of land was granted and guaranteed to the defendant by any of the acts of Congress making grants of land to the defendant or its predecessor or predecessors in interest."

And in further support of its position the company contends that where, through preemption and homestead entries or other disposals, the available lands in the indemnity limits have been so far diminished that *63 those *remaining are all needed to supply losses in the place limits the government is not at liberty to reserve the remaining lands, or any of them, for its own uses and thereby to cut off the company's right to claim them as indemnity, because, as against the government, they thenceforth are appropriated to the fulfillment of its obligation under the grant, and because the company has a vested right in the fulfillment of that obligation which all departments of the government are bound to respect. On the other hand, counsel for the government insist (a) that no right to lands in the indemnity limits attaches, either generally or specifically, until they are selected by the company; (b) that up to that time the government is free to reserve them for its own purposes and thereby to cut off the right of selection; and (c) that this is so even where the losses in the place limits exceed the available lands in the indemnity limits, and although the company's purpose to claim the latter be asserted at the earliest opportunity. The question thus presented has an important bearing on the further administration and adjustment of this grant, and perhaps of others, and counsel on both sides have dealt with it accordingly. In its present form the question is new, but the principles which must control its solution are well settled.

[1] The purpose of the granting act and resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions and public stores to and from the Pacific Coast, with all the resultant advantages to the government and the public. To that end the act and resolution embodied a proposal to the company to the effect that if it would *64 *undertake and perform that vast work it should receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the government. Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 679, 680, 34 Sup. Ct. 907, 58 L. Ed. 1527. The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place (Payne v. Central Pacific Ry. Co., 255 U. S. 228, 41 Sup. Ct. 314, 65 L. Ed. —); and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits" (Weyerhaeuser v. Hoyt, 219 U. S. 380, 387, 31 Sup. Ct. 300, 303, 55 L. Ed. 258). Such rights are within the protection of the due process of law clause of the Constitution. Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496.

[2] When the grant was made by the act

and resolution it was thought that the indemnity limits as therein defined contained lands largely in excess of what would be required to supply losses within the place limits, and hence the provision in section 6 under which, as construed by the land officers and this court, all lands in the indemnity limits were to be and remain subject to the operation of the pre-emption and homestead laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant the company must submit to whatever of disadvantage results from it. This the company frankly recognizes, for in its brief it says:

> "It was a part of our contract that, until selected, lands within the indemnity belt should *65 be open to settlement under *the homestead and pre-emption laws."

And also:

> "The question here is not whether in the face of the deficiency the settler [before selection] may acquire rights superior to ours, for we concede that he may."

But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say "required" because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses.

[3] While it often has been said that under such a grant no right attaches to any specific land within the indemnity limits until it is selected, an examination of the cases will show that this general rule never has been applied as between the government and the grantee where the lands available for indemnity were not sufficient for the purpose. Its only application has been where either the rights of settlers were involved, or the lands available for indemnity exceeded the losses, thereby making it essential that there be a selection and identification of the particular lands sought to be taken. This distinction is illustrated in St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77. The question there presented was whether there was any need for a selection where no right of a settler was involved and the lands available for indemnity were not sufficient to supply the losses. By reason of this insufficiency it was ruled that the lands in the indemnity limits necessarily were appropriated to satisfy the losses and that no selection was required. The court said (139 U. S. 19, 11 Sup. Ct. 395, 35 L. Ed. 77):

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place *66 *limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

That ruling related to the right to indemnity lands under this grant, and so is particularly in point; but it is well to observe that what was said about an existing deficiency related, as appears No. 139 U. S. on pages 8 and 9 of the opinion (11 Sup. Ct. 391, 35 L. Ed. 77), to the portion of the grant in Minnesota and not to other portions. This exception to the general rule that a selection is essential has been recognized by this court in other cases. United States v. Missouri, Kansas & Texas Ry Co., 141 U. S. 358, 376, 12 Sup. Ct. 13, 35 L. Ed. 766; United States v. Colton Marble & Lime Co., 146 U. S. 615, 616, 13 Sup. Ct. 163, 36 L. Ed. 1104; Southern Pacific R. R. Co. v. Bell, 183 U. S. 675, 682, 22 Sup. Ct. 232, 46 L. Ed. 383.

[4] One of the regulations of the Land Department requires that indemnity selections be accompanied by a specification—tract for tract—of the losses on account of which they are made. But that department holds that this regulation does not apply where the losses exceed the lands which may be taken as indemnity. Thus in Hastings & Dakota Ry. Co., 19 Land Dec. 30, it was said by Secretary Smith:

> "The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As this grant is known to be deficient over 800,000 acres, * * * the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate."

And a similar ruling is found in Chicago, Rock Island & Pacific Ry. Co. v. Wagner, 25 Land Dec. 458, 460, and other cases.

[5] Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant it was not admissible for the government to reserve or appropriate to its own uses *67 *lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. But it cannot do either. The "substantial right" conferred by that provision (Weyerhaeuser v. Hoyt, supra) cannot be thus cut down or extinguished (Sinking Fund Cases, supra).

[6] A more difficult question—to which only slight attention is given in the briefs—is whether it sufficiently appears from this record that the grant was deficient at the time of the temporary withdrawal; that is, that the lands available as indemnity were not then sufficient to supply the losses. The question is one the determination of which rests primarily with the Land Department. The stipulation on which the case was heard does not show that the department has determined the question, nor that it has refused to do so, but only that the question was not considered when this patent was issued, the withdrawal being then inadvertently overlooked. In these circumstances, to entitle either party to have the question determined in this suit the facts shown should make its right solution quite plain, for the decision might conclude both parties for all time—as respects other lands as well as those in suit. Southern Pacific R. R. Co. v United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355. Of course, the company is entitled to have the question considered and decided somewhere, and, if the deficiency be established, is entitled to have the selection of these lands sustained. A third of a century already has elapsed since the company earned the right to receive what was intended by the grant.

Two matters stated in the stipulation are relied upon as showing a deficiency. One is that in 1906 the Commissioner reported to the Secretary that the adjustment of the grant had progressed to a point where *68 it was dis*closed that there was a net deficiency of 4,092,472.09 acres. By the act of March 3, 1887, supra, the supervision of the adjustment was specially devolved on the Secretary, and yet the stipulation does not show that he approved the Commissioner's report or in any way recognized it as correct. We think the report, in the absence of any confirmatory action by the Secretary, cannot be taken as sufficiently establishing that a deficiency existed. The other statement is that at the time of the temporary withdrawal all the lands theretofore received by the company plus all that it was possible for it to receive thereafter, whether as place lands or indemnity lands, did not equal "the sum total of all the odd-numbered sections lying within the primary or place limits," and that condition still obtains. But the statement also says that the government "does not admit that the correct measure of the grant is the aggregate area of all odd-numbered sections within the primary or place limits." What was meant by this qualification is not otherwise disclosed; nor is it explained in the briefs. The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections,[1] or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company.[2] There would be no right to indemnity as respects the moiety *69 not included, nor as *respects the lands required to be deducted. Either of those conditions, if existing, would affect the measure of the grant and would have to be considered in determining whether there was a deficiency. The stipulation does not show the presence or the absence of either condition, and the matter is not one of which courts take judicial notice. Therefore the actual situation, whatever it may have been, should have been shown. As this was not done, neither party is entitled to have the question whether there was a deficiency determined upon the present record.

Turning to the published decisions of the Land Department, we find that in Hessey v. Northern Pacific Ry. Co., 43 Land Dec. 302, the Secretary distinctly declared that the grant was so far deficient that many losses within the place limits must remain unsatisfied, and therefore that compliance with a provision that indemnity selections be made from lands nearest the line of the road was no longer required. But as that finding apparently related to the situation existing December 9, 1909, it cannot be taken as showing that there was a deficiency almost six years before, when the temporary withdrawal now in question was made. The situation may have changed materially in the meantime, for doubtless large numbers of homestead entries were being made within the indemnity limits every year.

We conclude that the decrees below must be reversed and the suit remanded to the District Court with directions (a) to accord the parties a reasonable opportunity, on a further hearing, to supplement and perfect the showing made in the present record, if either or both are so disposed; (b) if the parties avail themselves of that opportunity, to proceed to an adjudication of the suit upon the record as thus supplemented; and (c) if the parties do not avail themselves of that opportunity, to enter a decree canceling the patent without prejudice to the right of the company to have the question of the asserted

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[1] Southern Pacific R. R. Co. v. United States, 183 U. S. 519, 525, 22 Sup. Ct. 154, 46 L. Ed. 307; Sioux City & St. Paul R. R. Co. v. United States, 159 U. S. 349, 364, 365, 16 Sup. Ct. 17, 40 L. Ed. 583. And see United States v. Northern Pacific R. R. Co., 193 U. S. 1, 24 Sup. Ct. 330, 48 L. Ed. 593.

[2] Section 3 of the granting act contains the following: "Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

*70

deficiency *in the grant determined by the Land Department and to have the present selection sustained and given full effect, if the grant was deficient when the temporary withdrawal was made.

Decree reversed.

(256 U. S. 28)

STATE OF ARKANSAS v. STATE OF MISSISSIPPI.

(Decided April 11, 1921.)

No. 6, Original.

Original suit by the State of Arkansas against the State of Mississippi. On exceptions by defendant to the report of the commissioners appointed to run, locate, and mark the boundary line. Exceptions overruled, report confirmed, and final decree made in accordance with the report.

See, also, 252 U. S. 344, 40 Sup. Ct. 333, 64 L. Ed. 605.

Messrs. Walter P. Armstrong, of Memphis, Tenn., J. M. Moore, of Little Rock, Ark., and Herbert Pope, of Chicago, Ill., for State of Arkansas.

Messrs. Garner W. Green, of Jackson, Miss., Gerald Fitz Gerald, of Clarksdale, Miss., and Ross A. Collins, of Meridian, Miss., for State of Mississippi.

PER CURIAM.[1] The state of Arkansas, having moved the court to take up for consideration the exceptions filed by the state *29 *of Mississippi to the report of the commissioners appointed by the decree in this cause on the 22d day of March, 1920 (252 U. S. 344, 40 Sup. Ct. 333, 64 L. Ed. 605), to run, locate, and permanently mark the boundary line between the states of Arkansas and Mississippi; and the state of Mississippi, having filed certain exceptions to said report, which report is in the words and figures following, to wit:

"To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

"We, Samuel S. Gannett, Washington, D. C., Charles H. Miller, Little Rock, Arkansas, and Stevenson Archer, Jr., Greenville, Mississippi, commissioners appointed under the decree of the court, rendered March 22, 1920, 'to run, locate and designate the boundary line between said states along that portion of said river which ceased to be a part of the main navigable channel of said river as the result of said avulsion, in accordance with the above principles: Commencing at a point in said Mississippi river about one mile southwest from Friar Point, Coahoma county, Mississippi, where the main navigable channel of said river, prior to said avulsion, turned and flowed in a southerly direction, and thence following along the middle of the former main channel of navigation by its several courses and windings to the end of said portion of said Mississippi river which ceased to be a part of the main channel of navigation of said river as the result of said avulsion of 1848,' have the honor to submit the following report, which report is accompanied by a map entitled:

"Supreme Court of the United States, October Term, 1919.

"No. 7, Original.

"Map Showing Boundary Line Between States of Arkansas and Mississippi Below Friar Point, Mississippi.

"On account of a continuous high stage in the Mississippi river it was impracticable to carry on any field work previous to August 1, *30 1920, but in the meantime the *record was read, local data and maps were examined, and preliminary investigations made in the field.

"The commissioners met at Friar Point, Mississippi, August 4, 1920, and proceeded to view the ground and formulate a plan of procedure.

"The determination of the boundary line proceeded upon the finding of the law as laid down by the court, namely, that if the former channel of a river separating two states ceases to be navigable by reason of an avulsion, it does not render inapplicable the rule which fixes as the boundary line the middle of the navigable channel rather than the middle line between the banks. State of Arkansas v. State of Tennessee, 246 U. S. 158, sec. 4, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258.

"After a study of all the evidence in the case and a careful examination of the physical facts on the ground at this time, the commissioners are unanimously of the opinion that 'Horseshoe Lake' or 'Old River' or 'Pecan Lake' was, at the time the avulsion or cut-off took place, the main navigable channel of the Mississippi river, and therefore this portion of the boundary line should follow in general the deepest water in this lake.

"Leaving the west or lower end of Horseshoe Lake, the boundary line as determined by your commissioners follows, in general, the course of the present 'channel' or well-defined chute which runs in a northeasterly direction to the Mississippi river, because the evidence on the ground (namely, well-defined high banks on both sides for practically the entire distance, both of which are covered with timber of about the same age; its location west of the meander line of 1833 near the 'Horseshoe Lake' where caving would be expected, and its location east of the meander line of 1833 at a point farther north where accretion would be expected) clearly indicates that this was the last channel actually navigated by the steamboats that entered the 'Horseshoe Lake' several years after the avulsion or cut-off of 1848.

*31

*"In arriving at the proper location for the line between the northeast end of 'Horseshoe Lake' and the Mississippi river at a point about one mile southwest from Friar Point, we considered the following facts and conditions:

"(a) The Arkansas shore, being in a concave bend, would naturally undergo some caving or recession during the 32 years between the date of the original land survey (1816) and the date of the cut-off (1848).

"(b) The 'slough' immediately east of the field in sections 10 and 15, township 4 south range 4 east, being totally devoid of short and irregular bends and following a generally uniform curve of radius similar to that of the original river in this vicinity, was, without doubt, formed by the main river, and the great difference in the age of the timber on the west bank as compared with the age of that on the east bank shows that the west bank of this 'slough' marked the most westerly limit of the main river at the time of the avulsion.

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[1] Announced by Mr. Justice Day.

"(c) The Mississippi land survey of 1835 shows that an island existed at that time near to the Mississippi shore or meander line; evidence on the ground to-day shows conclusively that this portion of the area is much older than is that part which lies farther to the west. The conformation of the old bank lines is such that accretion to the Mississippi shore in this vicinity is a logical sequence.

"We have therefore decided that this line after leaving the northeast end of 'Horseshoe Lake' should gradually swing over towards the northwest and follow the general line of the 'slough,' but in front, or east, of the same, a distance which is approximately equal to that which is ordinarily found between the main bank and the line of deepest water in the Mississippi river.

"After reaching a point which is opposite the upper end of this 'slough' we must, in order to reach the present river, cross over, for a distance of approximately a mile, land that has
*32
evidently been formed by the process of *accretion since the time of the avulsion, and hence the boundary line should be brought east, as soon as is practicable, to a point about midway between the old original meander lines, and thence along this mid-line to the Mississippi river.

"Commencing at a point in said Mississippi river, approximate latitude 34° 22′ 18″, longitude 90° 39′ 19″, about one mile west from Friar Point, we herewith specifically describe the boundary line as follows:

S. 30° W. 6,831 feet, or 103.50 chains, to monument (1).
S. 0° W. 2,587 feet, or 39.20 chains, to monument (2).
S. 23° E. 5,035 feet, or 76.29 chains, to monument (3).
S. 11½° E. 4,927 feet, or 74.65 chains.
S. 25° W. 2,805 feet, or 42.50 chains.
S. 70¼° W. 2,607 feet, or 39.50 chains.
N. 88½° W. 2,290 feet, or 34.70 chains.
N. 68¼° W. 2,607 feet, or 39.50 chains.
N. 51° W. 1,571 feet, or 23.80 chains.
No. 34° W. 1,733 feet, or 26.25 chains.
No. 4° W. 2,676 feet, or 40.55 chains.
N. 12¼° E. 3,383 feet, or 51.25 chains.
N. 31½° E. 3,317 feet, or 50.25 chains.
N. 22¼° E. 2,864 feet, or 43.40 chains.
N. 15° E. 5,148 feet, or 78.00 chains to a point in the Mississippi river, approximate latitude 34° 22′ 04″, longitude 90° 40′ 35″.

"Monuments.

"Monuments have been set as follows:

"State Line Monument No. 1.

"Situated in southeast quarter of Sec. 10, T. 4 S., R. 4 E., 600 feet east of west bank of slough and on north side of road through timber-reinforced concrete post 12 inches square, 36 inches high, set on a concrete base 24 by 24 by 24 inches.

"Monument marked on west side ARK, on east side MISS, on north side 1920, on south side No. 1.

*33

*"State Line Monument No. 2.

"Situated 2,587 feet due south of state line Mon. No. 1 and is in the N. E. ¼ Sec. 15, T. 4 S., R. 4 E. A reinforced concrete post 12 inches square, 36 inches high, set on a concrete base 24 by 24 by 24 inches.

The monument is marked on west side ARK, on east side MISS, on north side 1920, on south side No. 2.

"State Line Monument No. 3.

"Situated 5,035 feet S. 23° E. from monument No. 2 and 2,375 feet west of a point 100 feet south of levee mile post 72–73. It is in north part of Sec. 23, T. 4 S., R. 4 E., a few feet south of line of Sec. 14, T. 4 S., R. 4 E. It is a reinforced concrete post 12 inches square, 36 inches high, set on a concrete base 24 by 24 by 24 inches.

"This monument is marked on west side ARK, on east side MISS, on north side 1920, on south side No. 3.

"Witness trees: Cottonwood 24 inches diameter bears N. 56° E. 47 feet distant; hackberry 3 inches diameter bears N. 46° E. 6 feet distant; overcup oak 10 inches diameter bears N. 65° ½ W. 38.5 feet distant.

"Reference Point No. 1.

"1,025 feet north of corner of Secs. 7 and 18, T. 28 N., R. 4 W., and Secs. 12 and 13, T. 28 N., R. 5 W.

"Reinforced concrete post 12 inches square, 36 inches high, set on concrete base 24 by 24 by 24 inches.

"Monument is marked on north side REF. PT. No. 1, on south side 1920.

"From this monument middle of old River or Horse Shoe Lake or State line bears N. 40° W. 1,353 feet.

"Reference Point No. 2.

"At ¼ corner between Secs. 10 and 11, T. 28 N., R. 5 W.

"Reinforced concrete post 12 inches square, 36 inches high, set on concrete base 24 by 24 inches.

"Monument marked on north side REF. PT. No. 2, on south side 1920.

"Witness trees: Cottonwood, 14 inch diame-
*34
ter, N. 42° *E. 78.6 feet; cottonwood, 24 inch diameter, S. 66° ¼ W. 33.1 feet.

"From this monument middle of old river or Horse Shoe Lake or state line bears N. 67° ¾ E. 1,353 feet.

"Reference Point No. 3.

"At corner of Secs. 2, 3, 34 and 35, Tps. 28 and 29 N., R. 5 W.

"Iron post 6 feet long 2 inches in diameter, set 3 feet in ground.

"Witness trees: A sycamore 18 inches diameter bears N. 23° W. 18.3 feet distant; a boxelder 12 inches diameter bears S. 83° ¾ W. 23.3 feet distant.

"From this reference point or monument the state line or middle of channel or Horse Shoe Lake is 808 feet due east.

"We return herewith a financial statement showing in detail the money actually expended by the commissioners for running, locating, and designating the boundary line under the decree in this case, including the per diem compensation of the commissioners.

"Respectfully submitted,
"Samuel S. Gannett,
"Chas. H. Miller,
"Stevenson Archer, Jr.
"Commissioners."

The cause coming on to be heard upon said motion of the state of Arkansas, and exceptions of the state of Mississippi, it is ordered, adjudged, and decreed that the exceptions filed on behalf of the state of Mississippi be and the same are hereby overruled, and said report is in all respects confirmed.

It is further ordered, adjudged, and decreed that the line as delineated and set forth in said report, and upon the map accompanying the same, which line has been marked by permanent monuments, as stated in said *report, be and the same is hereby established, declared and decreed to be the true boundary line between the states of Arkansas and Mississippi, and said map is directed to be filed as a part of this decree. And it appearing that the expenses and compensation of the commissioners attendant upon the discharge of their duties, amounts to $6,116.45, it is ordered that the same be allowed and approved as a part of the costs of this suit to be borne equally by the parties. And it appearing further from the report that the state of Arkansas has paid said sum, it is hereby ordered that it be credited to the state of Arkansas in the settlement of the costs of this suit between the states of Arkansas and Mississippi. It is further ordered that the clerk of this court do transmit to the respective Governors of the states of Arkansas and Mississippi copies of this decree, duly authenticated, and under the seal of this court, omitting from said copies the map filed with the report.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(255 U. S. 565)

No. 142. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, plaintiff in error, v. Thomas M. REYNOLDS. March 21, 1921. In error to the Superior Court of the State of Massachusetts. For opinion below, see 233 Mass. 32, 123 N. E. 235. Messrs. J. L. Thorndike, of Boston, Mass. and R. G. Dodge, of Boston, Mass., for plaintiff in error. Mr. Burton E. Eames, of Boston, Mass., for defendant in error.

PER CURIAM. Affirmed with costs upon the authority of St. Louis Southwestern Railway Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

(255 U. S. 565)

No. 210. The WESTERN UNION TELEGRAPH COMPANY, petitioner, v. Eugene E. SOUTHWICK. March 21, 1921. On a writ of certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas. For opinion below, see, 214 S. W. 987. See also, 251 U. S. 549, 40 Sup. Ct. 219, 64 L. Ed. 409. Messrs. Rush Taggart, of New York City, and Francis Raymond Stark, of New York City, for petitioner.

PER CURIAM. Reversed with costs and cause remanded for further proceedings upon the authority of Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. 118; Western Union Telegraph Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. 167, 64 L. Ed. 281.

(255 U. S. 566)

No. 231. The STATE of WASHINGTON ex rel. McPHERSON BROTHERS COMPANY, plaintiff in error, v. DOUGLAS COUNTY and Superior Court of Chelan County, Washington. March 21, 1921. In error to the Supreme Court of the State of Washington. For opinion below, see 108 Wash. 58, 182 Pac. 962. Mr. Peter McPherson, of Brewster, Wash., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (U. S. Comp. St. § 1214).

(255 U. S. 580)

No. 249. Charles W. STEENE et al., plaintiffs in error, v. The UNITED STATES of America. March 21, 1921. In error to the District Court of the United States for the Northern District of New York. For opinion below, see 263 Fed. 130. Mr. Seymour Stedman, of Chicago, Ill., for plaintiffs in error. The Attorney General for the United States. Reversed, on confession of error, and remanded for further proceedings, on motion of Mr. Solicitor General Frierson for the defendant in error.

(255 U. S. 579)

No. 276. The UNITED STATES of America, appellant, v. Francis FAY, alias Fay Yong. March 21, 1921. Appeal from the District

Court of the United States for the Southern District of New York. The Attorney General, for the United States. Dismissed on motion of Mr. Solicitor General Frierson for the appellant.

(255 U. S. 580)

No. 277. The UNITED STATES of America, appellant, v. William CHAN, alias William Shan. March 21, 1921. Appeal from the District Court of the United States for the Southern District of New York. The Attorney General, for the United States. Dismissed on motion of Mr. Solicitor General Frierson for the appellant.

(255 U. S. 575)

No. 726. William G. McADOO, Director General of Railroads, et al., petitioners, v. Neva M. McCOY, Administratrix, etc. March 21, 1921. For opinion below, see 215 S. W. 870. Messrs. Alexander Britton, of Washington, D. C., J. W. Terry, of Galveston, Tex. and A. H. Culwell, of El Paso, Tex. (Mr. Gardiner Lathrop, of Chicago, Ill., of counsel), for petitioners. Messrs. Geo. E. Wallace, Claude B. Hudspeth, and A. J. Harper, all of El Paso, Tex., for respondent. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas denied.

(255 U. S. 575)

No. 732. Thomas H. MATTERS, petitioner, v. The UNITED STATES of America. March 21, 1921. For opinion below, see 261 Fed. 826. Messrs. John Lee Webster and Frank H. Gaines, both of Omaha, Neb., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Roy C. McHenry, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(255 U. S. 576)

No. 743. SOUTHERN PACIFIC COMPANY, petitioner, v. John J. THOMAS, Administrator, etc. March 21, 1921. For opinion below, see 188 Pac. 268. Mr. Francis M. Hartman, of Tucson, Ariz., (Messrs. Wm. F. Herrin and Henly C. Booth, both of San Francisco, Cal., of counsel), for petitioner. Mr. O. T. Richey, of Tucson, Ariz. (Messrs. Richey & Richey, of Tucson, Ariz., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Arizona denied.

(255 U. S. 576)

No. 744. John Barton PAYNE, Agent, etc., petitioner, v. Mrs. Virgie MILLS, Administratrix, etc. March 21, 1921. For opinion below, see Hines v. Mills, 218 S. W. 777. Mr. F. H. Prendergast, of Marshall, Tex., for petitioner. Messrs. Cone Johnson and Jas. M. Edwards, both of Tyler, Tex., for respondent. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied.

(255 U. S. 567)

No. 758. NORTH CAROLINA RAILROAD COMPANY, petitioner, v. Evelyn K. LEE, administratrix, etc. March 21, 1921. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted.

(255 U. S. 576)

No. 759. Edward ANDERSON et al., petitioners, v. The UNITED STATES of America. March 21, 1921. For opinion below, see 269 Fed. 65. Mr. Otto Christensen, of Chicago, Ill., for petitioners. Mr. Robert P. Stewart, Asst. Atty. Gen., and Roy C. McHenry, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(255 U. S. 575)

No. 775. Walker D. HINES, Director General of Railroads, and Missouri Pacific Railroad Co., petitioners, v. H. H. SMITH. March 21, 1921. For opinion below, see 108 Kan. 151, 194 Pac. 318. Messrs. Edw. J. White, of St. Louis, Mo., Jerry South, of Washington, D. C., and W. P. Waggener, of Atchison, Kan., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(255 U. S. 580)

No. 258. The NATIONAL SURETY COMPANY, appellant, v. The COUNTY of LEFLORE in the STATE of MISSISSIPPI. March 23, 1921. Appeal from the District Court of the United States for the Northern District of Mississippi. For opinion below, see 262 Fed. 325. See, also, 253 U. S. 490, 40 Sup. Ct. 583, 64 L. Ed. 1028. Mr. John R. Tyson, of Montgomery, Ala., for appellant. Mr. R. C. McBee, of Greenwood, Miss., for respondent. Dismissed with costs on motion of counsel for appellant.

(255 U. S. 580)

No. 264. Ernest B. DANE, plaintiff in error, v. Charles L. BURRILL. March 24, 1921. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion below, see 125 N. E. 135. Mr. Charles F. Choate, Jr., of Boston, Mass., for plaintiff in error. Mr. William Harold Hitchcock, of Boston, Mass., for defendant in error. Dismissed without costs, per stipulation.

(255 U. S. 566)

No. 212. Frank M. HOY, appellant, v. Franklin K. LANE, Secretary of the Interior; and

No. 213. The UNITED STATES of America ex rel. Edmund O. WATTIS, plaintiff in error, v. Franklin K. LANE, Secretary of the Interior. Appeal from and in error to the Court of Appeals of the District of Columbia. March 28, 1921. For opinions below, see 49 App. D. C. 385, 266 Fed. 1005, 49 App. D. C. 388, 266 Fed. 1008. Mr. Harry A. Hegarty, of Washington, D. C., for appellant. The Attorney General, for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) United States v. Boutwell, 17 Wall. 604, 607, 21 L. Ed. 721; Pullman Co. v. Knott, 243 U. S. 447, 449, 37 Sup. Ct. 428, 61 L. Ed. 841; Shaffer v. Howard, 249 U. S. 200, 201, 39 Sup. Ct. 255, 63 L. Ed. 559; (2) act of February 8, 1899, c. 121, 30 Stat. 822 (Comp. St. § 1594); LeCrone v. McAdoo, 253 U. S. 217, 219, 40 Sup. Ct. 510, 64 L. Ed. 869.

(255 U. S. 581)

No. 379. The UNITED STATES of America, plaintiff in error, v. PEOPLES FUEL & FEED COMPANY. March 28, 1921. In error to the District Court of the United States for the District of Arizona. For opinion below, see 271 Fed. 790. The Attorney General, for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(255 U. S. 581)

No. 408. SULTZBACH CLOTHING COMPANY (Inc.), appellant, v. Stephen T. LOCKWOOD, as United States Attorney for the Western District of New York. March 28, 1921. Appeal from the District Court of the United States for the Western District of New York. For opinion below, see C. A. Weed & Co. v. Lockwood, 264 Fed. 453. Mr. Martin Clark, of Buffalo, N. Y. for the United States. Decree reversed with costs, and cause remanded for further proceedings; on confession of error, on motion of Mr. Solicitor General Frierson for the appellee.

(255 U. S. 581)

No. 486. The UNITED STATES of America, plaintiff in error, v. AMERICAN WOOLEN COMPANY et al. March 28, 1921. In error to the District Court of the United States for the Southern District of New York. For opinion below, see 265 Fed. 404. The Attorney General, for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(255 U. S. 581)

No. 499. SEHON, STEVENSON & COMPANY, plaintiff in error, v. The UNITED STATES of America. March 28, 1921. In error to the District Court of the United States for the Southern District of West Virginia. Messrs. Herbert Fitzpatrick, of Huntington, W. Va., and Malcolm Jackson, of Charleston, W. Va., for plaintiff in error. Mr. L. H. Kelly, U. S. Atty., of Charleston, W. Va., for the United States. Judgment reversed, and cause remanded for further proceedings; on confession of error, on motion of Mr. Solicitor General Frierson for the appellee.

(255 U. S. 582)

No. 688. UNITED STATES of America, plaintiff in error, v. BROOKLYN EDISON COMPANY (Inc.), et al. March 28, 1921. In error to the District Court of the United States for the Southern District of New York. Mr. Francis G. Caffey, of New York City, for the United States. Messrs. Ingraham, Sheehan & Moran, of New York City, for Brooklyn Edison Co. Messrs. Perkins & Train, of New York City, for Walter F. Wells. Messrs. O'Gorman, Battle & Vandiver, and Joseph F. Mulqueen, all of New York City, for Adelphia Coal Co. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(255 U. S. 582)

No. 689. The UNITED STATES of America, plaintiff in error, v. BROOKLYN EDISON COMPANY (Inc.) et al. March 28, 1921. In error to the District Court of the United States for the Southern District of New York. Mr. Francis G. Caffey, of New York City, for the United States. Messrs. Ingraham, Sheehan & Moran, of New York City, for defendant in error. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(255 U. S. 582)

No. 735. The UNITED STATES of America, plaintiff in error, v. BROOKLYN EDISON COMPANY (Inc.), et al. March 28, 1921. In error to the District Court of the United States for the Southern District of New York. Mr. Francis G. Caffey, of New York City, for the United States. Messrs. Ingraham, Sheehan & Moran, of New York City, for Brooklyn Edison Co. Messrs. Perkins & Train, of New York City, for Walter F. Wells. Dismissed, on motion of Mr. Solicitor General Frierson for the plaintiff in error.

(255 U. S. 576)

No. 745. John GILMORE, petitioner, v. The UNITED STATES of America. March 28, 1921. For opinion below, see 268 Fed. 719. Messrs. P. E. Gardner, M. Scarborough, and E. F. Cameron, all of El Paso, Tex., for the United States. Mr. R. P. Stewart, Asst. Atty. Gen., and W. C. Herron, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(255 U. S. 577)

No. 751. BOSTON and MAINE RAILROAD, petitioner, v. The UNITED STATES of America. March 28, 1921. For opinion below, see 269 Fed. 89. Messrs. Archibald R. Tisdale, and George E. Kimball, both of Boston, Mass., for petitioner. Annette Abbott Adams, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(255 U. S. 577)

No. 777. Jessie G. DARROW, petitioner, v. The POSTAL TELEGRAPH-CABLE COMPANY. March 28, 1921. For opinion below, see 250 Fed. 581. Mr. Paul J. Sherwood, of Wilkes-Barre, Pa., for petitioner. Messrs. Reese H. Harris, Walter L. Hill, Charles P. O'Malley and Henry A. Knapp, all of Scranton, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(255 U. S. 576)

No. 774. John Barton PAYNE, as Agent, etc., petitioner, v. Katharine McL. SMITH, administratrix, etc. March 28, 1921. For opinion below, see Hines v. Smith, 270 Fed. 132. Messrs. L. A. Manchester and S. & Conroy, both of Youngstown, Ohio, for petitioner. Messrs. Anderson, Lamb & Osborne, of Youngstown, Ohio, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(255 U. S. 563)

No. 783. Charles W. ANDERSON, Collector of Internal Revenue, petitioner, v. NEW YORK LIFE INSURANCE COMPANY. March 28, 1921. For opinion below, see 269 Fed. 1021. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. Writ of certiorari recalled, and petition for certiorari denied, 256 U. S. 696, 41 Sup. Ct. 536, 65 L. Ed. —.

No. —. original. Ex parte in the matter of The UNITED STATES ("THE WESTERN MAID"), petitioner;

No. —, original. Ex parte in the matter of The UNITED STATES ("THE LIBERTY"), petitioner; and

No. —, original Ex parte in the matter of The UNITED STATES ("THE CAROLINIAN"), petitioner. April 11, 1921. Motions for leave to file petitions for writs of prohibition and/or writs of mandamus herein granted, and rules to show cause awarded returnable on Monday, October 10, next.

(256 U. S. 681)

No. 198. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY et al., plaintiffs in error, v. Hannah L. ZUBER. April 11, 1921. On writ of certiorari to the Supreme Court of the State of Oklahoma. For opinion below, see 76 Okl. 146, 184 Pac. 452, 7 A. L. R. 840. Messrs. Joseph M. Bryson, of St. Louis, Mo., J. R. Cottingham, of Oklahoma City, Okl., and Clifford L. Jackson, of Muskogee, Okl., Samuel W. Hayes, of Oklahoma City, Okl., and Alex. Britton, of Washington, D. C., for plaintiffs in error. Mr. Charles W. Smith, of Topeka, Kan., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Furness-Withy & Co. v. Yang-Tsze Insurance Association, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409; Houston Oil Co. v. Goodrich, 245 U. S. 440, 38 Sup. Ct. 140, 62 L. Ed. 385; (2) California Powder Works v. Davis, 151 U. S. 389, 393, 14 Sup. Ct. 350, 38 L. Ed. 206; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Farson, Son & Co. v. Bird, 248 U. S. 268, 271, 39 Sup. Ct. 111, 63 L. Ed. 233. See writ of error dismissed, February 28, 1921. 255 U. S. 561, 41 Sup. Ct. 322, 65 L. Ed. —.

(256 U. S. 705)

No. 310. J. Q. SMITH, Attorney General of the State of Alabama, et al., appellants, v. WOFFORD OIL COMPANY. April 11, 1921. Appeal from the District Court of the United States for the Middle District of Alabama. For opinion below, see 263 Fed. 396. Mr. Lawrence E. Brown, of Birmingham, Ala., for appellants. Dismissed per stipulation.

No. 572. Charles S. FAIRCHILD, appellant, v. Bainbridge COLBY, Secretary of State of the United States, et al. April 11, 1921. Suggestion of resignation of Bainbridge Colby, as Secretary of State, and A. Mitchell Palmer, as Attorney General, of the United States, and motion to make Charles E. Hughes, as Secretary of State, and Harry M. Daugherty, as Attorney General, of the United States, the parties appellees herein, granted on motion of Mr. Alfred D. Smith for the appellant.

(256 U. S. 689)

No. 752. J. B. FLOWERS et al., petitioners, v. The UNITED STATES of America. April 11, 1921. For opinion below, see Hardy v. United States, 269 Fed. 134. Messrs. W. F. Weeks, of Wichita Falls, Tex., and C. C. McDonald, of Wichita Falls, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(256 U. S. 689)

No. 760. William D. HAYWOOD et al., petitioners, v. The UNITED STATES of America. April 11, 1921. For opinion below see 268 Fed. 795. Messrs. Otto Christensen, of Chicago, Ill., and George F. Vanderveer, of Seattle, Wash., for petitioners. Mr. R. P. Stewart, Asst. Atty. Gen. and W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 689)

No. 763. Ellsworth H. GREEN et al., petitioners, v. The UNITED STATES of America. April 11, 1921. For opinion below, see 266 Fed. 779. Messrs. Ed. S. Vaught and John B. Dudley, both of Oklahoma City, Okl., for petitioners. Mr. Robert P. Stewart, Asst. Atty. Gen. and Mr. Harry S. Ridgely, of Washington, D. C. for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(256 U. S. 690)

No. 764. WAGNER ELECTRIC MANUFACTURING COMPANY, petitioner, v. Lamar LYNDON. April 11, 1921. For opinion below, see 225 S. W. 711. Messrs. Albert Blair, of St. Louis, Mo., Thomas J. Cole, of Joplin, Mo., and Charles A. Houts, of St. Louis, Mo., for petitioner. Messrs. Lawrence C. Kingsland, and John D. Rippey, both of St. Louis, Mo., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(256 U. S. 686)

No. 766. The NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, petitioner, v. David FRUCHTER, an infant, etc.; and

No. 767. The NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, petitioner, v. Sam FRUCHTER. April 11, 1921. For opinion below, see 271 Fed. 419. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(256 U. S. 690)

No. 769. Mary FLACK, Administratrix, etc., petitioner, v. The ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY. April 11.

1921. For opinion below, see 224 S. W. 415. Messrs. John H. Atwood, of Kansas City, Mo. Henry Lamm, of Sedalia, Mo. and Oscar S. Hill, of Kansas City, Mo., for petitioner. Mr. Cyrus Crane, of Kansas City, Mo. (Messrs. George J. Mersereau and John H. Lathrop, both of Kansas City, Mo., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied.

(256 U. S. 690)

No. 772. Charles O'CONNOR et al., petitioners, v. John SLAKER, Acting Administrator, etc., et al. April 11, 1921. For opinion below, see 179 N. W. 401. Mr. James M. Johnson, of Kansas City, Mo. (Messrs. F. P. Olmstead, and J. W. James, both of Hastings, Neb., and James B. O'Connor, Donald W. Johnson and Henri L. Warren, all of Kansas City, Mo., of counsel), for petitioners. Messrs. Sutton, McKenzie, Cox & Harris, of Omaha, Neb., for respondent John F. Kirkman. Burkett, Wilson, Brown & Wilson, of Lincoln, Neb.. for respondents Henry O'Connor and others. Petition for a writ of certiorari to the Supreme Court of the State of Nebraska denied.

(256 U. S. 690)

No. 773. John Barton PAYNE, as Agent, etc., petitioner, v. Matthew FOLEY. April 11 1921. For opinion below, see Foley v. Hines. 119 Me. 425, 111 Atl. 715. Mr. Evans Shelby, of New York City (Mr. Frank M. Libby, of Portland, Me., of counsel), for petitioner. Messrs. R. E. Harvey and W. H. Looney, both of Portland, Me., for respondent. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Maine denied.

(256 U. S. 686)

No. 776. AUDITORE CONTRACTING COMPANY, Inc., et al., petitioners, v. FOREIGN TRADE BANKING CORPORATION. April 11, 1921. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(256 U. S. 690)

No. 787. J. Sidney SMITH, petitioner, v. The UNITED STATES of America. April 11, 1921. For opinions below, see 267 Fed. 665, 269 Fed. 365. Mr. John Lee Webster, of Omaha, Neb., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Roy C. McHenry, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(256 U. S. 691)

No. 788. Charles M. THOMPSON, petitioner, v. The UNITED STATES of America. April 11, 1921. For opinions below, see 267 Fed. 665, 269 Fed. 365. Mr. John Lee Webster, of Omaha, Neb., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and Mr. Roy C. McHenry, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(256 U. S. 691)

No. 789. Clyde A. SMITH, petitioner, v. The UNITED STATES of America. April 11, 1921. For opinions below, see 267 Fed. 665, 269 Fed. 365. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(256 U. S. 691)

No. 825. Edward A. SHEDD et al., petitioners, v. CALUMET CONSTRUCTION COMPANY. April 11, 1921. for opinion below, see 270 Fed. 942. Mr. Fred Barnett, of Hammond, Ind., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 705)

No. 509. Ernest B. DANE, plaintiff in error, v. Fred J. BURRELL, Treasurer, etc. April 14, 1921. In error to the Supreme Judicial Court of the State of Massachusetts. For opinion below, see 236 Mass. 280, 128 N. E. 943. Dismissed with costs, on motion of counsel for the plaintiff in error.

(256 U. S. 208)

FREY & SON, Inc., v. CUDAHY PACKING CO.

(Argued March 16, 1921. Decided April 18, 1921.)

No. 200.

1. Appeal and error 🔑1089(1)—Judgment of reversal by Circuit Court of Appeals affirmed, if any errors assigned well taken.

Where a judgment for plaintiff was reversed by the Circuit Court of Appeals, and plaintiff waived a new trial and consented to the entry of final judgment for defendant, reserving its right of review in the Supreme Court, the judgment must be affirmed, if any of the errors assigned were well taken.

2. Monopolies 🔑17(1)—Agreement or conspiracy to maintain resale prices may be implied from course of dealing or other circumstances.

An agreement, combination, or conspiracy between a manufacturer and jobbers for the maintenance of resale prices contrary to the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830) may be implied from a course of dealing or other circumstances.

3. Monopolies 🔑17(1)—Sales plan, fixing selling prices called to attention of jobbers, etc., who co-operated in carrying it out, held not to establish forbidden combination.

That a manufacturer indicated a sales plan to wholesalers and jobbers, which fixed a price below which the wholesalers and jobbers were not to sell, and called this particular feature of the plan to the attention of the wholesalers and jobbers on many different occasions, and that the great majority of the wholesalers and jobbers expressed no dissent from the plan, but actually co-operated in carrying it out by selling at the prices named, did not alone establish an agreement or combination to maintain resale prices, forbidden by the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830).

4. Appeal and error 🔑1064(1)—Monopolies 🔑28—Error in instruction as to what would constitute violation of Sherman Act held material.

In an action for treble damages under the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), an instruction that, if defendant, a manufacturer, indicated a sales plan to wholesalers and jobbers, which fixed a price below which they were not to sell, and called this particular feature of the plan to their attention on many different occasions, and if the great majority expressed no dissent from the plan, but actually co-operated in carrying it out by selling at the prices named, the jury might reasonably find therefrom that there was an agreement or combination forbidden by the Sherman Act, was materially erroneous.

Mr. Justice Pitney, Mr. Justice Day, and Mr. Justice Clarke, dissenting.

In error to the United States Circuit Court of Appeals for the Fourth Circuit.

Action by Frey & Son, Incorporated, against the Cudahy Packing Company. A judgment for plaintiff was reversed by the Circuit Court of Appeals (261 Fed. 65, 171 C. C. A. 661), and plaintiff brings error. Affirmed.

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*Messrs. Horace T. Smith and Charles Markell, both of Baltimore, Md., for plaintiff in error.

Mr. Gilbert H. Montague, of New York City, for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Alleging the existence of an unlawful contract, combination or conspiracy between the Packing Company, manufacturer of "Old Dutch Cleanser," and various jobbers for the maintenance of resale prices, and relying upon the Sherman Act (chapter 647, 26 Stats. 209 [Comp. St. §§ 8820–8823, 8827–8830]), as interpreted in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. Frey & Son, Incorporated, instituted this action in the District Court of the United States for Maryland to recover threefold damages. Under an elaborate charge the issues were submitted to the jury *210 for determination. Judgment for $2,139 entered (June 22, 1917) upon a verdict for plaintiff was reversed by the Circuit Court of Appeals July 16, 1919 (Cudahy Packing Co. v. Frey & Son, 261 Fed. 65, 171 C. C. A. 661), after decision of United States v. Colgate & Co. (June 2, 1919), 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, and before United States v. Schrader's Son, Inc., 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471. Plaintiff in error reserved its right of review here, waived a new trial and consented to entry of final judgment for the Packing Company. Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322.

[1] The court below concluded "there was no formal written or oral agreement with jobbers for the maintenance of prices," and that, considering the doctrine approved in United States v. Colgate & Co., the District Court should have directed a verdict for the defendant. Other errors by the trial court were assigned and relied upon. If any of them was well taken, we must affirm the final judgment, entered after waiver of new trial and upon consent, as above shown.

[2] It is unnecessary to repeat what we said in United States v. Colgate & Co. and United States v. Schrader's Son, Inc. Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an un-

lawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

[3, 4] Among other things the trial court charged:

> "I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this *211 plan *to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

The recited facts, standing alone (there were other pregnant ones), did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in United States v. Colgate & Co. As given the instruction was erroneous and material.

The judgment below must be
Affirmed.

Mr. Justice PITNEY, with whom concurred Mr. Justice DAY and Mr. Justice CLARKE, dissenting.

I am constrained to dissent from the opinion and judgment of the court. The action was brought by plaintiff in error, in part to recover threefold damages under section 7 of the Sherman Anti-Trust Act of July 2, 1890 (chapter 647, 26 Stat. 209, 210 [Comp. St. § 8829]), because of injuries sustained in its business by reason of an alleged combination or agreement for the maintenance of prices made between the Packing Company and various wholesalers and jobbers in its product known as "Old Dutch Cleanser." The declaration contained a second count, based upon alleged discrimination in violation of the Clayton Act of October 15, 1914 (chapter 323, §§ 2, 4, 38 Stat. 730, 731 [Comp. St. §§ 8835b, 8835d]); but this calls for no special notice. A judgment rendered by the United States District Court upon the verdict of a jury in favor of plaintiff was reversed by the Circuit Court of Appeals (Cudahy Packing Co. v. Frey & Son, 261 Fed. 65, 171 C. C. A. 661), upon the ground that the acts of defendant and its associates amounted to no more than an announcement in advance that *212 customers were expected *to charge prices fixed by defendant upon penalty of refusal to sell to an offending customer, observance of the request by customers generally, and actual enforcement of the penalty by refusing to sell to such customers as failed to maintain the price; and hence that under the decision of this court in United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, there was no ground of recovery under the Anti-Trust Act.

I agree with the court that the Circuit Court of Appeals misapprehended the effect of our decision in the case cited, and that under rules laid down in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 399, 400, 408, 31 Sup. Ct. 376, 55 L. Ed. 502, and United States v. Schrader's Son, Inc., 252 U. S. 85, 99, 40 Sup. Ct. 251, 64 L. Ed. 471, the trial judge was right in submitting the case to the jury.

Notwithstanding its conclusion that the Court of Appeals erred in holding that a verdict ought to have been directed in favor of defendant, the majority holds that the judgment under review here ought to be affirmed, because of supposed error in an instruction given to the jury (a new trial having been waived by plaintiff on consenting to entry of final judgment for the Packing Company by the Circuit Court of Appeals under the practice followed in Thomsen v. Cayser, 243 U. S. 66, 83, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322).

The instruction to which error is attributed related to the question whether a combination between defendant and the wholesalers and jobbers for the purpose of maintaining resale prices had in fact been shown. After referring to the method pursued by defendant in marketing "Old Dutch Cleanser," and stating that under the law defendant could not be held liable under the first count unless it was a party to a contract or combination or conspiracy to fix and maintain prices; that defendant denied it was a party to any such combination, contract, or conspiracy, and insisted it had merely notified the jobbing trade what prices it thought were the lowest at which jobbers would resell its product at sufficient return *213 *to make it worth their while to push the sale of such product; that plaintiff admitted that, with reference to most of the jobbers at least, there was no written and signed agreement on the subject, and none couched in any formal or express terms; but that defendant from time to time had issued circulars to the trade urging the importance of maintaining "uniform and fair jobbing and retail prices and trading provisions" and stating that "any sales by jobbers at special prices would * * * demoralize prices and disturb the entire business in these products," and that "uniformity and equality as to terms, delivery and price is essential. It is therefore required of our distributing agents that they fully co-operate with us in this direction, as per terms, conditions, and prices laid down in our published General Sales List," and that upon bills sent to wholesalers by defendant there was stamped a notice that "All your quotations, bids, sales and invoices for Old Dutch Cleanser either to jobbers, semijobbers, retailers or consumers, should be at a rate not lower than laid down in our published General Sales List"—the trial judge proceeded, as to the particular question whether in fact there was a combination, to speak thus:

> "I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

Passing for the moment the question whether this was legally erroneous, I am unable to find in the record any *214 *basis for attributing error to the trial judge in respect to it, because it was not made the subject of any proper exception. The trial was litigiously contested, defendant having taken no less than 157 exceptions, of which 20 were directed to the charge given to the jury. Among them, however, I can find none that challenges the proposition embodied in the instruction now held to be erroneous, recites either the words or the substance of that instruction, or otherwise fairly identifies it so as to bring it to the attention of the trial judge. Defendant relies upon an exception which reads as follows:

> "I also respectfully except to so much of your honor's charge as indicates that an unlawful contract and combination or conspiracy or understanding is shown where it appears that in the absence of an express obligation some dealer, responding to a suggestion from Cudahy Packing Company, may have sold at the prices mentioned in its literature."

To which the judge responded:

> "All a question of fact for the jury. All I can say on such questions is that the jury, when they come into this jury box, I do not suppose, leave their common sense behind."

There is nothing here to show that the attention of the trial judge either was or ought to have been directed to that part of his charge now held to be erroneous. The exception alleged did not even faintly or approximately express the tenor and effect of that instruction or of any other that was given to the jury; much less did it fairly and distinctly raise a question of law upon this or any other point in the charge.

It is elementary that, in order to lay foundation to review by writ of error the proceedings of the courts of the United States in the trial of common-law actions, the questions of law proposed to be reviewed must be raised by specific, precise, direct, and unambiguous objections, so taken as clearly to afford to the trial judge an opportunity for revising his rulings; and that a bill of exceptions not *215 *fulfilling this test will furnish no support for an assignment of error. To quote from some of the decisions:

> "One object of an exception is to call the attention of the Circuit Judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it would be proper to do so." Beaver v. Taylor, 93 U. S. 46, 55 (23 L. Ed. 797).
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> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases de novo." Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19 (47 L. Ed. 65).
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> "It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify them. * * * In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous." McDermott v. Severe, 202 U. S. 600, 610, 26 Sup. Ct. 709, 713 (50 L. Ed. 1162).
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> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court." United States v. U. S. Fidelity Co., 236 U. S. 512, 529, 35 Sup. Ct. 298, 303 (59 L. Ed. 696).

See, also, Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 348, 39 Sup. Ct. 102, 63 L. Ed. 275; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82, 39 Sup. Ct. 435, 63 L. Ed. 853.

Not only the trial judge, but the opposing party has *216 *rights that one who objects to the course of the proceedings is bound to respect, if he seeks a review by writ of error. To permit the result of a trial to be set at naught because of an objection that has no proper relation to any ruling made unless it be taken in a sense entirely variant from the language expressed by objecting counsel, would render the fair and orderly conduct of a trial impossible and place a premium upon ambiguity and even trickery. Upon the present record, it would be most unjust to the plaintiff, as well as to the trial judge, to call upon the latter, wearied as he must have been in the course of such a trial, to recognize in the one hundred and fifty-fourth objection a challenge of the legal accuracy of an instruction that he had expressed in language so very different.

But, were the instruction duly excepted to, I am unable to assent to the view that it was erroneous. The jury were not told that from the facts recited, if believed, an agreement or combination forbidden by the act of Congress necessarily resulted, but only that from those facts, together with other and undisputed facts that were in evidence, they reasonably might find there was such an agreement or combination. It is settled beyond controversy that an agreement in order to be a violation of the act need not be expressed, but may be "implied from a course of dealing or other circumstances." United States v. Schrader's Son, Inc., 252 U. S. 85, 99, 40 Sup. Ct. 251, 253 (64 L. Ed. 471). And, while naturally it influences the action of the participants, it of course need not be such as to control them in a legal sense. From the very fact that it is a violation of the law it cannot be legally binding; and it is only as a de facto agreement, or understanding, or combination that the conspiracy in restraint of trade need control the conduct of the participants in order that it may constitute a violation of the act.

Reading the criticized instruction in the light of the other parts of the charge, it

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amounted to no more than *telling the jury that if defendant had a sales plan that, if assented to and carried into effect, would constitute a fixing of prices in restraint of interstate trade and commerce, and the particulars of this plan were repeatedly communicated by defendant to the many wholesalers and jobbers with whom it had relations, and if the great majority of them not only did not express dissent from the plan but actually co-operated in carrying it out by themselves adhering to its details; the jury reasonably might infer that they did mutually give assent to the plan, equivalent to an agreement or combination to pursue it. In short, that upon finding many persons, actuated by a common motive, exchanging communications between themselves respecting a plan of conduct and acting in concert in precise accordance with the plan, the jury might find that they had agreed or combined to act as in fact they did act; that their simultaneous pursuit of an identical programme was not a miraculous coincidence, but was the result of an agreement or combination to act together for a common end.

The opinion states no ground upon which the instruction is held to be erroneous; the elaborate brief submitted in behalf of the Packing Company specifies no criticism upon it; and I am unable to discern adequate reason for condemning it. It suggested a perfectly natural and legitimate inference that might be drawn by the jury from the facts in evidence; having included in the recital the very same facts and circumstances, indeed, upon which this court now unanimously holds that the case was for the jury. Concerted action is of the essence of a conspiracy (Pettibone v. United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419), and it is "hornbook law" that, where concerted action is found to exist following an interchange of communication between the actors, it gives ground for a reasonable inference of an agreement to act in concert. Just as the mechanism of a watch affords

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evidence of a design, and *hence of a designer; so a systematic course of action, pursued at one and the same time by many persons and affecting their mutual interests, raises a fair inference of an agreement between them to pursue that course of action. Juries in conspiracy cases are instructed to this effect every day, without disapproval; and it seems to me the permitted inference is in accord with common sense and the ordinary rules by which men's motives and secret understandings are judged from their acts.

I find nothing in the Colgate & Co. decision to support a criticism of the judge's instruction. There the indictment, under the interpretation adopted by the trial court and necessarily accepted by us, failed to charge the making of any agreement, either express or implied, that imported an obligation to observe specified resale prices. This was the very ground of our decision, as was pointed out in the case of Schrader's Son, Inc., 252 U. S. 99, 40 Sup. Ct. 251, 64 L. Ed. 471. Here the state of the evidence, as this entire court now holds, required the trial court to submit to the jury the question of fact whether an agreement to observe the specified resale prices was to be inferred from the course of dealing and other circumstances. The trial judge fairly summarized the pertinent facts and circumstances disclosed by the record regarding the course of dealing between the parties, from which the alleged agreement, combination, or conspiracy in restraint of trade might or might not be inferred, and then, in the clause now criticized, submitted to the jury the question of fact whether one should be inferred. I am unable to see in what respect he failed to conform to correct practice and the decisions of this court; or how, if his instruction was erroneous, a trial judge can correctly submit to a jury the question whether, from a course of dealing and other circumstances, an agreement to fix prices in restraint of trade shall be found.

The circumstances from which the trial judge permitted an inference of conspira-

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cy to be drawn seem to me stronger *than those held sufficient by this court in Thomsen v. Cayser, 243 U. S. 66, 84, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322, where there was no direct proof of the terms of any conference or agreement participated in by the defendants, and the principal evidence consisted of circulars issued and a concerted course of dealing under which certain steamship owners operated their vessels in the trade from New York to South African ports without competing with one another; upon the strength of which the court rejected the suggestion that the circulars and the concerted course of dealing under them were accidental and without premeditation followed by unity in execution. So in Eastern States Lumber Assoc. v. United States, 234 U. S. 600, 607–609, 612, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, there was no express agreement among the retailers to refrain from dealing with the listed wholesalers, nor any penalty for failing to do so. But the court found, in the systematic and periodical circulation of certain confidential information, commonly called black lists, intended to guide the action of the recipients and cause them to withhold patronage from the listed concerns, sufficient evidence of a conspiracy in restraint of trade, saying (234 U. S. 612, 34 Sup. Ct. 954, 58 L. Ed. 1490, L. R. A. 1915A, 788):

> "It is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Here the character of the communications was different; but as evidence, when taken in connection with the concerted action that followed, they have the same tendency to show a conspiracy.

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*Authorities easily might be multiplied, but it is unnecessary. Convinced that the ruling now made, if adhered to, will seriously hamper the courts of the United States in carrying into effect the prohibition of Congress against combinations in restraint of interstate trade, I respectfully dissent from the opinion and judgment of the court.

Mr. Justice DAY and Mr. Justice CLARKE concur in this dissent.

(256 U. S. 201)

PRIVETT et al. v. UNITED STATES et al.

(Argued March 18, 1921. Decided April 18, 1921.)

No. 236.

Judgment 🔑702—United States not concluded by judgment in suit between other parties when suing to cancel Indian's conveyance.

In a suit by the United States to cancel conveyances of lands allotted to a Creek Indian by his heirs on the ground that he left a minor son born after March 4, 1906, and hence that the lands were subject to the restrictions imposed by the proviso of Act May 27, 1908, c. 199, § 9, the United States is not concluded by the judgment in a prior suit between the heirs and one claiming under the conveyances in which it was decided that such minor son was born February 23, 1906, as the United States is suing by virtue of its own interest in maintaining the restriction and safeguarding the Indians in the possession and enjoyment of their allotted lands.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States and others against C. R. Privett and others. A decree for plaintiffs was affirmed by the Circuit Court of Appeals (261 Fed. 351), and defendants appeal. Affirmed.

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*Messrs. Preston C. West and A. A. Davidson, both of Tulsa, Okl., for appellants.

Mr. Assistant Attorney General Garnett, for the United States.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

The United States brought this suit to cancel conveyances made by the heirs of a Creek Indian of land allotted to him as a homestead out of the Creek tribal lands. After answer and hearing the District Court granted the relief sought and the Circuit Court of Appeals affirmed the decree. 261 Fed. 351.

The allottee was an Indian of the half blood and died intestate in 1911 leaving as his heirs a widow, an adult daughter, and a minor son, all of whom were Creek Indians. Thereafter deeds purporting to convey the land to one Privett were executed by the heirs, the deed of the minor son being made by his guardian. These are the conveyances sought to be canceled, and the ground on which they are assailed is that the minor son was born after March 4, 1906, and therefore that the land passed to the heirs subject to the qualification and restriction imposed by a proviso in section 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312, which declares:

> "That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of
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> such issue, during their life or lives, until *April twenty-six, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore

provided for die before April twenty-six, nineteen hundred and thirty-one, the land shall then descend to the heirs," etc.

The minor son is still living, and, if he was born after March 4, 1906, it is conceded that the heirs took the land subject to the qualification and restriction imposed by the proviso (see Parker v. Riley, 250 U. S. 66, 39 Sup. Ct. 405, 63 L. Ed. 847), that there was no removal of the restriction by the Secretary of the Interior, and that the conveyances made by the heirs are void. But it is urged: First, that the evidence produced at the hearing shows that the minor son was born before, and not after, March 4, 1906; and, secondly, that, in any event, it was settled conclusively in a prior suit that he was born February 23, 1906.

The District Court found that the date of the son's birth was April 23, 1906, and the Circuit Court of Appeals acquiesced in that finding without particularly discussing the point in its opinion. The evidence has been examined and in our opinion it amply supports the finding.

The reliance on the decision in the prior suit is ill-founded. That suit was between the heirs and one who was claiming under these conveyances, the United States not being a party, and the decree therein pronounced the conveyances valid. This suit is brought by the United States in virtue of its interest in maintaining the restriction and safeguarding the Indians in the possession and enjoyment of the lands allotted out of the tribal domain. As yet the Indians have not been fully discharged from the guardianship of the United States. "During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for *204 the security of the Indians cannot *be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States." Heckman v. United States, 224 U. S. 413, 437, 32 Sup. Ct. 424, 431 (56 L. Ed. 820). See, also, La Motte v. United States, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. —. "And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. * * * Authority to enforce restrictions of this character is the necessary complement of the power to impose them. It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the government is a stranger can affect its interest." Bowling v. United States, 233 U. S. 528, 534, 535, 34 Sup. Ct. 659, 660 (58 L. Ed. 1080). As the United States is here suing in its own interest, it is in no wise concluded by any matter, whether of fact or law, that may have been adjudged in the prior suit to which it was not a party.

Decree affirmed.

(256 U. S. 205)

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Submitted March 22, 1921. Decided April 18, 1921.)

No. 256.

1. Carriers 🔑32(1)—Government, requesting transportation without contract, implies agreement to pay established rate.

Where the United States requested a railroad company to furnish transportation for men in the military service, and accepted the service without arranging for a different or reduced rate, as it might under Interstate Commerce Act, § 9 (Comp. St. § 8595), it assented to and became obligated to pay the established rate of the carrier under Act July 27, 1866, § 5, less any lawful land grant deduction, and it was error to determine this rate by combining the party rate covering a part only of the distance, and the individual rate for the remainder, and then making any deductions on account of land grants.

2. Carriers 🔑30—Party through rate not on file cannot be made up of party rate on file for part of distance and individual rate for balance.

The rate for through transportation of a party, where the carrier had no through party rate on file, is the individual through rate for each person, not the combination of a party rate, which had been filed, applying to part of the distance, and of the individual rates for the rest of it.

Appeal from the Court of Claims.

Claim by the Atchison, Topeka & Santa Fé Railway Company against the United States. From a judgment dismissing the claim (55 Ct. Cl. 528), claimant appeals. Reversed.

Messrs. Alexander Britton, of Washington, D. C., Gardiner Lathrop, of Chicago, Ill., and Evans Browne, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Davis, for the United States.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

On several occasions in 1914 and 1915 the railway company at the request of the United States furnished *206 *transportation from one state to another for officers and enlisted men in the United States Army. In each instance a through individual rate from the initial point to the destination was in force, and also individual rates to and from intermediate points. In no instance was there a through party rate; but in all there was a party rate for a part only of the distance. This situation was shown in schedules regularly filed and posted under the Interstate Commerce Act. In two instances the transportation was furnished under a contract calling for a special reduced rate for the full trip, and in the others it was furnished without any prior contract or special arrangement. Bills for the transportation—computed in the two instances at the contract rate, and in the others at the through individual rate with appropriate land grant deductions—were presented to the accounting officers, who allowed a part of what was claimed in each bill and disallowed the balance. The company then brought this suit in the Court of Claims to recover the part disallowed and the court, without opinion, sustained the action of the accounting officers.

[1, 2] As to the transportation furnished without a prior contract or special arrangement the accounting officers proceeded on the theory that the collectible rate should be determined by combining the party rate covering a part only of the distance and the individual rate for the remainder and then making any necessary land grant deductions, and not by taking the through individual rate, less any deductions arising from land grants, as claimed by the company. In this we think the accounting officers erred. The service requested and rendered was a through service. The only rate applicable to a like service for others was the through individual rate. By requesting and accepting the service without some special arrangement for a different rate the United States assented to and became obligated to *207 pay that rate. Under a provision *in the Interstate Commerce Act the United States could have arranged with the company for a different and reduced rate, if the company was so disposed (chapter 382, § 9, 25 Stat. 862 [Comp. St. § 8595]); but that was not done. In the absence of such an arrangement, the company's duty to the United States was merely that of serving it at rates no higher than those applied to individuals for like transportation (chapter 278, § 5, 14 Stat. 295), less any lawful land grant deduction. No individual could require that the party rate covering a part only of the distance and the individual rate for the remainder be taken as the through rate, or as the lawful rate for a through service. Neither could the United States do so in the absence of some prior arrangement to that effect. The situation as respects individuals is aptly stated in Conference Ruling No. 268 of the Interstate Commerce Commission, which is as follows:

> "The tariffs of certain carriers provide a 10-party fare from A to B, but no such fare from B to C. Upon inquiry whether it would be legal to ticket a party of 10 from A to C on the basis of the party fare from A to B and the individual fares from B to C, when such combination makes less than the joint through individual fare from A to C: Held, that while a party of 10 acting on their own initiative would have the right to use the party fare from A to B, and to purchase such transportation as is available from B to C, the carriers may not ticket them through from A to C on such a combination, and thus defeat their own published through fare."

The contract under which some of the transportation was furnished called for a rate of $12.80 per man for the full trip, unless that rate should be found to be in excess of the "regular tariff rate," less land grant deductions, in which event the "lower rate" was to govern. The accounting officers proceeded on the theory that the regular tariff rate was to be determined by combining the party rate covering a part only of *208 the distance and the individual *rate for the remainder; and, finding that the rate so constructed, less a land grant deduction, was lower than the contract rate, they rejected the latter and gave effect to the new rate which they had constructed. They proceeded on a mistaken theory. The through individual rate was the only regular tariff rate which was applicable. It, less any land grant deduction, should have been compared with the contract rate ($12.80) and whichever was lower should have been treated as controlling.

The findings relating to the transportation under the contract do not show what the through individual rate was, and therefore the suit cannot be finally determined here.

The judgment is accordingly reversed and the suit is remanded to the Court of Claims with directions to re-examine the company's claim and award a judgment conforming to the views herein expressed.

Judgment reversed.

(256 U. S. 135)

BLOCK v. HIRSH.

(Argued March 3, 1921. Decided April 18, 1921.)

No. 640.

1. Constitutional law 🔑70(1) — Legislative declaration as to existence of conditions entitled to respect.

While a legislative declaration of facts material only as a ground for enacting a rule of law may not be held conclusive by the courts, a declaration by a Legislature concerning public conditions that by necessity and duty it must know is entitled to great respect.

2. Statutes 🔑210—Existence of emergency, justifying passage of rent regulation act, presumed.

The declaration in Act Oct. 22, 1919, § 122, as to the existence of emergencies growing out of the war, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees and accessories, and thereby embarrassing the federal government in the transaction of the public business, was but the statement of a publicly notorious and almost worldwide fact, and the existence of such emergency must be assumed.

3. Eminent domain 🔑13—Landlord and tenant 🔑278½, New, vol. 11A Key-No. Series—Letting of buildings in District of Columbia may be regulated by law.

The letting of buildings in the District of Columbia is clothed with a public interest so great as to justify regulation by law, such as that contained in Act Oct. 22, 1919, tit. 2.

4. Constitutional law 🔑36—Eminent domain 🔑69—Restriction of property rights in land without compensation may be justified by public exigency.

A public exigency will justify the Legislature in restricting property rights in land to a certain extent without compensation.

5. Constitutional law 🔑278(1)—Regulation of leasing of buildings may amount to taking without due process.

As there comes a point at which the police power ceases and leaves only the power of eminent domain, regulations of the letting of buildings may be pressed to a point where they amount to a taking of property without due process of law.

6. Landlord and tenant 🔑278½, New, vol. 11A Key-No. Series—Statute permitting tenant to remain in possession on payment of former rental, as modified by commission, is valid.

As the letting of buildings in the District of Columbia is affected with a public interest, Act Oct. 22, 1919, § 109, allowing tenants to continue in the occupancy of leased buildings, notwithstanding the expiration of the term, at the same rent that they had been paying, unless modified by the commission established by that act, does not unconstitutionally cut down the owner's use of the land, and his right to do what he will with his own, and to make what contracts he pleases, in view of section 106, providing machinery to secure to the landlord a reasonable rent.

7. Constitutional law 🔑70(3) — Wisdom of legislation not concern of courts.

As Act Oct. 22, 1919, tit. 2, regulating letting of buildings in the District of Columbia, is justified by conditions, and the means adopted by Congress have some possible relation to the relief sought, it is no concern of the courts whether those means were the wisest, or whether they may not cost more than they come to, or will effect the desired result.

8. Jury 🔑10—Statute regulating leasing of buildings in District of Columbia not invalid, because denying jury trial.

Act Oct. 22, 1919, tit. 2, regulating the leasing of buildings in the District of Columbia, and permitting tenants to remain in possession after the expiration of the term, on payment of the rent and performance of the conditions fixed by the lease, or as modified by the commission therein established, is not invalid, because denying landlords and tenants a trial by jury on the question of the right to possession, as the suspension of ordinary remedies to secure a speedy and summary administration of the law was a reasonable provision.

Mr. Justice McKenna, the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

In Error to the Court of Appeals of the District of Columbia.

Proceedings by Louis Hirsh against Julius Block, carrying on business under the name of Whites. A judgment for defendant was reversed by the Court of Appeals of the District of Columbia (50 App. D. C. 56, 267 Fed. 614), and defendant brings error. Reversed.

See, also, 254 U. S. 640, 41 S. Ct. 13, 65 L. Ed. —.

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*Mr. Jesse C. Adkins, of Washington, D. C., for plaintiff in error.

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*Mr. William G. Johnson, of Washington, D. C., for defendant in error.

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*Mr. Henry H. Glassie, of Washington, D. C., for the United States, amicus curiæ.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a proceeding brought by the defendant in error, Hirsh, to recover possession of the cellar and first floor of a building on F street in Washington which the plaintiff in error, Block, holds over after the expiration of a lease to him. Hirsh bought the building while the lease was running, and on December 15, 1919, notified Block that he should require possession on December 31 when the lease expired. Block declined to surrender the premises, relying upon the Act of October 22, 1919, c. 80, Title 2 —'District of Columbia Rents'; especially § 109; 41 Stat. 297, 298, 301. That is also the ground of his defence in this Court, and the question is whether the statute is constitutional, or, as held by the Court of Appeals, an attempt to authorize the taking of property not for public use and without due process of law, and for this and other reasons void.

By § 109 of the act the right of a tenant to occupy any hotel (apartment, or 'rental prop- *154 erty,' i. e., any building *or part thereof, other than hotel or apartment, (§ 101,) is to continue notwithstanding the expiration of his term, at the option of the tenant, subject to regulation by the Commission appointed by the act, so long as he pays the rent and performs the conditions as fixed by the lease or as modified by the Commission. It is provided in the same section that the owner shall have the right to possession 'for actual and bona fide occupancy by himself, or his wife, children or dependents * * * upon giving thirty days' notice in writing.' According to his affidavit Hirsh wanted the premises for his own use, but he did not see fit to give the thirty days' notice because he denied the validity of the act. The statute embodies a scheme or code which it is needless to set forth, but it should be stated that it ends with the declaration in section 122 that the provisions of Title 2 are made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarassing the Federal Government in the transaction of the public business. As emergency legislation the Title is to end in two years unless sooner repealed.

[1, 2] No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. Shoemaker v. United States, 147 U. S. 282, 298, 13 Sup. Ct. 361, 37 L. Ed. 170; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 606, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; Prentiss v. Atlantic Coast Line Co., 211 U. S. 210, 227, 29 Sup. Ct. 67, 53 L. Ed. 150; Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230, 40 Sup. Ct. 131, 64 L. Ed. 239. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emer- *155 gency declared by the statute did exist *must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

[3] The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; irrigation, in Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; and mining, in Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30, 32, 36 Sup. Ct. 234, 60 L. Ed. 507, and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See, also, Noble State Bank v. Haskell, 219 U. S. 104, 110, 111, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

[4, 5] The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hun- *156 dred feet. Welch v. *Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923. Safe pillars may be required in coal mines. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713. Billboards in cities may be regulated. St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599. Watersheds in the country may be kept clear. Perley v. North Carolina, 249 U. S. 511, 39 Sup. Ct. 357, 63 L. Ed. 735. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is

necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law. Martin v. District of Columbia, 205 U. S. 135, 139, 27 Sup. Ct. 440, 51 L. Ed. 743.

[6] Perhaps it would be too strict to deal with this case as concerning only the requirement of thirty days' notice. For although the plaintiff alleged that he wanted the premises for his own use the defendant denied it and might have prevailed upon that issue under the act. The general question to which we have adverted must be decided, if not in this then in the next case, and it *157 should *be disposed of now. The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since Munn v. Illinois, 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. See Wilson v. New, 243 U. S. 332, 345, 346, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Fort Smith & Western R. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

Machinery is provided to secure to the landlord a reasonable rent. Section 106. It may be assumed that the interpretation of 'reasonable' will deprive him in part at least of the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property—of a part of the value of his property as defined in International Harvester Co. v. Kentucky, 234 U. S. 222, 34 Sup. Ct. 853, 58 L. Ed. 1284; Southern Ry. Co. v. Greene, 216 U. S. 400, 414, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy and is tradition- *158 al in English law. If the tenant *remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

[7] Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world, is futile or has no reasonable relation to the relief sought. Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U. S. 549, 569, 31 Sup. Ct. 259, 55 L. Ed. 328.

[8] The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent. The plaintiff obtained a judgment on the ground that the statute was void, root and branch. That judgment must be reversed.

Judgment reversed.

Mr. Justice McKENNA, dissenting.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, *159 and I dissent from the opinion *and judgment of the court. The grounds of dissent are the explicit provisions of the Constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions and, we think, would require no expression but for the opposition of those whose judgments challenge attention.

The national government by the Fifth Amendment to the Constitution, and the states by the Fourteenth Amendment, are forbidden to deprive any person of "life, liberty, or property, without due process of law." A further provision of the Fifth Amendment is that private property cannot be taken for public use, without just compensation. And there is a special security to contracts in section 10 of article 1 in the provision that "No state shall * * * pass any * * * law impairing the obligation of contracts. * * *" These provisions are limitations upon the national legislation, with which this case is concerned, and limitations upon state legislation with which Marcus Brown Holding Co. v. Feldman et al., 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. —, is concerned. We shall more or less consider the cases together, as they were argued and submitted on the same day and practically depend upon the same principles, and what we say about one applies to the other.

The statute in the present case is denominated the "Rent Law" and its purpose is to permit a lessee to continue in possession of leased premises after the expiration of his term against the demand of his landlord, and in direct opposition to the covenants of the lease, so long as he pays the rent and performs the conditions as fixed by the lease or as modified by a commission created by the statute. This is contrary to every conception of leases that the world has ever entertained, and of the reciprocal rights and obligations of lessor and lessee.

As already declared, the provisions of the Constitution seem so direct and definite as to need no reinforcing words and to leave no other inquiry than does the statute under *160 *review come within their prohibition. It is asserted, that the statute has been made necessary by the conditions resulting from the "Imperial German war." The thought instantly comes that the country has had other wars with resulting embarrassments, yet they did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power. Constitutional restraints were increased, not diminished. However, it may be admitted that the conditions presented a problem and induced an appeal for government remedy. But we must bear in mind that the Constitution is, as we have shown, a restraint upon government, purposely provided and declared upon consideration of all the consequences of what it prohibits and permits, making the restraints upon government the rights of the governed. And this careful adjustment of power and rights makes the Constitution what it was intended to be and is, a real charter of liberty, receiving and deserving the praise that has been given it as "the most wonderful work ever struck off at any given time by the brain and purpose of man." And we add that more than a century of trial "has certainly proven the sagacity of the constructors, and the stubborn strength of the fabric."

The "strength of the fabric" cannot be assigned to any one provision, it is the contribution of all, and therefore it is not the expression of too much anxiety to declare that a violation of any of its prohibitions is an evil—an evil in the circumstance of violation, of greater evil because of its example and malign instruction. And against the first step to it this court has warned, expressing a maxim of experience: "Withstand beginnings." Boyd v. United States, 116 U. S. 616, 635, 6 Sup. Ct. 524, 29 L. Ed. 746. Who can know to what end they will conduct?

The facts of this litigation point the warning. Recurring to them, we may ask: Of what concern is it to the public health or the operations of the federal government as *161 to who *shall occupy a cellar and a room above it for business purposes in the city of Washington? (the question in this case); and why is it the solicitude of the police power of the state of New York to keep from competition an apartment in the city of New York? (the question in the other case). The answer is to supply homes to the homeless. It does not satisfy. If the statute keeps a tenant in, it keeps a tenant out; indeed, this is its assumption. Its only basis is that tenants are more numerous than landlords and that in some way this disproportion, it is assumed, makes a tyranny in the landlord, and an oppression to the tenant, notwithstanding the tenant is only required to perform a contract entered into, not under the statute, but before the statute, and that the condition is remedied by rent fixing—value adjustment—by the power of the government. And this, it is the view of the opinion, has justification because "space in Washington is limited" and "housing is a necessary of life." A causative and remedial relation in the circumstances we are unable to see. We do see that the effect and evil of the statute is that it withdraws the dominion of property from its owner, superseding the contracts that he confidently made under the law then existing and subjecting them to the fiat of a subsequent law.

If such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government? Who supplies them, and upon what inducement? And when supplied may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?

An affirmative answer seems to be the requirement of the decision. If the public interest may be concerned, as in the statute under review, with the control of any *162 form *of property, it can be concerned with the control of all forms of property. And, certainly, in the first instance, the necessity or expediency of control must be a matter of legislative judgment. But, however, not to go beyond the case—if the public interest can extend a lease it can compel a lease; the difference is only in degree and boldness. In one as much as in the other, there is a violation of the positive and absolute right of the owner of the property. And it would seem, necessarily, if either can be done, unoccupied houses or unoccupied space in occupied houses can be appropriated. The efficacy of either to afford homes for the homeless cannot be disputed. In response to an inquiry from the bench counsel replied that the experiment had been tried or was being tried in a European country. It is to be remembered, that the legality of power must be estimated not by what it will do but by what it can do.

The prospect expands and dismays when we pass outside of considerations applicable to the local and narrow conditions in the District of Columbia. It is the assertion of the statute that the federal government is embarrassed in the transaction of its business, but, as we have said, a New York statute is submitted to us and counsel have referred to the legislation of six other states. And there is intimation in the opinion that Congress in its enactment has imitated the laws of other countries. The facts are significant and suggest the inquiry, have conditions come not only to the District of Columbia embarrassing the federal government, but to the world as well, that are not amenable to passing palliatives, and that Socialism, or some form of Socialism, is the only permanent corrective or accommodation? It is indeed strange that this court, in effect, is called upon to make way for it and, through an instrument of a Constitution based on personal rights, and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for *163 their destruc*tion. The inquiry occurs, have we come to the realization of the observation that "War unless it be fought for liberty is the most deadly enemy of liberty."

But passing that, and returning to the Constitution, it will be observed, as we have said, that its words are a restraint upon power, intended as such in deliberate persuasion of its wisdom as against unrestrained freedom.

And it is significant that it is not restraint upon a "'governing one,'" but restraint upon the people themselves, and in the persuasion, to use the words of one of the supporters of the Constitution, "the natural order of things is for liberty to yield and for government to gain ground." Sinister interests, its conception is, may move government to exercise; one class may become dominant over another, and against the tyranny and injustice that will result, the framers of the Constitution believed precautions were as necessary as against any other abuse of power. And so careful is it of liberty that it protects in many provisions the individual against the magistrate.

Has it suddenly become weak—become not a restraint upon evil government, but an impediment to good government? Has it become an anachronism, and is it to become "an archæological relic," no longer to be an efficient factor in affairs but something only to engage and entertain the studies of antiquarians? Is not this to be dreaded—indeed, will it not be the inevitable consequence of the decision just rendered? Let us see what it justifies, and upon what principle! But first and preliminary to that inquiry are the provisions it strikes down. We have given them, but we repeat them. By article 1 of section 10 it is provided "No state shall * * * pass any * * * law impairing the obligation of contracts. * * *" By the Fifth Amendment no person can be deprived of property without due process of law. The prohibitions need no strengthening comment. They are as absolute as axioms. A contract *164 existing, its obligation is impreg*nable. The elements that make a contract or its obligation we need not consider. The present case is concerned with a lease, and that a lease is a contract we do not pause to demonstrate either to lawyers or to laymen, nor that the rights of the lessor are the obligations of the lessee, and, of course, the rights of the lessee are the obligations of the lessor—the mutuality constituting the consideration of the contract—the inducement to it and its value, no less to the lessee than to the lessor.

What were the rights and obligations in the present case and what was the right of Hirsh to control his property? Hirsh is the purchaser of a lot in the city of Washington; Block is the lessee of the lot, and he agreed that at the end of his tenancy he would surrender the premises, and this, and "each and every one of the covenants, conditions and agreements," he promised "to keep and perform." Hirsh at the end of the term demanded possession. It was refused and against this suit to recover possession there was pleaded the statute. The defense prevailed in the trial court; the statute was declared unconstitutional in the Court of Appeals. It is sustained by the decision just announced.

It is manifest, therefore, that by the statute the government interposes with its power to annul the covenants of a contract between two of its citizens and to transfer the uses of the property of one and vest them in the other. The interposition of a commission is but a detail in the power exerted—not extenuating it in any legal sense. Indeed, intensifies its illegality, takes away the right to a jury trial from any dispute of fact.

If such power exist what is its limit and what its consequences? And by consequences we do not mean who shall have a cellar in the city of Washington or who shall have an apartment in a million-dollar apartment house in the city of New York, but the broader consequences of unrestrained power and *165 its exertion against property, having *example in the present case, and likely to be applied in other cases. This is of grave concern. The security of property next to personal security against the exertions of government is of the essence of liberty. They are joined in protection, as we have shown, and both the national government (Fifth Amendment) and the states (Fourteenth Amendment) are forbidden to deprive any person "of life, liberty or property, without due process of law," and the emphasis of the Fifth Amendment is that private property cannot be "taken for public use, without just compensation." And in recognition of the purpose to protect property and the rights of its owner from governmental aggression, the Third Amendment provides:

> "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

There can be no conception of property aside from its control and use, and upon its use depends its value. Branson v. Bush, 251 U. S. 182, 187, 40 Sup. Ct. 113, 64 L. Ed. 215. Protection to it has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. Chicago, Burlington, etc., R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. Our social system rests largely upon its sanctity, "and that state or community which seeks to invade it will soon discover the error in the disaster which follows." City of Knoxville v. Knoxville Water Co., 212 U. S. 1, 18, 29 Sup. Ct. 148, 154 (53 L. Ed. 371).

There is not a contention made in this case that this court has not pronounced untenable. An emergency is asserted as a justification of the statute and the impairment of the contract of the lease. A like contention was rejected in Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. It is there declared (4 Wall. 120, 18 L. Ed. 281) "that the principles of constitutional liberty would be in peril, unless established by irrepealable law." And it was said that "the Constitution of the United States is a law for rulers and *166 people, equally in war *and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

But what is the power that is put in opposition to the Constitution and supersedes its prohibitions? It is not clear from the opinion what it is. The opinion gives to the police power a certain force but its range is not defined. Circumstances, it is said, "have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law" though at other times and places such letting may be only of private concern; and the deduction is justified, it is said, by analogy to the business of insurance, the business of irrigation and the business of mining. German Alliance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174. It is difficult to handle the cases or the assertion of what they decide. An opposing denial is only available.

To us the difference is palpable between life insurance and the regulation of its rates by the state and the exemption of a lessee from the covenants of his lease with the approval of the state, in defiance of the rights of the lessor. And as palpably different is the use of water for mining or irrigation or manufacturing, and eminent domain exercised for the procurement of its means with the requirement of compensation, and as palpably different is eminent domain, with attendant compensation, exercised for railways and other means for the working of mines.

And there is less analogy in laws regulating the height of buildings in business sections of a city; or the requirement of boundary pillars in coal mines to safeguard the employés of one in case the other should be abandoned and allowed to fill with water; *167 or the regulation of billboards *in cities on account of their menace to morality, health and decency (in what way it is not necessary to specify); or the keeping clear of watersheds to protect the water reservoirs of cities from damage or devastating fires or the peril of them, from accumulation of "tree tops, boughs and lops" left upon the ground.[1]

The cases and their incidents hardly need explanatory comment. They justify the prohibition of the use of property to the injury of others, a prohibition that is expressed in one of the maxims of our jurisprudence. Such use of property is, of course, within the regulating power of government. It is one of the objects of government to prevent harm by one person to another by any conduct.

The police power has some pretense for its invocation. Regarding alone the words of its definition, it embraces power over everything under the sun, and the line that separates its legal from its illegal operation cannot be easily drawn. But it must be drawn. To borrow the illustration of another, the line that separates day from night cannot be easily discerned or traced, yet the light of day and the darkness of night are very distinct things. And as distinct in our judgment is the puissance of the Constitution over all other ordinances of power, and as distinct are the cited cases from this case, and if they can bear the extent put upon them, what extent can be put upon the case at bar or upon the limit of the principle it declares? It is based upon the insistency of the public interest and its power. As we understand, the assertion is, that legislation can regard a private transaction as a matter of public interest. It is not possible to express the possession or exercise of more unbounded or irresponsible power. It is *168 true in mitigation of this declara*tion and of the alarm that it causes it is said that the regard is not necessarily conclusive on the courts, but "is entitled at least, to great respect." This is intangible to measurement or brief answer. But we need not beat about in generalities or grope in their indetermination in subtle search for a test of a legal judgment upon the conditions, or the power exerted for their relief. The "Rent Law" is brought to particularity by the condemnation of the Constitution of the United States. Call it what you will—an exertion of police or other power—nothing can absolve it from illegality. Limiting its duration to two years certainly cannot. It is what it does that is of concern. Besides, it is not sustained as the expedient of an occasion, the insistence of an emergency, but as a power in government over property based on the decisions of this court whose extent and efficacy the opinion takes pains to set forth and illustrate. And as a power in government, if it exist at all, it is perennial and universal and can give what duration it pleases to its exercise, whether for two years or for more than two years. If it can be made to endure for two years, it can be made to endure for more. There is no other power that can pronounce the limit of its duration against the time expressed in it and its justification practically marks the doom of the judicial judgment on legislative action.

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[1] Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 91 L. Ed. 923; Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599; Perley et al. v. State of North Carolina, 249 U. S. 510, 39 Sup. Ct. 357, 63 L. Ed. 735.

The wonder comes to us, what will the country do with its new freedom? Contracts and the obligation of contracts are the basis of life and of all its business, and the Constitution, fortifying the conventions of honor, is their conserving power. Who can foretell the consequences of its destruction or even question of it? The case is concerned with the results of the German war and we are reminded thereby that there were contracts made by the national government in the necessity or solicitude of the conduct of the war—contracts into which patriotism eagerly entered, but, it may be, that interest was entic- *169 ed by the promise of exemp*tion from a burden of government. Burdens of government are of the highest public interest, and their discharge is of imperious necessity. Therefore, the provocation or temptation may come to those who feel them that the property of others (estimated in the millions, perhaps) should not have asylum from a share of the load. And what answer can be made to such demand within the principle of the case now decided? Their promises are as much within the principle as the lease of Hirsh is, for necessarily, if one contract can be disregarded in the public interest every contract can be; patriotic honor may be involved in one more than in another but degrees of honor may not be attended to—the public interest regarded as paramount. At any rate, does not the decision just delivered cause a dread of such result and take away assurance of security and value from the contracts and their evidences? And it is well to remember that other exigencies may come to the government making necessary other appeals. The government can only offer the inducement and security of its bonds, but who will take them if doubt can be thrown upon the integrity of their promises under the conception of a public interest that is superior to the Constitution of the United States?

It comes to our recollection also that some states of the Union, in consummation of what is conceived to be a present necessity, have also entered into contracts of like kind. They, too, may come under a subsequent declaration of an imperious public interest and their promises be made subject to it.

The prophecy is not unjustified. This court has at times been forced to declare particular state laws void for their attempted impairment of the obligation of contracts. To accusations hereafter of such an effect of a state law this decision will be opposed, and the conception of the public interest.

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*Indeed, we ask, may not the state have other interests besides the nullification of contracts, and may its police power be exerted for their consummation? If not, why not? Under the decision just announced, if one provision of the Constitution may be subordinated to that power, may not other provisions be? At any rate, the case commits the country to controversies, and their decision, whether for the supremacy of the Constitution or the supremacy of the power of the states, will depend upon the uncertainty of judicial judgment.

(256 U. S. 170)

MARCUS BROWN HOLDING CO., Inc., v. FELDMAN et al.

(Argued March 3 and 7, 1921. Decided April 18, 1921.)

No. 731.

1. Constitutional law 🔑170—Landlord and tenant 🔑278½, New, vol. 11A Key-No. Series—Statutes suspending remedies to recover possession of leased dwellings do not impair obligation of contracts.

Laws N. Y. 1920, cc. 942, 947, prohibiting the maintenance of actions to recover possession of real property occupied for dwelling purposes in a city with a population of 1,000,000, etc., except on certain grounds, until November 1, 1922, do not impair the obligation of existing leases, in violation of Const. art. 1, § 10, as contracts are made subject to the exercise of the power of the state, when otherwise justified, as this is.

2. Constitutional law 🔑249—Statute suspending remedies to recover possession of leased dwellings in certain cities not unconstitutionally discriminatory.

Laws N. Y. 1920, cc. 942, 947, prohibiting, until November 1, 1922, actions to recover possession of real property occupied for dwelling purposes in a city of 1,000,000 or more, or a city in an adjoining county, except on certain grounds, is not discriminatory, in violation of Const. Amend. 14, in respect of the cities affected, or because of the exclusion of buildings occupied for business purposes, hotel property, buildings in course of erection, etc., in view of the fact that the evil to be met was the pressing want of shelter in certain crowded centers, and in view of the unknown cost of completing buildings in course of erection and the need to encourage such structures.

3. Constitutional law 🔑83(2)—Landlord and tenant 🔑124(1), 125(1)—Statute making failure to furnish agreed service criminal does not violate Thirteenth Amendment.

Laws N. Y. 1920, c. 951, making it a misdemeanor for a lessor or any agent or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper or customary use of the building, does not violate Const. Amend. 13, since the services in question are not strictly personal services, but are analogous to services that under the old law might issue out of or be attached to land.

Mr. Justice McKenna, the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Marcus Brown Holding Company, Incorporated, against Marcus Feldman and others. From a decree dismissing the bill (269 Fed. 306), plaintiff appeals. Affirmed.

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*Mr. Joseph A. Seidman, of New York City, for appellant.

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*Mr. David L. Podell, of New York City, for appellees.

Mr. William D. Guthrie, of New York City, for the Attorney General of New York, amicus curiæ.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the Marcus Brown Holding Company, the appellant, owner of a large apartment house in the city of New York, against the tenants of an apartment in the house and the District Attorney of the County of New York. The tenants are holding over after their lease has expired, which it did on September 30, 1920, claiming the right to do so under Chapters 942 and 947 of the Laws of New York of 1920. The object of the bill is to have these and other connected laws declared unconstitutional. The District Attorney is joined in order to prevent his enforcing by criminal proceedings Chapters 131 and 951 of the acts of the same year, which make it a misdemeanor for the lessor or any *197 agent *or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper or customary use of the building. The case was heard in the District Court by three judges upon the bill, answer, affidavits and some public documents, all of which may be summed up in a few works. The bill alleges at length the rights given to a lessor by the common law and statutes of New York before the enactment of the statutes relied upon by the tenants, a covenant by the latter to surrender possession at the termination of their lease, and due demand, and claims protection under Article 1, Section 10 and the Fourteenth Amendment of the Constitution of the United States. An affidavit alleges that before the passage of the new statutes another lease of the premises had been made, to go into effect on October 1, 1920. The answer of the tenants relies upon the new statutes and alleges a willingness to pay a reasonable rent and any reasonable increase as the same may be determined by a court of competent jurisdiction. It also alleges that they made efforts to obtain another suitable apartment but failed. The District Attorney moved to dismiss the bill. The judges considered the case upon the merits, upheld the laws and ordered the bill to be dismissed.

By the above mentioned Chapters 942 and 947, a public emergency is declared to exist and it is provided by Chapter 947 that no action "shall be maintained to recover possession of real property in a city of a popula-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, * * * or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein *198 for the im*mediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building. * * *" The earlier Chapter 942 is similar with some further details. Both acts are to be in effect only until November 1, 1922. It is unnecessary to state the provisions of Chapter 944 for disputes as to what is a reasonable rent. They are dealt with in the decisions of the Court of Appeals cited below and in Edgar A. Levy Leasing Co., Inc., v. Siegel, 130 N. E. 923, March 8, 1921, by the same Court. In this as in the previous case of Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. ——, we shall assume in accordance with the statutes, the finding of the Court below and of the Court of Appeals of the State, in People ex rel. Durham Realty Corporation v. La Feltra, 230 N. Y. 429, 130 N. E. 601, March 8, 1921, and Guttag v. Shatzkin, 130 N. E. 929, March 8, 1921, that the emergency declared exists. Hebe Co. v. Shaw, 248 U. S. 297, 303, 39 Sup. Ct. 125, 63 L. Ed. 255; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 607, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008.

[1,2] The chief objections to these acts have been dealt with in Block v. Hirsh. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. Manigault v. Springs, 199 U. S. 473, 480, 26 Sup. Ct. 127, 50 L. Ed. 274; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 482, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 76, 77, 35 Sup. Ct. 678, 59 L. Ed. 1204; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 375, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; Producers Transportation Co. v. Railroad Commission of California, 251 U. S. 228, 232, 40 Sup. Ct. 131, 64 L. Ed. 239. It is said too that the laws are discriminating, in respect of the cities affected and the character of the buildings, the laws not extending to buildings occupied for business purposes, hotel property or buildings now in course of erection, etc. *199 *But as the evil to be met was a very pressing want of shelter in certain crowded centers the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list.

[3] It is objected finally that Chapter 951, above stated, in so far as it required active services to be rendered to the tenants is void on the rather singular ground that it infringes the Thirteenth Amendment. It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to land. We perceive no additional difficulties in this statute, if applicable as assumed. The whole case was well discussed below and we are of opinion that the decree should be affirmed.

Decree affirmed.

Mr. Justice McKENNA, The CHIEF JUSTICE, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS dissent.

This case was submitted with Block, etc., v. Hirsh, No. 640, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. ——.

Like that case it involves the right of a lessee of property—in this case an apartment in an apartment house in New York City, to retain possession of it under a law of New York after the expiration of the lease. This case is an emphasis of the other, and the argument in that applies to this. It may be *200 more directly applica*ble for in this case the police power of the state is the especial invocation and the court's judgment is a concession to it. And, as we understand, the opinion, in broader and less hesitating declaration of the extent of the potency of that power. "More emphasis," it is said, "is laid upon the impairment of the obligation of the contract," than in the Hirsh Case. In measurement of this as a reliance, it is said:

> "But contracts are made subject to this exercise of the power of the State *when otherwise justified as we have held this to be.*"

The italics are ours and we estimate them by the cases that are cited in their explanation and support. We are not disposed to a review of the cases. We leave them in reference, as the opinion does, with the comment that our deduction from them is not that of the opinion. There is not a line in any of them that declares that the explicit and definite covenants of private individuals engaged in a private and personal matter are subject to impairment by a state law, and we submit, as we argued in the Hirsh Case, that if the state have such power—if its power is superior to article 1, § 10, and the Fourteenth Amendment, it is superior to every other limitation upon every power expressed in the Constitution of the United States, commits rights of property to a state's unrestrained conceptions of its interests, and any question of them—remedy against them—is left in such obscurity as to be a denial of both. There is a concession of limitation but no definition of it, and the reasoning of the opinion, as we understand it, and its implications and its incident, establish practically unlimited power.

We are not disposed to further enlarge upon the case or attempt to reconcile the explicit declaration of the Constitution against the power of the state to impair the obligations of a contract or, under any pretense, to disregard the declaration. It is safer, saner, and more consonant with constitutional

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pre-eminence and its pur*poses to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, or bend it to some impulse or emergency "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." Northern Securities Co. v. United States, 193 U. S. 197, 400, 24 Sup. Ct. 436, 468 (48 L. Ed. 679).

We therefore dissent.

(256 U. S. 222)

NICKEL et al. v. COLE, State Controller.

SAME v. STATE OF NEVADA.

(Argued March 24, 1921. Decided April 25, 1921.)

Nos. 268, 269.

1. Courts 🔑394(18)—State court's construction of transfer sought to be taxed followed, when not adopted to evade constitutional issue.

Where a state statute imposing a tax on transfers was passed before the execution of a will and a deed of trust conveying stock in trust for the grantor for life and after his death for others, and might have been construed so as to tax such transaction, the decision of the state court holding the transfer subject to tax, based upon its construction of the transfer, and not on grounds having relation to any federal question will be accepted by the federal Supreme Court, whether right or wrong, when not adopted in order to evade a constitutional issue.

2. Constitutional law 🔑229(1), 283—Taxation 🔑859(1)—Transfer tax act not invalid, if construed to apply to transfer in trust after passage.

St. Nev. 1913, c. 266, imposing a tax on transfers in contemplation of death, etc., infringes no rights under Const. U. S. Amend. 14, if construed to apply to a will and a deed of trust executed after its passage, but before its taking effect, and transferring stock in trust for the grantor for life and for others after his death.

Mr. Justice McKenna dissenting.

In Error to the Supreme Court of the State of Nevada.

Suit by George A. Cole, as State Controller of the State of Nevada, against J. Leroy Nickel and another, as trustees, etc., and others; also suit by Nellie Miller Nickel and another, as trustees, etc., and others, against the State of Nevada. Judgments for plaintiff in the first suit, and defendant in the second suit, were affirmed by the Supreme Court of Nevada (Nickel v. State, 43 Nev. 12, 177 Pac. 409, 185 Pac. 565), and the other parties bring error and petition for certiorari. Judgments affirmed, and writs of certiorari denied.

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*Messrs. Edward F. Treadwell, of San Francisco, Cal., and Azro E. Cheney, of Reno, Nev., for plaintiffs in error.

Mr. Leonard B. Fowler, of Carson City, Nev., for defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

The first of these suits was brought by the Controller of Nevada to collect a transfer tax alleged to be due under a statute of Nevada approved on March 26, 1913, to take effect thirty days from that date. Nevada Stats. of 1913, c. 266, p. 411. The second suit was brought to quiet title to the shares of stock in respect of which the tax was assessed—to establish that there was no lien upon or claim against them for the tax. The

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two cases were *heard together in the state courts and here upon the same facts. The Supreme Court of Nevada held that the tax was due and decided in favor of the State. The parties on the other side had set up and claimed immunity under the Constitution of the United States, especially the Fourteenth Amendment, and brought the cases here by writ of error. By way of caution they also filed a petition for certiorari which has not yet been passed upon by this Court.

The facts are these: Henry Miller, a resident of California, was the owner of 119,875.75 shares of the stock of Miller & Lux, Incorporated, a Nevada corporation. Miller & Lux, Incorporated, owned the stock of the Pacific Live Stock Company, a California corporation, and the latter owned real estate and personal property in Nevada appraised at $1,431,326.86. On April 17, 1913, after the above mentioned statute had been passed but before it went into operation, Miller in California made a will, and at the same time a deed of trust conveying his stock to the plaintiffs in error, in trust for himself for life and after his death upon limitations similar to those in his will—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. The deed contained no power of revocation. The stock was endorsed and delivered to the trustees and thereafter was retained by them. Miller died on October 14, 1916. The statute imposes a tax upon the transfer of all property which shall pass in trust or otherwise by will or by statutes of inheritance or by deed or gift made without valuable and adequate consideration in contemplation of the death of the grantor or donor, or to take effect in possession or enjoyment at or after such death.

The plaintiffs in error admit that if the statute had been in operation at the time of the transfer the tax would have been due, so that it is not necessary to go into further particulars about the act. But they say that

the *interest of the remaindermen after the death of Miller vested upon the execution of the deed and that therefore the statute did not apply to them, and could not do so consistently with the Constitution of the United States.

[1, 2] We shall not discuss the postulate of the argument for the plaintiffs in error—the notion that a tax upon transfers imposed by a statute passed after the transfers had taken place would be void. In this case the statute was passed before the date of the deed of trust and therefore undeniably could have been drawn so as to tax the transaction. Reading as it did it possibly might have been construed as doing so, notwithstanding the postponement of the date for its going into operation, and so construed would have been good as against constitutional objections.

But the plaintiffs in error say that what we pronounce possible is not what the Supreme Court of Nevada did. The Supreme Court of Nevada seems to have conceded that if the interest of those who took upon Miller's death was vested when the deed was delivered the statute did not and perhaps could not apply. They reached the result by holding that the execution of the deed and will was one transaction and gave no vested right until Miller's death. Thereupon the plaintiffs in error say that the above limitation to the statute being admitted the State Court could not avoid the supposed constitutional difficulty by assuming a view of the instrument that is deemed to be plainly untenable as held by the Chief Justice dissenting, and contrary to the law of California where the parties lived and the transfer was made. Nickel v. State, 179 Cal. 126, 175 Pac. 641. But the answer to this is that when as here there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. Enterprise

*Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644. And when, as here, the statute unquestionably might have made the tax applicable to this transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. "As there was state power to tax * * * the question whether or not the * * * interest [of the plaintiffs in error] under the circumstances was correctly subjected to the tax was a purely state question." Moffitt v. Kelly, 218 U. S. 400, 405, 31 Sup. Ct. 79, 81 (54 L. Ed. 1086, 30 L. R. A. [N. S.] 1179). The plaintiffs in error contend that this Court is "concerned * * * solely with the effect and operation of the law as put in force by the State." Corn Products Refining Co. v. Eddy, 249 U. S. 427, 432, 39 Sup. Ct. 325, 326 (63 L. Ed. 689). The operation of the law if construed to cover this case infringes no constitutional rights.

Judgments affirmed.

Writs of certiorari denied.

Mr. Justice McKENNA dissents.

Mr. Justice CLARKE took no part in the decision of this case.

(256 U. S. 232)

NEWBERRY et al. v. UNITED STATES.

(Argued Jan. 7 and 10, 1921. Decided May 2, 1921.)

No. 559.

1. **United States 🔑11—Congress has no power to regulate election of Senators and Representatives, except that given to regulate manner of holding elections.**

That the offices of Senator and Representative were created by the Constitution gives Congress no power over elections to such offices, other than that conferred by Const. art. 1, § 4, providing that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed by the state Legislature, but that Congress may make or alter such regulations.

2. **Elections 🔑11—"Election," which may be regulated by Congress, defined.**

In view of Const. art. 1, §§ 2, 3, providing for the choosing of Senators and Representatives, the "elections," which Congress is authorized to regulate by section 4, meant when the Constitution was adopted, and under the Seventeenth Amendment still means, the final choice of an officer by the duly qualified electors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Election.]

3. **Constitutional law 🔑48—Exercise of power no proof of existence.**

Attempts by Congress to exercise power to regulate primary elections at which candidates for the offices of Senator and Representative are nominated cannot be treated as conclusive evidence that Congress possesses such power.

4. **United States 🔑11—Corrupt Practices Act not validated by subsequent adoption of Seventeenth Amendment.**

The validity of Corrupt Practices Act U. S. June 25, 1910, § 8, as amended by Act Aug. 19, 1911, § 2 (Comp. St. § 195), limiting expenditures by candidates for Representative in Congress or for Senator of the United States, must be tested by the powers possessed by Congress at the time of its enactment, and it cannot be validated by any power afterwards acquired by Congress by reason of the adoption of the Seventeenth Amendment.

5. **United States 🔑11—Corrupt Practices Act beyond power of Congress as applied to primary elections.**

Corrupt Practices Act U. S. June 25, 1910, § 8, as amended by Act Aug. 19, 1911, § 2 (Comp. St. § 195), limiting the amount which any candidate for Representative or Senator may give, contribute, etc., in procuring his nomination and election, so far as it applies to party primaries or conventions for designating candidates, is not within the power conferred on Congress by Const. art. 1, § 4, to regulate the manner of holding elections for those offices, or within the power conferred by article 1, § 8, cl. 18, to make all laws necessary and proper for carrying into effect the powers granted by the Constitution.

The Chief Justice and Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting in part, but concurring in the reversal.

In Error to the District Court of the United States for the Western District of Michigan.

Truman H. Newberry and others were convicted of conspiring to violate the Corrupt Practices Act, and they bring error. Reversed and remanded.

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*Mr. Charles E. Hughes, of New York City, for plaintiffs in error.

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*Messrs. Solicitor General Frierson, of Chattanooga, Tenn., and Frank C. Dailey, of Indianapolis, Ind., for the United States.

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*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiffs in error—Truman H. Newberry, Paul H. King, and 15 others—were found guilty of conspiring (Criminal Code, § 37; Comp. St. § 10201) to violate section 8, Act of Congress approved June 25, 1910, c. 392, 36 Stat. 822–824, as amended by Act of August 19, 1911, c. 33, § 2, 37 Stat. 25–29 (Comp. St. 195), the federal Corrupt Practices Act, which provides:

"No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the state in which he resides: Provided, that no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election:

"Provided further, that money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the state in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and

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subsistence, stationery *and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed." Comp. St. § 195(7).

Act No. 109, Sec. I, Michigan Legislature, 1913, prohibits expenditure by or on behalf of a candidate, to be paid by him, in securing his nomination, of any sum exceeding 25 per centum of one year's compensation; and puts like limitation upon expenditures to obtain election after nomination. Section I is copied below.[1]

Taken with the state enactment, the federal statute in effect declares a candidate for the United States Senate punishable by fine and imprisonment, if (except for cer- *245 *tain specified purposes) he give, contribute, expend, use, promise or cause to be given, contributed, expended, used or promised in procuring his nomination and election more than $3.750—one-half of one year's salary. Under the construction of the act urged by the government and adopted by the court below it is not necessary that the inhibited sum be paid, promised or expended by the candidate himself, or be devoted to any secret or immoral purpose. For example, its open and avowed contribution and use by supporters upon suggestion by him or with his approval and cooperation in order to promote public discussion and debate touching vital questions or to pay necessary expenses of speakers, etc., is enough. And upon such interpretation the conviction below was asked and obtained.

The indictment charges: That Truman H. Newberry became a candidate for the Republican nomination for United States Senator from Michigan at the primary election held August 27, 1918; that by reason of selection and nomination therein he became a candidate at the general election, November 5, 1918; that he and 134 others (who are named) at divers times from December 1, 1917, to November 5, 1918, unlawfully and feloniously did conspire, combine, confederate, and agree together to commit the offense on his part of wilfully violating the Act of Congress approved June 25, 1910, as amended, by giving, contributing, expending, and using and by causing to be given, contributed, expended and used, in procuring his nomination and election at said primary and general elections, a greater sum than the laws of Michigan permitted and above ten thousand dollars, to wit, $100,000, and on the part of the other defendants of aiding, counseling, inducing, and procuring Newberry as such candidate to give, contribute, expend, and use or cause to be given, contributed, expended and used said large and excessive sum in order to procure his nomination *246 *and election. Plaintiffs in error were convicted under count one, set out in the margin.[2]

*247 *The court below overruled a duly interposed demurrer which challenged the constitutionality of section 8; and by so doing we think fell into error.

Manifestly, this section applies not only to final elections for choosing Senators but also to primaries and conventions of political parties for selection of candidates. Michigan and many other states undertake to control these primaries by statutes and give recognition to their results. And the ultimate question for solution here is whether under the grant of power to regulate "the manner of holding elections" Congress may fix the maximum sum which a candidate therein may spend, or advise or cause to be contributed and spent by others to procure his nomination.

[1] Section 4, article 1, of the Constitution provides:

"The times, places and manner of holding elections for Senators and Representatives,

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[1] Act 109, Michigan Legislature, 1913:

"Section I. No sums of money shall be paid, and no expenses authorized or incurred by or on behalf of any candidate to be paid by him in order to secure or aid in securing his nomination to any public office or position in this state, in excess of twenty-five per cent. of one year's compensation or salary of the office for which he is candidate: Provided, that a sum not exceeding fifty per cent. of one year's salary may be expended by the candidates for Governor and Lieutenant Governor; or where the office is that of member of either branch of the Legislature of the state, the twenty-five per cent. shall be computed on the salary fixed for the term of two years: Provided further, that no candidate shall be restricted to less than one hundred dollars in his campaign for such nomination. No sums of money shall be paid and no expense authorized or incurred by or on behalf of any candidate who has received the nomination to any public office or position in this state, in excess of twenty-five per cent. of one year's salary or compensation of the office for which he is nominated; or where the office is that of member of either branch of the Legislature of the state, the twenty-five per cent. shall be computed on the salary fixed for the term of two years: Provided, that no candidate shall be restricted to less than one hundred dollars. No sum of money shall be paid and no expenses authorized or incurred by or on behalf of any candidate contrary to the provisions of this act."

[2] Count One.—That Truman H. Newberry, Chase S. Osborne, Henry Ford and William B. Simpson, before and on August 27, 1918, were candidates for the Republican nomination for the office of Senator in the Congress of the United States from the state of Michigan at the primary election held in said state on that day under the laws of said state, and Henry Ford and James Helm, before and on said August 27, 1918, were candidates for the Democratic nomination for the same office at said primary election; that from said August 27, 1918, to and including November 5, 1918, said Truman H. Newberry and said Henry Ford, by reason of their election and nomination at said primary election, became and were opposing candidates for election to the office of Senator in the Congress of the United States from said state of Michigan at the general election held in said state on said November 5, 1918—said Truman H. Newberry of the Republican party and said Henry Ford of the Democratic party—each of said candidates having, on said August 27, 1918, and on November 5, 1918, attained to the age of thirty years and upwards and been a citizen of the United States for more than nine years and each then being an inhabitant and resident of said state; and that said Truman H. Newberry, Paul H. King (and 133 others), hereinafter called the defendants, continuously and at all and divers times throughout the period of time from December 1, 1917, to and including said November 5, 1918, at and within said Southern division of said Western district of Michigan, unlawfully and fe-

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shall be prescribed in each state *by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Here is the source of Congressional power over the elections specified. It has been so declared by this court—Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; United States v. Gradwell, 243 U. S. 476, 481, 37 Sup. Ct. 407, 61 L. Ed. 857—and the early discussions clearly show that this was then the accepted opinion. The Federalist, LVIII, LIX, LX; Elliot's Debates, vol. II, 50, 73, 311; volume III, 86, 183, 344, 375; volume IV, 75, 78, 211.

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*We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from section 4.

"The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." Martin v. Hunter's Lessee, 1 Wheat. 304, 326 (4 L. Ed. 97).

Clear constitutional provisions also negative any possible inference of such authority because of the supposed anomaly "if one government had the unrestricted power to control matters affecting the choice of the officers of another." Mr. Iredell (afterwards of this court) in the North Carolina Convention of 1788, pointed out that the states may —must indeed—exert some unrestricted control over the federal government:

"The very existence of the general government depends on that of the state governments. The state Legislatures are to choose the senators. Without a Senate there can be no Congress. The state Legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state Legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state Legislature. If there are no state Legislatures, there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state Legislatures." Elliot's Debates, vol. IV, p. 78.

See also The Federalist, XLIV.

The federal features of our government are so clear and have been so often declared that no valuable discussion can proceed upon the opposite assumption.

[2] Undoubtedly elections within the orig-

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loniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit an offense against the United States, to wit, the offense on the part of said Truman H. Newberry of willfully violating the Act of Congress approved June 25, 1910, as amended by the Acts of August 19, 1911, and August 23, 1912, by giving, contributing, expending and using and by causing to be given, contributed, expended and used, in procuring his nomination and election as such Senator at said primary and general elections, a sum, in the aggregate, in excess of the amount which he might lawfully give, contribute, expend, or use or cause to be given, contributed, expended or used for such purpose under the laws of said state of Michigan, to wit the sum of one hundred thousand dollars, and by giving, contributing, expending and using and causing to be given, contributed, expended and used in procuring his nomination and election as such Senator, at said primary and general elections, a sum in the aggregate, in excess of ten thousand dollars, to-wit said sum of one hundred thousand dollars and on the part of said other defendants of aiding, counseling, inducing and procuring said Truman H. Newberry so to give, contribute, expend and use and cause to be given, contributed, expended and used said large sum of money in excess of the amounts permitted by the laws of the state of Michigan and the said Acts of Congress; the same to be money so unlawfully given, contributed, expended and used by said Truman H. Newberry and by him caused to be given, contributed, expended and used as such candidate for the following and other purposes, objects and things, to wit:

Advertisements in newspapers and other publications;

Print paper, cuts, plates and other supplies furnished to newspaper publishers;

Subscriptions to newspapers;

Production, distribution and exhibition of moving pictures;

Traveling and subsistence expenses of campaign managers, public speakers, secret propagandists, field, district and county agents and solicitors, and of voters not infirm or disabled;

Compensation of campaign managers, public speakers and secret propagandists, and of field, district and county agents and solicitors;

Appropriating and converting to the use of the defendants themselves, and each of them, large sums of money under the guise and pretense of payment of their expenses and compensation for their services:

Rent of offices and public halls;

Bribery of election officials:

Unlawful assistance of election officials;

Bribery of voters;

Expenses and compensation of Democratic obstructionist candidates at the primary election;

Expenses and compensation of detectives;

Dinners, banquet and other entertainments given to persons believed to be influential in said state of Michigan;

And no part of which said money was to be money expended by said Truman H. Newberry, as such candidate, to meet or discharge assessments, fees, or charges made or levied upon candidates by the laws of said state, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), or for distributing letters, circulars, or postage, or for telegraph or telephone service, or for proper legal expenses in maintaining or contesting the results of either of said elections.

[38 distinct and separate overt acts are specified.]

And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that said defendants, continuously and at all and divers times throughout the period of time in this count mentioned, at and within said division and district, in manner and form in this count aforesaid, unlawfully and feloniously did conspire to commit an offense against the United States, and certain of them did do acts to effect the object of the conspiracy—against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

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inal intendment *of section 4 were those wherein Senators should be chosen by Legislatures and Representatives by voters possessing "the qualifications requisite for electors of the most numerous branch of the state Legislature." Article 1, §§ 2 and 3. The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence—final choice of an officer by the duly qualified electors. Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. 871. Primaries were then unknown. Moreover, they are in no sense elections for an office but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors. General provisions touching elections in Constitutions or statutes are not necessarily applicable to primaries—the two things are radically different. And this view has been declared by many state courts. People v. Cavanaugh, 112 Cal. 674, 44 Pac. 1057; State v. Erickson, 119 Minn. 152, 137 N. W. 385; State v. Taylor, 220 Mo. 618, 119 S. W. 373; State v. Woodruff, 68 N. J. Law, 89, 52 Atl. 294; Commonwealth v. Wells, 110 Pa. 463, 1 Atl. 310; Ledgerwood v. Pitts, 122 Tenn. 570, 125 S. W. 1036.

Sundry provisions of the Constitution indicate plainly enough what its framers meant by elections and the "manner of holding" them:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states." Article 1, § 2, cl. 1.
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> "No person shall be a Representative * * * who shall not, when elected, be an inhabitant of the state in which he shall be chosen." Article 1, § 2, cl. 2.
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> "When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." Article 1, § 2, cl. 4.
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> "Immediately after they [the Senators] shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes." Article 1, § 3, cl. 2.
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> "No person *shall be a Senator * * * who shall not, when elected, be an inhabitant of that state for which he shall be chosen." Article 1, § 3, cl. 3.
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> "Each House shall be the judge of the elections, returns, and qualifications of its own members." Article 1, § 5, cl. 1.
>
> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office," etc. Article 1, § 6, cl. 2.
>
> "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows." Article 2, § 1, cl. 1.
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> "The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected." Article 2, § 1, cl. 6.

And provisions in the Seventeenth Amendment are of like effect.

The plain words of the Seventeenth Amendment and those portions of the original Constitution directly affected by it, should be kept in mind. Article 1, § 31:

> "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof, for six years; and each Senator shall have one vote. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. * * * And if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any state, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies."

Seventeenth Amendment:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislatures. When vacancies happen in the representation of any state in the Senate, the executive authority of
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> such state shall *issue writs of election to fill such vacancies: Provided, that the Legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the Legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

As finally submitted and adopted the amendment does not undertake to modify article 1, § 4, the source of congressional power to regulate the times, places and manner of holding elections. That section remains "intact and applicable both to the election of Representatives and Senators." Cong. Rec. vol. 46, p. 848. When first reported, January 11, 1911, by Senator Borah for the Judiciary Committee, the proposed Seventeenth Amendment contained a clause providing:

> "The times, places and manner of holding elections for Senators shall be as prescribed in each state by the Legislature thereof"

—the avowed purpose being thereby to modify section 4, art. 1, by depriving Congress of power to regulate the manner of holding elections for Senators. (A copy of the original resolution as presented to the Senate is in the margin.)[3]

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*Upon recommendation of

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[3] S. J. Res. 134, 61st Congress, Cong. Rec., vol. 46, p. 847.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring a minority of the Judiciary Committee this clause was eliminated and reference to section 4, art. 1, omitted from the resolution. After prolonged debate in the 61st and 62d Congresses the amendment in its present form was submitted for ratification. See Sen. Rep. 961, 61st Cong. 3d Sess; Sen. Rep. 35, 62d Cong., 1st Sess.; Cong. Rec. vol. 46, pp. 847, 851, et seq.; volume 47, passim, and pp. 1924, 1925, 6366.

[3, 4] Apparently because deemed unimportant, no counsel on either side referred to "An act providing a temporary method of conducting the nomination and election of United States Senators," approved June 4, 1914 (chapter 103, 38 Stat. 384). To show its irrelevancy and prevent misapprehension, *254 the act is copied in the margin.[4] Section *2, which contains the only reference to nomination of candidates for Senator, expired by express limitation June 4, 1917, more than a year prior to the conduct here challenged. The act has no criminal provisions, makes no reference to the earlier statute upon which this prosecution is founded and sheds no light on the power of Congress to regulate primaries and conventions. Its terms indicate intention that the machinery for designating party candidates shall remain under state control. But in no view can an attempt to exercise power be treated as conclusive evidence that Congress possesses such power. Otherwise serious discussion of constitutional limitations must cease. Moreover, the criminal statute now relied upon antedates the Seventeenth Amendment and must be tested by powers possessed at time of its enactment. An after-acquired power can not ex proprio vigore validate a statute void when enacted. See Sutherland, Stat. Constr. (2d Ed.) vol. 1, § 107.

A concession that the Seventeenth Amend- *255 ment might *be applicable in this controversy if assisted by appropriate legislation would be unimportant, since there is none. Section 2, Act of June 4, 1914, had expired by express limitation many months before Newberry became a candidate, and counsel very properly disregarded it.

Because deemed appropriate in order effectively to regulate the manner of holding general elections, this court has upheld federal statutes providing for supervisors and prohibiting interference with them, declaring criminal failure by election officers to perform duties imposed by the state and denouncing conspiracies to prevent voters from freely casting their ballots or having them counted. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; United States v. Mosley, 238 U. S. 383, 35 Sup. Ct. 904, 50 L. Ed. 1355. These enactments had direct and immediate reference to elections by the people, and decisions sustaining them do not control the present controversy. Congress clearly exercised its power to regulate the manner of holding

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therein), that in lieu of the first paragraph of section 3 of article 1 of the Constitution of the United States, and in lieu of so much of paragraph 2 of the same section as relates to the filling of vacancies, and in lieu of all of paragraph 1 of section 4 of said article 1, in so far as same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for Senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the Legislatures of three-fourths of the states:

" 'The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislatures.

" 'The times, places, and manner of holding elections for Senators shall be prescribed in each state by the Legislature thereof.

" 'When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the Legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the Legislature may direct.

" 'This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.' "

[4] Act of June 4, 1914, c. 103, 38 Stat. 384:

"An act providing a temporary method of conducting the nomination and election of United States Senators.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that at the regular election held in any state next preceding the expiration of the term for which any Senator was elected to represent such state in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

"Sec. 2. That in any state wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the Legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be in accordance with the laws of such state regulating the nomination of candidates for and election of members at large of the national house of Representatives: Provided, that in case no provision is made in any state for the nomination or election of Representatives at large, the procedure shall be in accordance with the laws of such state respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire state: And, provided further, that in any case the candidate for Senator receiving the highest number of votes shall be deemed elected.

"Sec. 3. That section two of this act shall expire by limitation at the end of three years from the date of its approval."

Approved June 4, 1914.

an election when it directed that voting must be by written or printed ballot or voting machines. 30 Stat. 836, c. 154 (Comp. St. § 24).

Section 4, art. 1, was bitterly attacked in the state conventions of 1787–1789, because of its alleged possible use to create preferred classes and finally to destroy the states. In defense, the danger incident to absolute control of elections by the states and the express limitations upon the power were dwelt upon. Mr. Hamilton asserted:

> "The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions, are defined *256 and fixed *in the Constitution, and are unalterable by the Legislature." The Federalist, LIX, LI.

The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the latitude we are now asked to sanction, it would not have been ratified. See Story on the Const. § 814 et seq.

[5] Our immediate concern is with the clause which grants power by law to regulate the "manner of holding elections for Senators and Representatives" (Const. art. 1, § 4)—not broadly to regulate them. As an incident to the grant there is, of course, power to make all laws which shall be necessary and proper for carrying it into effect. Article 1, § 8. Although the Seventeenth Amendment now requires Senators to be chosen by the people, reference to the original plan of selection by the Legislatures may aid in interpretation.

Who should participate in the specified elections was clearly indicated—members of state Legislatures and those having "the qualifications requisite for electors of the most numerous branch of the state Legislature." Who should be eligible for election was also stated:

> "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen." Article 1, § 2, cl. 2.
>
> "No person shall be a Senator who shall not have attained, to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen." Article 1, § 3, cl. 3.

Two Senators were allotted to each state and the method was prescribed for determining the number of Representatives. Subject to these important limitations, Congress was empowered by law to regulate the times, places and manner of holding the elections, except as to the places of choosing Senators. "These words are used without any veiled or obscure significance," but in their natural and usual sense.

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*If it be practically true that under present conditions a designated party candidate is necessary for an election—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition does not directly affect the manner of holding the election. Birth must precede but it is no part of either funeral or apotheosis.

Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, e. g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacture, mining, etc., commerce could not exist but this fact does not suffice to subject them to the control of Congress. Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346.

Elections of Senators by state Legislatures presupposed selection of their members by the people; but it would hardly be argued that therefore Congress could regulate such selection. In the Constitutional Convention of 1787 when replying to the suggestion that state Legislatures should have uncontrolled power over elections of members of Congress, Mr. Madison said:

> "It seems as improper in principle, though it might be less inconvenient in practice, to give to the state Legislatures this great authority over the election of the representatives of the people in the general Legislature as it would be to give to the latter a like power over the election of their representatives in the state Legislatures." Supplement to Elliot's Debates, vol. V, p. 402.

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*We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people.

It should not be forgotten that, exercising inherent police power, the state may suppress whatever evils may be incident to primary or convention. As "each house shall be the judge of the elections, qualifications and returns of its own members," and as Congress may by law regulate the times, places and manner of holding elections, the national government is not without power to protect itself against corruption, fraud or other malign influences.

The judgment of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McKENNA concurs in this opinion as applied to the statute under consideration which was enacted prior to the Seventeenth Amendment; but he reserves the question of the power of Congress under that amendment.

Mr. Chief Justice WHITE, dissenting from the opinion, but concurring with a modification in the judgment of reversal.

The conviction and sentence under review were based on an indictment charging a conspiracy to commit vio*lations of the act of Congress known as the Corrupt Practices Act as made applicable to state laws dealing with state nominating primaries for and the ensuing state elections of United States Senators and Representatives in Congress. The case is here by direct appeal because of the contention that primaries of that character are not subject to the regulating power of Congress, and as an incident there is involved the contention that even if the act of Congress was constitutional it had been prejudicially misconstrued. Sustaining the first of these contentions and therefore deciding the act to be unconstitutional, the court reverses and finally disposes of the case. Although I am unable to concur in the conclusion as to the want of power of Congress and in the judgment of reversal as rendered, I am nevertheless of opinion that there should be a judgment of reversal without prejudice to a new trial because of the grave misapprehension and grievous misapplication of the statute upon which the conviction and sentence below were based. I state the reasons which control me as to both these subjects.

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By an amendment to the Corrupt Practices Act of 1910 Congress, in 1911, dealt with state primaries for the nomination of Senators and Representatives in Congress and with the election after nomination of such candidates (Act of June 25, 1910, c. 392, 36 Stat. 822; Act of August 19, 1911, c. 33, § 8, 37 Stat. 25, 28). At that time there existed in the state of Michigan a law regulating state nominating primaries which included candidates for state offices as well as for the Senate and House of Representatives of the United States. These primaries were held in the month of August in each year preceding the November general election. By that law the result of the primaries determined the right to have a person's name placed as a candidate on the ballot at the general election, and in the case of United States Senators *provision was made for the return of the result of the primary to the state Legislature before the time when the duty of that body to elect a Senator would arise.

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The Seventeenth Amendment to the Constitution providing for the election of United States Senators by popular vote was promulgated in May, 1913. In June, 1914, Congress by legislation carrying out the amendment provided that thereafter Senators should be elected by popular vote, and, where state laws to that effect existed, made them applicable. But, evidently to give time for the states to enact the necessary legislation substituting for election by the Legislature the method of election established by the amendment, it was provided that where no law for primaries by popular vote as to Senators existed that subject should be controlled by the state law regulating primaries for the nomination of Representative at Large, if provided for, and if not, by the provisions controlling as to primaries for general state officers, the operation of these latter provisions being expressly limited to a term of three years (Act of June 4, 1914, c. 103, 38 Stat. 384). Within the time thus fixed and before the election which was held of this case, the state of Michigan, in order to conform its laws to the amendment, modified them so as to provide for the election of Senators by popular vote, and made the general nominating state primary law applicable to that condition (Act No. 156, Mich. Acts of 1915), and by virtue of the amendment, the act of Congress, and the state law just stated, the primary with which we are concerned in this case was held in August, 1918.

The plaintiff in error, Newberry, was a candidate for the nomination of the Republican party as United States Senator and having been nominated at such primary became a candidate at the ensuing November election, and was returned as elected. Subsequently the indictment under which the conviction below was had was *presented charging him and others in six counts with a conspiracy to commit violations of provisions of the Corrupt Practices Act relating to state nominating primaries as well as to the resulting general election. It is not at this moment necessary to describe the nature of these accusations further, since it is not questioned that the indictment charged a conspiracy to commit crimes within the in-

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tendment of the Corrupt Practices Act and hence involved the question of the constitutional power of Congress which the court now adversely decides and the basis for which I now come to consider.

As the nominating primary was held after the adoption of the Seventeenth Amendment, the power must have been sanctioned by that amendment, but for the purpose of clarity I consider the question of the power, first from the provisions of the Constitution as they existed before the amendment, and second in contemplation of the light thrown upon the subject by the force of the amendment.

The provisions of sections 2 and 3 of article I of the Constitution fixing the composition of the House of Representatives and the Senate and providing for the election of Representatives by vote of the people of the several states and of Senators by the state Legislatures, were undoubtedly reservoirs of vital federal power constituting the generative sources of the provisions of section 4, clause 1, of the same article creating the means for vivifying the bodies previously ordained (Senate and House), that is, providing:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

As without this grant no state power on the subject was possessed, it follows that the state power to create primaries as to United *262 States Senators depended upon *the grant for its existence. It also follows that as the conferring of the power on the states and the reservation of the authority in Congress to regulate being absolutely coterminous, except as to the place of choosing Senators which is not here relevant, it results that nothing is possible of being done under the former which is not subjected to the limitation imposed by the latter. And this is illustrated by the legislation of Congress and the decisions of this court upholding the same. See "Act to regulate the times and manner of holding elections for Senators in Congress," approved July 25, 1866, 14 Stat. 243; Act of May 31, 1870, 16 Stat. 144; Act of July 14, 1870, 16 Stat. 254; Act of June 10, 1872, 17 Stat. 347; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; United States v. Mosely, 238 U. S. 383, 35 Sup. Ct. 904, 50 L. Ed. 1355.

But it is said that, as the power which is challenged here is the right of a state to provide for and regulate a state primary for nominating United States Senators free from the control of Congress, and not the election of such Senators, therefore as the nominating primary is one thing and the election another and different thing, the power of the state as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators. But the proposition is a suicidal one, since it at one and the same time retains in the state the only power it could posssibly have as delegated by the clause in question and refuses to give effect to the regulating control which the clause confers on Congress as to that very power. And mark, this is emphasized by the consideration that there is no denial here that the States possess the power over the federal subject resulting from the provision of the Constitution, but a holding that Congress may not exert as to such power to regulate authority which the terms of the identical clause of the Constitution confer upon it.

*263 *But, putting these contradictions aside let me test the contention from other and distinct points of view: (1) In last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination, that a paramount government authority having the right to regulate the latter is without any power as to the former. The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement.

(2) Moreover the proposition, impliedly at least, excludes from view the fact that the powers conferred upon Congress by the Constitution carry with them the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (article I, § 8, cl. 18), and in doing so virtually disregards the previous legislative history and the decisions of this court sanctioning the same, to which we have referred, since that practice and those decisions unmistakably recognize that the power under the clause in question extends to all the prerequisite and appropriate incidents necessary to the discharge of the authority given.

(3) From a somewhat different point of view the same result is even more imperatively required. Thus, as has been seen, the election was had under the Seventeenth Amendment to the Constitution, providing for the election of Senators by popular vote instead of by the state legislatures. In the resolution providing for the passage of that amendment through Congress, as first reported by Senator Borah on behalf of the judiciary committee, after making the changes necessary to substitute a provision causing Senators to be elected by popular vote instead of by the *264 legislatures of the several States, the *provi-

sion of section 4 of article I reserving to Congress the power "to make or alter," except as to places, the regulations adopted by the several states as to the "times, places and manner" of electing Senators, was omitted, thus leaving all power on the subject in the States, free from any regulating control of Congress. (S. Rep. 961, 61st Cong. 3d Sess.)

There was division, however, concerning the matter, manifested by a proposition to amend the resolution, as reported, so as to retain the omitted provision, thus preserving the power of Congress as originally conferred. Cong. Rec. vol. 46, part 1, p. 847. The legislative situation thus created was aptly stated by Senator Borah, referring to the report of the committee and to the proposition (submitted by Senator Sutherland of Utah) to amend that report and the resolution accompanying it. He said:

> "In reference to the amendment which has been suggested by the Senator from Utah (Mr. Sutherland), it was considered at some length before the committee. The proposition is a simple one. As the joint resolution now stands, the times, places and manner of electing United States Senators is left entirely to the state. The state may determine the rules and regulations, and the times, places and manner of holding elections for United States Senators.
>
> "If the amendment as offered by the Senator from Utah should prevail, then the matter would be left as it now is, subject to the supervision and control of Congress."[5]

After much consideration the amendment offered by Senator Sutherland was carried.[6] But the reported resolution, as thus amended, did not pass during that Congress. In the first session of the following Congress, however, the Sixty-Second Congress, a resolution *265 identical in *terms with the one which had been reported in the Senate at the previous session was introduced in the House and passed the same.[7] In the Senate the House resolution was favorably reported from the committee by Senator Borah,[8] accompanied, however, by a minority report by Senator Sutherland,[9] offering as a substitute a resolution preserving the complete power of Congress, as had been provided for in the Senate in the previous Congress, and an amendment to the same effect offered by Senator Bristow was subsequently adopted,[10] and as thus amended the resolution was ultimately submitted for ratification, and, as we have seen, was ratified and promulgated. 38 Stat. 2049.

When the plain purpose of the amendment is thus seen, and it is borne in mind that at the time it was pending, the amendment to the Corrupt Practices Act dealing with state primaries for nominating United States Senators which is now before us was in the process of consideration in Congress, and when it is further remembered that after the passage of the amendment, Congress enacted legislation so that the amendment might be applied to state senatorial primaries, there would seem to be an end to all doubt as to the power of Congress.

It is not disputable that originally instructions to representatives in state Legislatures by party conventions or by other unofficial bodies, as to the persons to be elected as United States Senators were resorted to as a means of indirectly controlling that subject and thus, in a sense, restricting the constitutional provision as to the mode of electing Senators. The potentiality of instructions of that character to accomplish that result is *266 *amply shown by the development of our constitutional institutions as regards the Electoral College, where it has come to pass that the unofficial nomination of party has rendered the discharge of its duties by the Electoral College a mere matter of form. That in some measure at least a tendency to that result came about under the constitutional direction that Senators should be elected by the people would appear not doubtful. The situation on this subject is illustrated by a statement in a treatise by Haynes on Election of Senators, 1906, p. 132, as follows:

> "Notwithstanding our rigid Constitution's decree that the senators from the several states shall be elected by 'the legislatures thereof.' this act of the Legislatures may be deprived of nearly all of its vitality. The election of President offers an illustration of the filching of actual power away from the electors in whom it is vested by law. When James Russell Lowell, a Republican elector for Massachusetts in 1876, was urged to exercise his independence and vote for Tilden, he declined, saying that, 'whatever the first intent of the Constitution was, usage had made the presidential electors strictly the instruments of the party which chose them.' The Constitution remains unchanged, yet presidential electors recognize that they have been stripped of all discretion. It appears that under certain conditions the election of Senators by state Legislatures has been and can be made an equally perfunctory affair."

The growth of the tendency to make the indirect result thus stated more effective evidently was the genesis of the statutory primary to nominate Senators. See statement concerning an amendment to the Constitution of Nebraska on that subject as early as 1875, in the same treatise (page 141).

The large number of states which at this day have by law established senatorial pri- *267 maries shows the develop*ment of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject,[11] showing how well founded this conviction is and how it has come to pass that in some cases at least the result of the primary has been in substance to render the subsequent election merely perfunctory. Under these conditions I find it impossible to say that the admitted power of Congress to control and regulate the *268 election of Senators does not embrace, as *appropriate to that power, the authority to regulate the primary held under state authority.

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[5] Cong. Rec. vol. 46, part 1, p. 851.

[6] Cong. Rec. vol. 46, part 4, p. 3307.

[7] H. Rep. No. 2, 62d Cong. 1st Sess.

[8] Cong. Rec. vol. 47, part 1, p. 787.

[9] S. Rep. No. 35, 62d Cong. 1st Sess.

[10] Cong. Rec. vol. 47, part 2, p. 1205.

(4) It is true that the plenary reservation in Congress of the power to control the states in the exercise of the authority to deal with the times, places, and manner of electing Senators and Representatives, as originally expressed in the Constitution, caused much perturbation in the conventions of the several states which were called upon to consider ratification, resulting from the fear that such power to regulate might be extended to and embrace the regulation of the election of the members of the state Legislatures who were to exercise the power to elect Senators. It is further true that articles in the Federalist and other papers published at the time served to dispel the fear by directing attention to the fact that the regulating power of Congress only extended to the times, places and manner of electing Senators and did not include an authority, even by implication, to deal with the election of the state Legislatures, which was a power reserved to the states. But this only served to emphasize the distinction between the state and federal power and affords no ground at this late day for saying that the reserved state power has absorbed and renders impossible of exercise the authority of Congress to regulate the federal power concerning the election of United States Senators, submitted, to the extent provided, to the authority of the states upon the express condition that such authority should be subordinate to and controlled by congressional regulation.

Can any other conclusion be upheld except upon the theory that the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished, may now be revived for the purpose of depriving Congress of the right to exert a power essential to its existence, and this in the face of the fact that the only basis for *269 the doubts which arose in *the beginning (the election of Senators by the state Legislatures) has been completely removed by the Seventeenth Amendment?

I do not stop to refer to the state cases concerning the distinction between state legislative power to deal with elections and its authority to control primaries, as I cannot discover the slightest ground upon which they could be apposite, since here an inherent federal right and the provision of the Constitution in dealing with it are the subjects for consideration.

Moreover, in passing, I observe that as this case concerns a state primary law imposing obligatory results, and the act of Congress dealing with the same, it is obvious that the effect of individual action is wholly beside the issue.

The consequence to result from a denial to Congress of the right to regulate is so aptly illustrated by the case in hand that in leaving the question I refer to it. Thus, it is stated, and not denied, that in the state primary in question, one of the candidates, as permitted by the state law, propounded himself at the primary election as the candidate for the nomination for Senator of both the Republican and the Democratic parties. If the candidacy had been successful as to both, the subsequent election would have been reduced to the merest form.

In view, then, of the plain text of the Constitution, of the power exerted under it from the beginning, of the action of Congress in its legislation, and of the amendment to the Constitution, as well as of the legislative action of substantially the larger portion of the states, I can see no reason for now denying the power of Congress to regulate a subject which from its very nature inheres in and is concerned with the election of Senators of the United States, as provided by the Constitution.

The indictment remains to be considered. It contained six counts. For the moment, it *270 suffices to say that the *first four all dealt with a common subject, that is, a conspiracy between Newberry and others named to contribute and expend, for the purposes of the state primary and general election, more money than allowed by the Corrupt Practices Act. The fifth count charged a conspiracy on the part of the defendants to commit a great number, to wit, 1,000, offenses against the United States, each to consist of giving money and things of value to a person to vote for Newberry at said election, and a great number, to wit, 1,000, other offenses against the United States, each to consist of giving money and things of value to a person to withhold his vote from Henry Ford at said general election. The sixth count charged a conspiracy to defraud by use of the mails.

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[11] "In many Western and Southern states the direct primary method has been applied to the choice of United States Senators as well as to state officers.† In the Southern states, victory in such a primary, on the Democratic side, is practically the equivalent of an election, as there is but one effective party in that section of the country. The direct nomination of senators is generally accomplished under voluntary party regulations, as in Alabama, Arkansas, South Carolina, and Virginia. In other cases, however, this method of choice has been placed under legal protection, as in Florida (1901), Mississippi (1902), Louisiana (1906), and Texas (1907). Some Northern states have also adopted this method of direct nomination. Among Northern states, Wisconsin led the way in 1903, followed by Oregon in 1904, Montana in 1905, Iowa, Washington, Nebraska, North Dakota in 1907, Illinois, Kansas, New Jersey, Ohio, and Oklahoma in 1908. * * * In some of the states, as in Oregon, candidates for the Legislature are afforded an opportunity to pledge themselves to vote for the party candidate receiving the highest vote in the regular election. In other cases a pledge is made to vote for the candidate receiving the highest number of votes in the primary." ‡ Merriam, Primary Elections, 1908, pp. 83-85.

† On this general topic, see the excellent treatise on the Election of Senators, by George H. Haynes (1906), especially chapter XI.

‡ Oregon, 1904, § 13. In Washington the candidate may pledge himself to vote for the party choice for United States Senator (1907, § 31). This latter is the general rule.

At the trial before the submission of the case to the jury, the court put the fifth count entirely out of the case by instructing the jury to disregard it, as there was no evidence whatever to sustain it. The bribery charge, therefore, disappeared. The second, third and fourth counts, dealing, as I have said, with one general subject, were found by the court to be all in substance contained in the first count. They were therefore, by direction of the court, either eliminated or consolidated with the first count. Thus, as contained in that count the matters charged in the first four counts were submitted to the jury, as was also the sixth count; but the latter we need not further consider, as upon it there was a verdict of not guilty.

The case therefore reduces itself solely to the matters covered in the first count. That count charged a conspiracy on the part of the defendants, 135 in number, including Newberry, to commit an offense against the United States, that is, the offense on the part of Newberry of violating the Corrupt Practices Act by giving, contributing, expending and using and by causing to be given, contributed, expended and used, in procuring *271 *his nomination and election as such Senator at said primary and general elections, a sum in excess of the amount which he might lawfully give, contribute, expend or use, and cause to be given, contributed, expended or used for such purpose under the laws of Michigan, and in excess of $10,000, to wit, the sum of $100,000; and on the part of the other defendants of aiding, counseling, inducing, and procuring Newberry as such candidate to give, contribute, expend and use, or cause to be given, contributed, expended or used said large and excessive sum, in order to procure his nomination and election.

Conspiracy to contribute and expend in excess of the amount permitted by the statute was, then, the sole issue, wholly disassociated from and disconnected with any corrupt or wrongful use of the amount charged to have been illegally contributed and expended. As putting out of view the constitutional question already considered, the errors assigned are based solely upon asserted misconstructions of the statute by the court in its charge to the jury, we bring the statute at once into view. It provides, so far as relevant to the case before us:

> "No candidate for * * * Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the state in which he resides: Provided, that * * * no candidate for United States Senator shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election. * * *"

Coming to deal with the statute, the court, after pointing out in the most explicit terms that the limitation on the amount which might be lawfully contributed and expended or caused to be contributed and expended in *272 *the case at hand was $3.750 (that being the limitation imposed by the laws of Michigan adopted by the statute of the United States just quoted), then proceeded, over objections duly reserved, to instruct as to the significance of the statute, involved in the prohibitions (a) against giving, contributing, expending, or using, and (b) against causing to be given, contributed, expended, or used, money in excess of that permitted by the statute, saying on these subjects as follows:

> (a) "It is important, therefore, that you should understand the meaning of the language employed in this Corrupt Practices Act, and that you should understand and comprehend the effect and scope of the act, and the meaning of the language there employed, and the effect and scope and extent of the prohibition against the expenditure and use of money therein contained.
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> "The words 'give, contribute, expend or use,' as employed in this statute have their usual and ordinary significance, and mean furnish, pay out, disburse, employ, or make use of. The term 'to cause to be expended, or used,' as it is employed in this statute, means to occasion, to effect, to bring about, to produce the expenditure and use of the money.
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> "The prohibition contained in this statute against the expenditure and use of money by the candidate is not limited or confined to the expenditure and use of his own money. The prohibition is directed against the use and expenditure of excessive sums of money by the candidate from whatever source or from whomsoever those moneys may be derived."
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> (b) "The phrase which constitutes the prohibition against the candidate 'causing to be given, contributed, expended or used excessive sums of money,' is not limited and not confined to expenditures and use of money made directly and personally by himself. This prohibition extends to the expenditure and use of *273 excessive sums of *money in which the candidate actively participates, or assists, or advises, or directs, or induces, or procures. The prohibition extends not only to the expenditure and use of excessive sums of money by the candidate directly and personally, but to such use

and expenditure through his agency, or procurement or assistance.

"To constitute a violation of this statute knowledge of the expenditure and use of excessive sums of money on the part of the candidate is not sufficient; neither is it sufficient to constitute a violation of this statute that the candidate merely acquiesces in such expenditures and use. But it is sufficient to constitute a violation of this statute if the candidate actively participates in doing the things which occasion such expenditures and use of money and so actively participates with knowledge that the money is being expended and used."

Having thus fixed the meaning of the prohibitions of the statute, the court came to apply them as thus defined to the particular case before it, saying:

(c) "To apply these rules to this case: If you are satisfied from the evidence that the defendant, Truman H. Newberry at or about the time that he became a candidate for United States Senator was informed and knew that his campaign for the nomination and election would require the expenditure and use of more money than is permitted by law and with such knowledge became a candidate, and thereafter by advice, by conduct, by his acts, by his direction, by his counsel, or by his procurement he actively participated and took part in the expenditure and use of an excessive sum of money, of an unlawful sum of money, you will be warranted in finding that he did violate this statute known as the Corrupt Practices Act."

Whether the instructions marked (a) and (b), if unexplained, were, in view of the ambiguity lurking in many of the expressions *274 used therein, prejudicially *erroneous, I do not think necessary to consider, since I see no escape from the conclusion that the instruction marked (c), which made application of the view of the statute stated in the previous passages (a) and (b), were in clear conflict with the text of the statute and were necessarily of a seriously prejudicial nature, since in substance they announced the doctrine that, under the statute, although a candidate for the office of Senator might not have contributed a cent to the campaign or caused others to do so, he nevertheless was guilty if he became a candidate or continued as such after acquiring knowledge that more than $3,750 had been contributed and was being expended in the campaign. The error in the instruction plainly resulted from a failure to distinguish between the subject with which the statute dealt—contributions and expenditures made or caused to be made by the candidate—and campaign contributions and expenditures not so made or caused to be made, and therefore not within the statute.

There can be no doubt when the limitations as to expenditure which the statute imposed are considered in the light of its context and its genesis, that its prohibitions on that subject were intended, not to restrict the right of the citizen to contribute to a campaign, but to prohibit the candidate from contributing and expending or causing to be contributed and expended, to secure his nomination and election a larger amount than the sum limited as provided in the statute. To treat the candidacy, as did the charge of the court, as being necessarily the cause, without more, of the contribution of the citizen to the campaign, was therefore to confound things which were wholly different, to the frustration of the very object and purpose of the statute. To illustrate: Under the instruction given, in every case where to the knowledge of the candidate a sum in excess of the amount limited by the statute was contrib- *275 uted by citizens to the *campaign, the candidate, if he failed to withdraw, would be subject to criminal prosecution and punishment. So also, contributions by citizens to the expenses of the campaign, if only knowledge could be brought home to them that the aggregate of such contributions would exceed the limit of the statute, would bring them, as illustrated by this case, within the conspiracy statute and accordingly subject to prosecution. Under this view the greater the public service, and the higher the character, of the candidate, giving rise to a correspondingly complete and self-sacrificing support by the electorate to his candidacy, the more inevitably would criminality and infamous punishment result both to the candidate and to the citizen who contributed.

As it follows from the considerations which I have stated that the judgment below was, in my opinion, clearly wrong and therefore should be reversed, it is not necessary that I should go further and point out how cogently under the case presented the illustrations just previously made apply to it. For the reasons stated, although I dissent from the ruling of the court as to the unconstitutionality of the act of Congress, I nevertheless think its judgment of reversal should be adopted, qualified, however, so as to reserve the right to a new trial.

Mr. Justice PITNEY, concurring in part.

I concur in the judgment reversing the conviction of plaintiffs in error, but upon grounds fundamentally different from those adopted by the majority: my view being that there is no constitutional infirmity in the act of Congress that underlies the indictment, but that there was an error in the submission of the case to the jury that calls for a new trial.

The constitutional question is so important that it deserves treatment at length.

*276

*The federal Corrupt Practices Act (Act of June 25, 1910, c. 392, 36 Stat. 822, amended by Act of August 19, 1911, c. 33, 37 Stat. 25, 28) limits the amount of money that may be given, contributed, expended, used, or promised, or caused to be given, contributed, expended, used, or promised by a candidate for Representative in Congress or for Senator of the United States in procuring his nomination and election, to a sum not in excess of the amount he may lawfully give, contribute, expend, or promise under the laws of the state of his residence, with a proviso that in the case of a candidate for Representative the amount shall not exceed $5,000, and in the case of a candidate for Senator shall not exceed $10,000, in any campaign for nomination and election; and a further proviso that any assessment, fee, or charge made or levied upon candidates by the laws of the state, or moneys expended for the candidate's necessary personal expenses for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure or considered as a part of the sum fixed as the limit of expense. Section 10 of the act (36 Stat. 824), renumbered as section 11 by the amendment (37 Stat. 26; Comp. St. § 198), prescribes fine or imprisonment for a willful violation of any of its provisions. The act and amendment were passed before the adoption of the Seventeenth Amendment, providing for the election of Senators by direct vote of the people (declared adopted May 31, 1913—38 Stat. 2049); but it is clear—indeed undisputed—that, for present purposes, they are to receive the same construction and effect as if enacted after adoption of the amendment.

The present case arose out of a campaign for nomination and election of a Senator in the state of Michigan, where a statute (Act No. 109, § 1, Mich. Pub. Acts 1913) limits the amount of money that may be paid, and of *277 *expenses that may be authorized or incurred by or on behalf of any candidate to be paid by him in order to secure his nomination to any public office in the state, to 25 per centum of one year's salary of the office, and imposes a similar limit upon expenditures by or on behalf of any candidate who has received the nomination. By section 19 of the same statute "public office" is made to apply to any national office filled by the voters of the state, as well as to the office of presidential elector and United States Senator. The acts of Congress, in connection with the statute of the state, limit the amount that a candidate for Senator of the United States may give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, to $3,750 in the aggregate, aside from those expenditures that are specifically permitted without limit.

Plaintiffs in error were indicted and convicted in the United States District Court for a conspiracy (section 37, Criminal Code) to commit an offense against the United States, to wit, the offense, on the part of Truman H. Newberry, of willfully violating the acts of Congress above referred to by giving, contributing, expending, and using, and by causing to be given, contributed, expended, and used, in procuring his nomination and election as Senator of the United States at the primary and general elections in the year 1918, a sum in excess of the amount thus limited, to wit, the sum of $100,000, and on the part of the other defendants of aiding, counseling, inducing, and procuring (section 332, Criminal Code; Comp. St. § 10506) said Truman H. Newberry so to give, contribute, expend, and use, and cause to be given, contributed, expended, and used said large sums of money in excess of the amounts permitted, etc.; no part of which money was to be expended for any of the purposes specifically permitted without limit; numerous overt acts being alleged to *278 have been done by one *or more parties defendant to effect the object of the conspiracy.

The averments of the indictment and the evidence at the trial related especially to expenditures contemplated to be made, and in fact made, to bring about Mr. Newberry's selection at a nominating or primary election held in August, 1918, with only minor expenditures made after that date and in contemplation of the general election which was held in the following November. The case is brought to this court by direct writ of error, upon the fundamental contention that the acts of Congress, in so far as they assume to regulate primary elections and limit the expenditures of money that may be made or caused to be made by a candidate therein, are in excess of the power conferred upon Congress to regulate the "manner of holding elections for Senators and Representatives" by section 4 of article I of the Constitution of the United States. This question was raised, but not decided, in United States v. Gradwell, 243 U. S. 476, 487, 488, 37 Sup. Ct. 407, 61 L. Ed. 857; Blair v. United States, 250 U. S. 273, 278, 279, 39 Sup. Ct. 495, 63 L. Ed. 1187.

For reasons to be stated below, I consider is erroneous to treat the question as dependent upon the words of the cited section alone. I will, however, first deal with that section, viewing it in connection with other provisions immediately associated with it and here quoted:

> "Article I. Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> "Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *" *279
>
> *(Section 3 is superseded by the Seventeenth Amendment, which provides:)
>
> "Article XVII. The Senate of the United States shall be composed of two Senators from

> each State, elected by the people thereof, * * * The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. * * *"
>
> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *
>
> "Section 5. Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members. * * *"

It is contended that Congress has no power to regulate the amount of money that may be expended by a candidate to secure his being named in the primary election; that the power "to regulate the manner of holding elections," etc., relates solely to the general elections where Senators or Representatives are finally chosen. Why should "the manner of holding elections" be so narrowly construed? An election is the choosing of a person by vote to fill a public office. In the nature of things it is a complex process, involving some examination of the qualifications of those from whom the choice is to be made and of those by whom it is to be made; some opportunity for the electors to consider and canvass the claims of the eligibles; and some method of narrowing the choice by eliminating candidates until one finally secures a majority, or at least a plurality, of the votes. For the process of elimination, instead of tentative elections participated in by all the electors, nominations by parties or groups of citizens have obtained in the United States from an early period. *280 Latterly the processes of nomina*tion have been regulated by law in many of the states, through the establishment of official primary elections. But in the essential sense, a sense that fairly comports with the object and purpose of a Constitution such as ours, which deals in broad outline with matters of substance and is remarkable for succinct and pithy modes of expression, all of the various processes above indicated fall fairly within the definition of "the manner of holding elections." This is not giving to the word "elections" a significance different from that which it bore when the Constitution was adopted, but is simply recognizing a content that of necessity always inhered in it. The nature of that instrument required, as Chief Justice Marshall pointed out in McCulloch v. Maryland, 4 Wheat. 316, 407 (4 L. Ed. 579):

> "That only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

It is said that section 4 of article I does not confer a general power to regulate elections, but only to regulate "the manner of holding" them. But this can mean nothing less than the entire mode of procedure—the essence, not merely the form, of conducting the elections. The only specific grant of power over the subject contained in the Constitution is contained in that section; and the power is conferred primarily upon the Legislatures of the several states, but subject to revision and modification by Congress. If the preliminary processes of such an election are to be treated as something so separate from the final choice that they are not within the power of Congress under this provision, they are for the same reason not with within the power of the states, and, if there is no other grant of power, they must perforce remain wholly unregulated. For if this section of the Constitution is to be strictly construed with respect to the power granted to Congress thereunder, it must be *281 construed with equal *strictness with respect to the power conferred upon the states; if the authority to regulate the "manner of holding elections" does not carry with it ex vi termini authority to regulate the preliminary election held for the purpose of proposing candidates, then the states can no more exercise authority over this than Congress can; much less an authority exclusive of that of Congress. For the election of Senators and Representatives in Congress is a federal function; whatever the states do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the Tenth Amendment cannot properly operate upon this subject in favor of the state governments; they could not reserve power over a matter that had no previous existence; hence if the power was not delegated to the United States it must be deemed to have been reserved to the people, and would require a constitutional amendment to bring it into play—a deplorable result of strict construction.

But if I am wrong in this, and the power to regulate primary elections could be deemed to have been reserved by the states to the exclusion of Congress, the result would be to leave the general government destitute of the means to insure its own preservation without governmental aid from the states, which they might either grant or withhold according to their own will. This would render the government of the United States something less than supreme in the exercise of its own appropriate powers; a doctrine supposed to have been laid at rest forever by the decisions of this court in McCulloch v. Maryland, 4 Wheat. 316, 405 et seq., 4 L. Ed. 579, Cohens v. Virginia, 6 Wheat. 264, 381, 387, 414, 5 L. Ed. 257; and many other decisions in the time of Chief Justice Marshall and since.

But why should the primary election (or

nominating convention) and the final election be treated as things so separate and apart as not to be both included in section 4 *282 of *article I? The former has no reason for existence, no function to perform, except as a preparation for the latter; and the latter has been found by experience in many states impossible of orderly and successful accomplishment without the former.

Why should this provision of the Constitution—so vital to the very structure of the government—be so narrowly construed? It is said primaries were unknown when the Constitution was adopted. So were the steam railway and the electric telegraph. But the authority of Congress to regulate commerce among the several states was extended over these instrumentalities, because it was recognized that the manner of conducting the commerce was not essential. And this court was prompt to recognize that a transportation of merchandise, incidentally interrupted for a temporary purpose, or proceeding under successive bills of lading or means of transport, some operating wholly intrastate, was none the less interstate commerce, if such commerce was the practical and essential result of all that was done. The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999; Southern Pacific Terminal Co. v. Interstate Com. Comm., 219 U. S. 498, 526, 527, 31 Sup. Ct. 288, 55 L. Ed. 283; Ohio R. R. Comm. v. Worthington, 225 U. S. 101, 108, 110, 32 Sup. Ct. 635, 56 L. Ed. 1004; United States v. Union Stock Yard, 226 U. S. 286, 304, 33 Sup. Ct. 83, 57 L. Ed. 226; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 124, 33 Sup. Ct. 229, 57 L. Ed. 442.

Why is it more difficult to recognize the integral relation of the several steps in the process of election?

Congress, by the so-called Enforcement Act of May 31, 1870 (chapter 114, § 20, 16 Stat. 140, 145), and the supplement approved February 28, 1871 (chapter 99, §§ 1, 2, 3, 4, 16 Stat. 433, 434), prescribed a variety of regulations relating to elections of members of the House of Representatives, including provisions for safeguarding the registration of voters. These were carried into the Revised Statutes as sections 2011, 2016, 2021, 2022, *283 5522. They were attacked *as unconstitutional in Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, and were sustained as an exertion of the authority of Congress to pass laws for regulating and superintending such elections and for securing their purity—without suggestion that the registration of voters was not, for practical purposes, a part of the election itself and subject to regulation as such. Yet, in point of causation, identification of voters is related to the election no more closely than is the naming of candidates.

It is said that if "the manner of holding elections" had been understood in a sense to include the nominating procedure, ratification of the Constitution by the state conventions could not have been secured. I do not see how this can be confidently asserted, in view of the fact that, by the very hypothesis, the conventions ratified a specific provision for regulating the only manner of holding elections with which they were familiar—dealt with the entire subject without limitation. Mr. Justice Story, in rehearsing the objections, and the reasoning by which they were met, with citations from the debates and from the Federalist, refers to no objection that would be more cogent, supposing the regulation were extended to nominating procedure, than it would be if the regulation were confined to the ultimate election. Story, Const., §§ 814–827. The sufficient answer to all objections was found in Hamilton's "plain proposition, that every government ought to contain in itself the means of its own preservation." Federalist, No. 59.

What was said, in No. 60 of the Federalist, about the authority of the national government being restricted to the regulation of the times, the places, and the manner of elections, was in answer to a criticism that the national power over the subject "might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others," as by discriminating "between the different departments of indus- *284 try, or between *the different kinds of property, or between the different degrees of property," or by a leaning "in favor of the landed interest, or the moneyed interest, or the mercantile interest, or the manufacturing interest," and it was to support his contention that there was "no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected," which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be "expressly restricted to the regulation of the times, the places, and the manner of elections." This authority would be as much restricted, in the sense there intended, if "the manner of elections" were construed to include all the processes of election from first to last. The restriction arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them, subject to which all regulation of preliminary, as well as of final, steps in the election necessarily would have to proceed.

In support of a narrow construction of the power of Congress to regulate "the manner of elections" of its membership, it is said there is a check against corruption and kindred evils affecting the nominating procedure, in the authority of each house to judge of the elections, returns, and qualifications of its own members; the suggestion being that if—

to take a clear case—it appeared that one chosen to the Senate had secured his election through bribery and corruption at the nominating primary, he might be refused admittance. Obviously, this amounts to a concession that the primary and the definitive election, whose legal separateness is insisted upon, are essentially but parts of a single process; else how could the conduct of a candidate with reference to the primary have legitimate bearing upon the question of his election as Senator? But the suggestion involves a fun- *285 damental *error of reasoning. The power to judge of the elections and qualifications of its members, inhering in each House by virtue of section 5 of article I, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion. And I am unable to see how, in right reason, it can be held that one of the houses of Congress, in the just exercise of its power, may exclude an elected member for securing by bribery his nomination at the primary, if the regulation by law of his conduct at the primary is beyond the constitutional power of Congress itself. Moreover, the power of each house, even if it might rightfully be applied to exclude a member in the case suggested, is not an adequate check upon bribery, corruption, and other irregularities in the primary elections. It can impose no penal consequences upon the offender; when affirmatively exercised it leaves the constituency for the time without proper representation; it may exclude one improperly elected, but furnishes no rule for the future by which the selection of a fit representative may be assured; and it is exerted at the will of but a single house, not by Congress as a law-making body.

But if I am wrong thus far—if the word "elections" in article I, section 4, of the Constitution must be narrowly confined to the single and definitive step described as an election at the time that instrument was adopted—nevertheless it seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress. It is matter of common knowledge that the great mass *286 of *the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interest, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made. Hence, the authority of Congress to regulate the primary elections and nominating conventions arises, of necessity, not from any indefinite or implied grant of power, but from one clearly expressed in the Constitution itself (article I, § 8, cl. 18):

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This is the power preservative of all others, and essential for adding vitality to the framework of the government. Among the primary powers to be carried into effect is the power to legislate through a Congress consisting of a Senate and House of Representatives chosen by the people—in short, the power to maintain a law-making body representative in its character. Another is the specific power to regulate the "manner of holding elections for Senators and Representatives," conferred by section 4 of the first article; and if this does *287 not in *literal terms extend to nominating proceedings intimately related to the election itself, it certainly does not in terms or by implication exclude federal control of those proceedings. From a grant to the states of power to regulate the principal matter, expressly made subject to revision and alteration by the Congress, it is impossible to imply a grant to the states of regulatory authority over accessory matters exclusive of the Congress. And it is obvious that if clause 18 adds nothing to the content of the other express powers, when these are literally interpreted, it has no efficacy whatever and must be treated as surplusage. It has not, heretofore, been so regarded. The subject was exhaustively treated by Chief Justice Marshall, speaking for the court in the great case already referred to, McCulloch v. Maryland, 4 Wheat. 316, 411–424, where he pointed out, pp. 419, 420 (4 L. Ed. 579):

> "1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."

According to the conclusive reasoning adopted in that case, whatever meaning may be attributed to section 4 of article I, there is added by clause 18 of section 8 everything necessary or proper for carrying it into execution—which means, into practical and complete effect.

The passage of the act under consideration amounts to a determination by the lawmaking body that the regulation of primary elections and nominating conventions is necessary if the Senate and House of Representatives are to be, in a full and proper sense, representative of the people. Not only is this true of those cases referred to in the report of the Senate Committee (Senate Rept. No. 78, 62d Cong. 1st Sess. p. 2), where the parties are so unequally divided that a nomination by the majority party is equivalent to *288 election; but it is true in every case *to the extent that the nominating processes virtually eliminate from consideration by the electors all eligible candidates except the few—two or three, perhaps—who succeed in receiving party nominations. Sinister influences exerted upon the primaries inevitably have their effect upon the ultimate election—are employed for no other reason. To safeguard the final elections while leaving the proceedings for proposing candidates unregulated, is to postpone regulation until it is comparatively futile. And Congress might well conclude that, if the nominating procedure were to be left open to fraud, bribery, and corruption, or subject to the more insidious, but (in the opinion of Congress) nevertheless harmful, influences resulting from an unlimited expenditure of money in paid propaganda and other purchased campaign activities, representative government would be endangered.

The question of the authority of Congress to determine that laws regulating primary elections are "necessary and proper for carrying into execution" the other powers specified, admits of but one answer—the same given by Chief Justice Marshall in the memorable case last cited (4 Wheat. 421, 4 L. Ed. 579):

> "We think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"

This principle has been consistently adhered to and liberally applied from that day until this. Among a multitude of illustrative *289 cases that might be cited, some *recent notable, but not exceptional, ones may be instanced: Second Employers' Liability Cases, 223 U. S. 1, 49, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, holding that the power of Congress to regulate commerce among the states brings within its authority the relations between common carriers by rail and their employees engaged in such commerce; Houston & Texas Ry. v. United States, 234 U. S. 342, 350, 355, 34 Sup. Ct. 833, 58 L. Ed. 1341, holding that the same power authorizes Congress to regulate rates of transportation in the internal commerce of a state, to the extent of preventing injurious discrimination against the movement of traffic from state to state; Wilson v. New, 243 U. S. 332, 353, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, holding that the power over interstate commerce extends to regulating the wages of the employees of common carriers engaged therein; Selective Draft Law Cases, 245 U. S. 366, 377, et seq., 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, sustaining an act imposing involuntary military duty upon the citizen as "necessary and proper for carrying into execution" the power to declare war, raise and support armies, and make rules for the government and regulation of the land and naval forces; United States v. Ferger, 250 U. S. 199, 205, 39 Sup. Ct. 445, 63 L. Ed. 936, upholding the authority of Congress to prohibit and punish the fraudulent making of spurious interstate bills of lading even in the absence of any actual or contemplated movement of commerce from state to state; Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 155, 163, 40 Sup. Ct. 106, 64 L. Ed. 194, sustaining war-time prohibition of the sale of distilled spirits for beverage purposes as a measure necessary and proper for carrying into execution the war power; Jacob Ruppert v. Caffey, 251 U. S. 264, 282, 299–301, 40 Sup. Ct. 141, 64 L. Ed. 260, sustaining an act prohibiting the manufacture and sale of nonintoxicating beer as "necessary and proper" to render effective a prohibition against intoxicants; First National Bank v. Union Trust Co., 244 U. S. 416, 419, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283, Ann. Cas. 1918D, 1169, sustaining an act conferring upon national banks powers not inherently federal, but deemed appropriate to enable such banks to *290 compete with state banks having *like powers; and Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577 (decided February 28, last), sustaining an act establishing federal land banks and joint stock land banks having broad powers, not national in their character, but deemed by Congress to be reasonably appropriate for performing certain limited fiscal functions in aid of the national treasury.

It would be tragic if that provision of the Constitution which has proved the sure defense of every outpost of national power should fail to safeguard the very foundation of the citadel.

But its function in preserving our representative government has long been recognized. In Ex parte Yarbrough, 110 U. S. 651, 657, 4 Sup. Ct. 152 (28 L. Ed. 274), where the question was as to the constitutionality of sections 5508 and 5520, Rev. Stat. U. S. (Comp. St. § 10183)—the question having arisen upon an indictment for a conspiracy to intimidate a citizen of African descent in the exercise of his right to vote for a member of Congress—the court, by Mr. Justice Miller, said:

> "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the Legislature is elected by the people directly [now true of both branches], has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. The proposition that it has no such power is supported by the old argument, often heard, often repeated, and in this court never *291 assented to, that *when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. * * * It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution. Article I, § 8, cl. 18."

I conclude that it is free from doubt that the Congress has power under the Constitution to regulate the conduct of primary elections and nominating conventions held for choosing candidates to be voted for in general elections for Representatives and Senators in Congress, and that the provisions of the Act of August 19, 1911 (37 Stat. 26–28), in that behalf are valid.

Since the majority of the court hold that the act is invalid, it would serve no useful purpose to spend time in discussing those assignments of error that relate to the conduct of the trial. It may be said, however, that, in my opinion, the trial court did not err in refusing to direct a verdict for the defendants for want of evidence of the alleged conspiracy; nor in instructing the jury that the prohibition of the statute against the expenditure and use of money by a candidate beyond the specified limit is not confined to his own money, but extends to the expenditure or use of excessive sums of money by him, from whatever source and from whomsoever derived; nor in instructing them that *292 in order to warrant a ver*dict of guilty upon an indictment for conspiracy it was not necessary that the government should show that defendants knew that some statute forbade the acts they were contemplating, but only to show an agreement to do acts constituting a violation of the statute; their knowledge of the law being presumed.

I find prejudicial error, however, in that part of the charge which assumed to define the extent to which a candidate must participate in expenditures beyond the amount limited in order that he may be held to have violated the prohibition—an instruction vitally important because it was largely upon overt acts supposed to have been done in carrying out the alleged conspiracy that the government relied to prove the making of the conspiracy and its character, and because, unless the purposes of defendants involved a violation of the Corrupt Practices Act, they were not guilty of a conspiracy to commit an "offense against the United States," within the meaning of section 37, Criminal Code.

The instruction upon this topic, excepted to and assigned for error, was as follows:

> "The phrase which constitutes the prohibition against the candidate 'causing to be given, contributed, expended or used' excessive sums of money, is not limited and not confined to expenditures and use of money made directly and personally by himself. This prohibition extends to the expenditure and use of excessive sums of money in which the candidate actively participates, or assists, or advises, or directs, or induces, or procures. The prohibition extends not only to the expenditure and use of excessive sums of money by the candidate directly and personally, but to such use and expenditure through his agency, or procurement, or assistance. To constitute a violation of this statute knowledge of the expenditure and use of excessive sums of money on the part of the candidate is not sufficient; neither is it sufficient to constitute a violation of this *293 *statute that the candidate merely acquiesces in such expenditures and use. But it is sufficient to constitute a violation of this statute if the candidate actively participates in doing the things which occasion such expenditures and use of money and so actively participates with knowledge that the money is being expended and used. To apply these rules to this case: If you are satisfied from the evidence that the defendant, Truman H. Newberry, at or about the time that he became a candidate for United

> States Senator was informed and knew that his campaign for the nomination and election would require the expenditure and use of more money than is permitted by law and with such knowledge became a candidate, and thereafter by advice, by conduct, by his acts, by his direction, by his counsel, or by his procurement he actively participated and took part in the expenditure and use of an excessive sum of money, of an unlawful sum of money, you will be warranted in finding that he did violate this statute known as the Corrupt Practices Act."

However this may be regarded when considered in the abstract, the difficulty with it, when viewed in connection with the evidence in the case to which the jury was called upon to apply it, is that it permitted and perhaps encouraged the jury to find the defendants guilty of a conspiracy to violate the Corrupt Practices Act, if they merely contemplated a campaign requiring the expenditure of money beyond the statutory limit, even though Mr. Newberry, the candidate, had not, and it was not contemplated that he should have, any part in causing or procuring such expenditure beyond his mere standing voluntarily as a candidate and participating in the campaign with knowledge that moneys contributed and expended by others without his participation were to be expended.

The language of the Corrupt Practices Act (37 Stat. 28) is:

> "No candidate * * * shall give, contribute, *294 ex*pend, use, or promise, or cause to be given, contributed, expended, used, or promised," etc.

A reading of the entire act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein. Of course, it does not mean that he must be alone in expending or causing to be expended the excessive sums of money; if he does it through an agent or agents, or through associates who stand in the position of agents, no doubt he is guilty; qui facit per alium facit per se; but unless he is an offender as a principal there is no offense. Section 332, Criminal Code, declares:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Clearly this makes any one who abets a candidate in expending or causing to be expended excessive sums a principal offender; but it cannot change the definition of the offense itself as contained in the Corrupt Practices Act, so as to make a candidate a principal offender unless he directly commits the offense denounced. Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.

It follows that one's entry upon a candidacy for nomination and election as a Senator with knowledge that such candidacy will come to naught unless supported by expenditure of money beyond the specified limit, is not within the inhibition of the act unless it is contemplated that the candidate shall have a part in procuring the excessive expenditures beyond the effect of his mere candidacy in evoking spontaneous contributions and expenditures by his supporters; and that his remaining in the field and participating in the ordinary activities of the campaign with knowledge that such activities *295 furnish in *a general sense the "occasion" for the expenditure is not to be regarded as a "causing" by the candidate of such expenditure within the meaning of the statute.

The state of the evidence made it important that, in connection with that portion of the charge above quoted, the jury should be cautioned that unless it was a part of defendants' plan that Mr. Newberry should actually participate in giving, contributing, expending, using, or promising, or causing to be given, contributed, expended, used, or promised moneys in excess of the limited amount—either himself or through others as his agents—his mere participation in the activities of the campaign, even with knowledge that moneys spontaneously contributed and expended by others, without his agency, procurement, or assistance, were to be or were being expended, would not of itself amount to his causing such excessive expenditure. The effect of the instruction that was given may well have been to convey to the jury the view that Mr. Newberry's conduct in becoming and remaining a candidate with knowledge that spontaneous contributions and expenditures of money by his supporters would exceed the statutory limit, and his active participation in the campaign were necessarily equivalent to an active participation by him in causing the expenditure and use of an excessive sum of money, and that a combination among defendants having for its object Mr. Newberry's participation in a campaign where money in excess of the prescribed limit was to be expended, even without his participation in the contribution or expenditure of such money, amounted to a conspiracy on their part to commit an offense against the act.

For error in the instructions in this particular the judgment should be reversed, with directions for a new trial.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this opinion.

(256 U. S. 314)

ST. LOUIS & E. ST. L. ELECTRIC RY. CO. v. STATE OF MISSOURI ex rel. and to Use of HAGERMAN, City Collector.

(Argued March 23, 1921. Decided May 2, 1921.)

(No. 261.)

1. Commerce 🔑72—Taxation of intangible property of company operating railroad over interstate bridge not tax on interstate commerce.

A company, having by contract an exclusive right to operate an electric railroad over a bridge over the Mississippi river at St. Louis and having profitable operating arrangements with connecting street railway companies, whereby it has considerable earning capacity on a small extent of physical property, has intangible property other than its mere right to conduct interstate passenger traffic over the bridge, and a tax on such intangible property is not invalid as a direct tax and burden on the right to engage in interstate commerce.

2. Commerce 🔑72—State may tax property employed in interstate commerce.

While a state may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, this immunity does not prevent the state from imposing an ordinary property tax upon property having a situs within its territory, though employed in interstate commerce.

3. Commerce 🔑72—Franchise may be taxed though franchise is business of interstate commerce.

A corporation's franchise, if not derived from the United States, is subject to state taxation as a part of its property, although the franchise is the business of interstate commerce.

In Error to the Supreme Court of the State of Missouri.

Suit by the State of Missouri, at the relation and to the Use of James Hagerman, Jr., Collector of the City of St. Louis, against the St. Louis & East St. Louis Electric Railway Company. A judgment for plaintiff was affirmed by the Supreme Court of Missouri (279 Mo. 616, 216 S. W. 763), and defendant brings error. Affirmed.

*315

*Messrs. Joseph S. Clark, of Philadelphia, Pa., and William E. Garvin, of St. Louis, Mo., for plaintiff in error.

Mr. Thomas G. Rutledge, of St. Louis, Mo., for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

The plaintiff in error, hereinafter referred to as the Bridge Electric Company, a corporation organized under Missouri law, was the owner in 1906 of 865-1000ths of a mile of electric railway, constructed upon and extending from the easterly to the westerly end of the Eads Bridge over the Mississippi river at St. Louis. In that year the State Board of Equalization of Missouri valued the portion of this railroad which was within that state at $186,019, and levied a tax upon it for state and local purposes, which the plaintiff in error refused to pay, and thereupon this suit was instituted to recover the amount of the tax.

The case was tried on an agreed statement of facts and the state prevailed in all the state courts. Only one of the several defenses relied upon in the answer has been argued in this court, viz. that the tax is invalid because, if allowed, it would constitute a direct and unconstitutional burden on interstate commerce.

The state statute provided that in valuing railroads for taxation the State Board of Equalization should determine the total value of the entire property in the state, tangible *316 *and intangible, of each company, and that from this total it should deduct the value of all its tangible property and then "enter the remainder upon the assessment list * * * under the head of 'all other property.'" Laws of Missouri 1901, p. 232, § 2.

Complying with this statute the Board of Equalization valued all of the rolling stock, poles, wires and cash of the Bridge Electric Company at $32,630 per mile, the roadbed and superstructure at $5,000 per mile, and "all other property" at $500,000 per mile, making a total value per mile of $537,630.

There were .346 of a mile of the track in the state of Missouri and this proportion of the total value per mile, amounting to $186,019 (of which $173,000 was included under the item "all other property"), was the amount on which the disputed tax was levied.

The unit rule thus adopted by the Board of Equalization has long been a familiar method, often approved by this court, for valuing interstate railroad properties. Cleveland, Cincinnati, Chicago & St. Louis Railroad Co. v. Backus, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 38 L. Ed. 1041; St. Louis Southwestern R. R. Co. v. Arkansas, ex rel. Norwood, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215.

[1] It is not contended that this valuation is unreasonable in amount, but only that the property of the company, which was valued as "all other property," consisted solely of its franchise to conduct interstate passenger traffic over the interstate bridge and that therefore the tax, so far as levied on the valuation placed on that property, is a direct tax and burden on the right to engage in interstate commerce and that it is, for this reason, unconstitutional.

But the stipulation on which the case was tried does not sustain this contention.

This stipulation shows that in 1902 the

Bridge Electric Company acquired by contract with the Terminal Railroad Association of St. Louis the exclusive right to operate an electric railroad over the Eads Bridge for *317 the term of *50 years (for passenger traffic only and for a part of the fare to be charged), and that in the same agreement it entered into a written contract with two other electric railroad companies for the recited purpose of causing all passenger traffic originating on the lines then or thereafter controlled by them to pass over the Bridge Electric Company's road. Of the two latter companies thus contracted with, one operated extensive lines of electric street railroad in the city of East St. Louis, in Illinois, and the other operated an extensive system of suburban electric railways in Illinois. Both of these Illinois systems connected with the Bridge Company's track at the easterly end of the bridge.

Later in the same year, 1902, the Bridge Electric Company entered into another agreement by which the company operating lines in East St. Louis contracted for a percentage of the fares to be collected for transportation over the bridge, to furnish the cars, crews and equipment for carrying, and to operate the cars necessary to carry, all passengers across the bridge, without change of cars. Coupon tickets were to be issued to passengers traveling either way across the bridge, and other conveniences were provided for the purpose of increasing the bridge traffic.

It is apparent that the large value which it is conceded this street railroad had was derived, not from its mere franchise to do an interstate business, but from the exclusive right which we have seen the company acquired by private contract to operate over the Eads Bridge, a public highway, and from the other rights also derived from private contract which made its line of track a part of two Illinois systems of railway and gave it a profitable operating arrangement with them. It was these contracts which gave the company's small extent of physical property an earning capacity, and therefore a value, which enabled it to pay from their date in 1902 to the date of the disputed as- *318 sessment 5 per cent. annual *interest on $500,000 of bonded indebtedness and an annual dividend of about 3 per cent. on an equal amount of capital stock.

[2, 3] The law applicable to the state of facts thus developed was summarized in Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995, in a form which has been frequently approved by this court, notably in St. Louis Southwestern Railway Co. v. Arkansas, 235 U. S. 350, 365, 35 Sup. Ct. 99, 59 L. Ed. 265. Slightly condensed, it is that, while a state may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, yet this immunity does not prevent the state from imposing an ordinary property tax upon property having a situs within its territory and employed in interstate commerce. Even the franchise of a corporation, if not derived from the United States, although that franchise is the business of interstate commerce, is subject to state taxation as a part of its property.

The record does not show what the specific items were which entered into the consideration of the Board of Equalization in valuing "all other property" of the Bridge Electric Company, but it appears from the stipulation that the president of the company was heard with respect to the valuation and assessment of all of its property, and we cannot doubt that the contracts we have described, which very plainly gave to this short line of railway much of the value as a going concern which led the company to bond and capitalize it at $1,000,000, and the board to value it at approximately one-half that amount, must have been taken into consideration by the board, and that, therefore, the contention that the tax was levied exclusively upon the franchise to do an interstate business is not sound and must be rejected.

It results that the judgment of the Supreme Court of Missouri must be

Affirmed.

(256 U. S. 226)

ST. LOUIS–SAN FRANCISCO RY. CO. v. MIDDLEKAMP, State Treasurer of Missouri, et al.

(Argued March 2 and 3, 1921. Decided May 2, 1921.)

(No. 636.)

1. Taxation 🔑608(2)—Corporation, seeking to restrain collection of franchise tax on matters of law, cannot complain of want of provision for hearing, when tax collectable only by suit.

A railroad company cannot restrain collection of franchise tax on corporations on the ground that Laws Mo. 1917, p. 237, § 1, imposing the tax, makes no provision for a hearing, where its contest is wholly on matters of law, and the tax is collectable only by suit, in which it must be supposed any question of law apparent on the face of the record would be open.

2. Taxation 🔑371½—Railroad, taxed on its own figures, cannot complain of unequal taxation.

A railroad company, whose franchise tax was based on its own statement of its assets and stock employed within the state, cannot complain that it is taxed disproportionately as compared with other railroads.

3. Constitutional law 🔑48—Certain corporations assumed subject to franchise tax, and equal protection of the laws not denied.

Until the Missouri Supreme Court decides otherwise, it must be assumed that corporations whose stock has no stated par value are subject to the franchise tax imposed by Laws 1917, p. 237, § 1, and that other corporations are not denied the equal protection of the laws, in violation of the Fourteenth Amendment.

4. Commerce 🔑72—Tax not invalid because value of franchise derived partly from interstate business.

That the value of a corporate franchise taxed by a state is derived partly from the fact that the corporation does an interstate business does not invalidate the tax.

5. Taxation 🔑6—Company, whose railroad was under federal control, held subject to state franchise tax.

Under Act Cong. March 21, 1918, §§ 1, 15 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a, 3115¾o), a corporation, whose railroad was under federal control, was profiting by its franchises and subject to the franchise tax imposed on corporations by Laws Mo. 1917, p. 237, § 1.

6. Taxation 🔑47(4)—Missouri franchise tax does not violate state Constitution.

Laws Mo. 1917, p. 237, § 1, imposing a franchise tax on corporations equal to a specified percentage of the outstanding capital stock and surplus employed within the state, does not violate the Missouri Constitution by providing for double taxation.

7. Taxation 🔑376(3)—Missouri franchise tax imposed on surplus, as well as capital stock, employed within the state.

Under Laws Mo. 1917, p. 237, § 1, imposing a franchise tax on corporations based on the par value of the outstanding capital stock and surplus, and providing that, if the corporation employs part of its capital stock in another state or country it shall pay a specified percentage of its "capital stock" employed within the state, and that it shall be deemed to employ within the state such proportion of its outstanding "capital stock and surplus" as its property and assets in the state bear to all property and assets, wherever located, the tax on a corporation employing part of its capital in other states is measured by the capital stock and surplus employed within the state, and not by the capital stock alone.

Appeal from the District Court of the United States for the Western District of Missouri.

Suit by the St. Louis-San Francisco Railway Company against George H. Middlekamp, State Treasurer of the State of Missouri, and another. From a decree for defendants, plaintiff appeals. Affirmed.

See, also, 41 Sup. Ct. 321.

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*Messrs. Edward T. Miller, of St. Louis, Mo., and Henry S. Conrad, of Kansas City, Mo., for appellant.

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*Mr. Frank W. McAllister, of Paris, Mo., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill to restrain the collection of a franchise tax imposed by the statutes of Missouri upon domestic corporations. Laws of 1917, pp. 237–242.[1] The plaintiff, a corporation of Missouri, filed with the State Tax Com*mission a report, as required by law, showing the value of its assets within the State to be $122,826,652, and the amount of its stock employed within the State $21,625,-830. The State Tax Commission accepted these figures and following the statute levied a tax measured by $^3/_{40}$ of one per cent. of the capital stock employed within the State, and also the same tax in respect of the excess in value of the assets within the State over that of such stock, treating that as the "surplus" which the statute takes as the measure along with the stock. The result of course was a tax of $^3/_{40}$ of one per cent. upon $122,826,852, equal to $92,119.99. The plaintiff contests the constitutionality of the Act under the Fourteenth Amendment and the Commerce Clause (art. 1, § 8), and under a supposed prohibition of double taxation in the Constitution of Missouri. It also contends that if the Act was valid it was misconstrued in the ascertainment of the surplus over the value of the capital stock in the State. A preliminary injunction was denied by three judges sitting in the District Court and the plaintiff appealed.

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[1, 2] The objection most insisted upon in this Court was that the statute made no provision for a hearing, and that although the plaintiff applied to the Tax Commission for a hearing and had one, the statute was bad because it did not provide one in terms. Central of Georgia Ry. Co. v. Wright, 207 U. S. 127, 138, 28 Sup. Ct. 47, 52 L. Ed. 134, 12

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[1] Section 1. Every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent. of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to three-fortieths of one per cent. of its capital stock employed in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. Every corporation, not organized under the law of this state, and engaged in business in this state, shall pay an annual franchise tax to the state of Missouri equal to three-fortieths of one per cent. of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this act such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located: Provided, that this act shall not apply to corporations not organized for profit, nor to express companies, which now pay (pay) an annual tax on their gross receipts in this state; and insurance companies, which pay an annual tax on their gross premium receipts in this state.

Ann. Cas. 463. The mode of collecting the tax is by a suit where, of course, the present plaintiff would be heard, but it is said that the judgment of the Commission can be attacked only for want of jurisdiction and fraud. We cannot suppose however that any question of law apparent on the face of the record would not be open. The constitutional objection mainly relied upon necessarily would be. And as in this case the Commission accepted the plaintiff's figures and the contest is wholly upon matters of law, we see

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nothing of which *the plaintiff can complain in this respect. There is to be sure one charge involving matter of fact dehors the record. It is alleged that the plaintiff was taxed disproportionately as compared with other railroads. But the plaintiff was taxed upon its own figures in accordance with the statute and could not complain of that. If it had made out a case of fraud against the Commission we presume that the State Courts would have been open to it, as well as the District Court of the United States. But nothing of that kind was proved. Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 353, 38 Sup. Ct. 495, 62 L. Ed. 1154.

[3] The next objection to the tax has assumed greater importance than any other because it induced the same judges who sat in this case to change their opinion and issue a temporary injunction in a suit like this brought by the Southwestern Bell Telephone Company. We will consider it although it hardly is open on the bill. It now has been decided by the Supreme Court of Missouri that corporations with stock having no stated par value can be admitted to do business in the State, State ex rel. Standard Tank Co. v. Sullivan (Mo.) 221 S. W. 728, and that decision was taken to mean that all such corporations fall within a provision imposing a tax of only twenty-five dollars upon foreign corporations without a capital stock. On that ground it was held that the Southwestern Bell Telephone Company was denied the equal protection of the laws. We hesitate to differ from judges presumably familiar with local conditions, but we cannot read the careful discussion by the Missouri Court as having the meaning supposed. It is true that it adverts to the "lump annual tax" imposed upon foreign corporations without a capital stock while arguing that the policy and laws of Missouri do not forbid their entering the State. But at a later page it quotes with approval a Kansas case to show not only that the absence of a stated value for the stock

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would create no difficulty *in determining whether a corporation should be admitted but also that it would create equally little difficulty in applying the tax imposed upon corporations with stock having a stated par. Until the Supreme Court of the State decides otherwise we shall assume that the supposed inequality of treatment does not exist.

[4, 5] There is no contravention of the Commerce Clause. It is said that the value of the franchise taxed is derived partly from the fact that the corporation does interstate business, but that does not invalidate the tax. St. Louis & East St. Louis Electric Ry. Co. v. Missouri, 256 U. S. 314, 41 Sup. Ct. 488, 65 L. Ed. ——, decided to-day. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 365, 35 Sup. Ct. 99, 59 L. Ed. 265. Of course the fact that the plaintiff's road was under federal control during the year in question does not exonerate it. It was profiting by its franchises although in a different way. Act of March 21, 1918, c. 25, §§ 1, 15. 40 Stat. 451, 458 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a, 3115¾*o*).

[6, 7] Nothing more needs to be said concerning the relation of the Act to the Constitution of the United States. As to the Constitution of Missouri we see no reason to believe that it has been violated and perceive no indication of such an opinion in the judgments of the Supreme Court of the State. That Court on the contrary seems to regard the Act as valid. State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, 221 S. W. Rep. 721. This case also sanctions the construction adopted by the Commission and the Court below for the word "surplus" in the statute and shows that the amount of the tax was right. It is urged that where, as here, only a part of the corporation's capital is employed within the State the tax is measured by that part of the capital alone and no part of the surplus is taken into account. The words are, "such corporation shall pay an annual franchise tax equal to three-fortieths of one per cent. of its capital stock employed in this State." But these words follow the words laying the normal tax meas

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ured by stock and sur*plus, and the sentence quoted continues "and for the purposes of this act such corporation shall be deemed to have employed in this State that proportion of its entire outstanding capital stock and surplus that its property and assets in this State bear to all its property and assets wherever located." We cannot much doubt that the tax was intended to be measured by the proportion of stock and surplus in the State, and that the omission of reference to surplus in the clause first quoted is a misprision or abbreviation that does not conceal the purpose to be gathered from the previous and following words. We think it unnecessary to go into further details.

Decree affirmed.

(256 U. S. 296)

PEOPLE OF STATE OF NEW YORK v. STATE OF NEW JERSEY et al.

(Argued Nov. 8, 11, and 12, 1918. Restored to the Docket for Further Argument March 10, 1919. Reargued Jan. 25, 1921. Decided May 2, 1921.)

No. 2, Original.

1. Courts 🔑304—State of New York held authorized to sue to enjoin pollution of New York Bay by sewage.

Independent of any rights under the compact of 1834 between the states of New York and New Jersey, and regardless of the precise location of the boundary line, the state of New York has a right to maintain a suit to enjoin the discharge of sewage into Upper New York Bay by a New Jersey sewerage district, on allegations that the health, comfort, and prosperity of the people of the state and the value of their property are being gravely menaced by the proposed discharge.

2. Courts 🔑304—Passaic Valley sewerage commissioners held such an agency of the state that its action must be treated as that of the state.

The Passaic Valley sewerage commissioners, created by an act of the New Jersey Legislature (P. L. 1902, p. 190) to construct a trunk sewer to take care of the sewage of municipalities on the Passaic river contracting for the right to use such sewer, is such a statutory corporate agency of the state that its actual or intended discharge of sewage into Upper New York Bay must be treated as that of the state.

3. Stipulations 🔑4—State of New Jersey held bound by stipulation of Passaic Valley sewerage commissioners.

A stipulation by the Passaic Valley sewerage commissioners, in a suit against them by the state of New York to enjoin the discharge of sewage into New York Bay, in which the government intervened, specifying the manner of removing solids from the sewage and the results to be accomplished, must be regarded as the valid obligation of the state, where the Legislature specifically authorized the commissioners to execute it, and by its special counsel entered of record its approval of and consent to such stipulation.

4. United States 🔑126—Intervention in suit to enjoin pollution of New York Bay held proper.

An intervention by the United States government in a suit by the state of New York against the state of New Jersey to enjoin the discharge of sewage into Upper New York Bay was proper, on allegations that such discharge would injure navigation and commerce, damage government property bordering on the bay, and affect the health of government officials and employees at the Brooklyn Navy Yard.

5. Attorney General 🔑7—Held authorized to stipulate for withdrawal from suit to enjoin discharge of sewage.

Where the United States government intervened in a suit to enjoin the discharge of sewage into New York Bay, it was within the power of the Attorney General, under the power to control and conduct litigation, conferred upon him by Rev. St. §§ 359, 367 (Comp. St. §§ 533, 542), to stipulate for the retirement of the United States from the case on terms stated in the stipulation and approved by the Secretary of War, and afterwards embodied in a permit for the construction of the sewer.

6. Courts 🔑304—Navigable waters 🔑35—State, suing in federal Supreme Court, must clearly show threatened invasion of rights of serious magnitude.

A state, invoking the original jurisdiction of the United States Supreme Court to enjoin the discharge of sewage into boundary waters by a sewerage district of another state, has a greater burden than that imposed on a complainant in an ordinary suit between private parties, and must establish by clear and convincing evidence a threatened invasion of rights of serious magnitude.

7. Navigable waters 🔑35—Evidence held insufficient to show discharge of sewage into New York Bay would cause public nuisance.

In a suit to enjoin a New Jersey sewerage district from discharging sewage into Upper New York Bay, evidence *held* insufficient to show that the sewage, when treated and discharged as provided in a stipulation between the sewerage commissioners and the United States government, would cause offensive odors or unsightly deposits on the surface of the water, constituting a public nuisance, or add seriously to the existing pollution of the water.

Original suit by the People of the State of New York against the State of New Jersey and another. Bill was dismissed without prejudice.

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*Messrs. Charles E. Hughes, Maurice B. Dean, William A. McQuaid, and William J. O'Sullivan, all of New York City, and Merton E. Lewis, of Rochester, N. Y., for the People of State of New York.

Messrs. Adrian Riker and Robert H. McCarter, both of Newark, N. J., George W. Wickersham, of New York City, Chandler W. Riker, of Newark, N. J., and John W. Wescott, of Camden, N. J., for the State of New Jersey.

Mr. Justice CLARKE delivered the opinion of the Court.

The people of the state of New York, in their bill filed in this suit, pray that the defendants, the state of New Jersey and the Passaic Valley sewerage commissioners, be permanently enjoined from discharging, as it is averred they intend to discharge, a large volume of sewage into that part of New York harbor known as the Upper Bay, for the reason, as it is alleged, that such pollution of the waters of the harbor will be caused thereby as to amount to a public nuisance. which will result in grave injury to the health, to the property, and to the commercial welfare, of the people of the state and city of New York.

The Passaic river rises in the northeasterly *299 part of *New Jersey and empties into Newark Bay. High land separates its watershed from direct drainage into the Hudson river or New York Bay, and on the lower 25 miles of it there are located the cities of Paterson, Passaic, and Newark, and also a number of such large towns that the population upon and near to the river is treated throughout the record as approximately 700,000 in 1911, when it was thought the sewer would be completed, and as likely to be about 1,650,000 in 1940, to which year it was designed to furnish adequate sewerage capacity. These cities and towns, from their earliest settlement, had all drained their sewage into the river. The ebbing and flowing of the tide almost to Paterson delayed the escaping of this sewage from the river and resulted in the water becoming greatly polluted. This polluted water was emptied directly into Newark Bay, but, ultimately, 84 per cent. of it, modified, no doubt, by nature's agencies, but still polluted, found its way through the natural channel of Kill van Kull, into Upper New York Bay.

This drainage of sewage into the Passaic river resulted in the stream becoming such a menace to the health and property of the adjacent communities that, in 1896, a commission was appointed by the Governor of New Jersey, under the provisions of an act of the Legislature, to study the problem presented, for the purpose of devising some system of sewage disposal which would afford relief. After this commission had reported, a second commission of investigation was provided for by act of the Legislature in 1897, and its report was followed by a third similar commission in 1898.

The reports of these various commissions led, in 1902, to an act of the New Jersey Legislature (P. L. 1902, p. 190) creating the Passaic Valley sewerage district, with boundaries embracing substantially the entire watershed of the Passaic river, and to another act, in 1907 (P. L. 1907, p. 22), prohibiting *300 the dis*charge of sewage into the river after a date named, and directing the defendant, the Passaic Valley sewerage commissioners to prepare plans and specifications for a trunk sewer to dispose of the sewage and authorizing municipalities to contract with them for the service which they might require.

Under authority of this act, the defendant sewerage commissioners in April, 1908, adopted a plan for sewage disposal, which provided for a main intercepting sewer, extending from the city of Paterson, along the right bank of the Passaic river, to a point in the city of Newark, and thence by a tunnel under the waters of Newark Bay and the cities of Bayonne and Jersey City to a point in Upper New York Bay about 500 feet north of Robbins Reef Light, where it was proposed to discharge the sewage at a depth of 40 feet of water below mean low tide. The estimated cost of the proposed sewer was $12,250,000.

It was provided in the act authorizing the construction of the sewer that before any work should be undertaken or obligations incurred, a further investigation should be made by the commissioners as to whether the discharge of the sewage into New York Bay would be likely to pollute its waters to such an extent as to cause a nuisance to persons or property within the state of New York, and that the result of such investigation, with the reasons for it, should be presented to the Governor of the state.

Such an investigation was made and upon report of the commissioners the Governor concluded that the discharge of the sewage as proposed would not pollute the waters of New York Bay so as to cause a nuisance to either persons or property within the state of New York, and the Attorney General of the state also advised the Governor that in his opinion the state of New York could not have any valid legal objection to the use of the sewer as proposed.

There can be no doubt that the various *301 commissioners *who investigated this subject were men of the highest character and intelligence and that they studied it with the aid of the best obtainable sanitary engineers, chemists and bacteriologists, for the purpose of arriving at a solution which would protect and preserve the interests of all of the great communities involved. It is equally beyond doubt that the Governor and other officials of New Jersey, with full appreciation of the magnitude and seriousness of the undertaking, proceeded with great caution and with a settled purpose to fully respect the rights of the people of the state of New York.

Learning of the plans of the state of New Jersey, thus detailed, the Legislature of New York passed an act providing for a commission to investigate the probable effect upon the waters of New York Bay of the proposed Passaic Valley sewer, with power to co-operate with the authorities of New Jersey with a view to arriving at some mutually satisfactory solution of the problem. The record shows that various conferences were held between the New York commission thus created and the Passaic Valley sewerage commissioners, but for some reason, which does not clearly appear, no mutually satisfactory course of action was arrived at, with the result that, in October, 1908, this suit for an injunction was commenced.

For the purpose of showing its right to maintain the suit, the bill thus filed sets out, with much detail, an agreement between the states of New York and New Jersey, approved by Congress in 1834, establishing the boundary line between the two states and giving to New York, to the extent therein written, exclusive jurisdiction over the waters of the Bay of New York.

[1] But we need not inquire curiously as to the rights of the state of New York derived from this compact, for, wholly aside from it, and regardless of the precise location of the boundary line, the right of the state to maintain such a suit as is stated in the bill is very

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clear. The health, *comfort and prosperity of the people of the state and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States. Missouri v. Illinois, 180 U. S. 208, 241, 243, 21 Sup. Ct. 331, 45 L. Ed. 497; Georgia v. Tennessee Copper Co., 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488.

[2] Also, for the purpose of showing the responsibility of the state of New Jersey for the proposed action of the defendant, the Passaic Valley sewerage commissioners, the bill sets out, with much detail, the acts of the Legislature of that state authorizing and directing such action on their part.

Of this it is sufficient to say that the averments of the bill, quite undenied, show that the defendant sewerage commissioners constitute such a statutory, corporate agency of the state that their action, actual or intended, must be treated as that of the state itself, and we shall so regard it. 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497, supra.

The remaining essential allegations of the bill are that the defendants are about to construct the sewer we have described and to discharge the sewage thereby collected into the Upper New York Bay, through a single opening 12 feet in diameter, at a point about half a mile north of Robbins Reef Light; that there would be about 120 millions of gallons of such sewage discharged into the bay every 24 hours in 1911, and in excess of 357 millions of gallons by 1940; that such sewage would be carried by the currents and tides into the Hudson and East Rivers and would be deposited on the bottom and shores of the bay and upon and adjacent to the wharves and docks of New York City, thereby so polluting the water as to render it a public nuisance offensive and injurious to persons living near it or using it for bathing or for purposes of commerce, damaging to

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vessels using the waters, and *so poisonous to the fish and oysters subsisting within it as to render them unfit for food. To prevent the public nuisance, which it is averred would thus be created, a permanent injunction was prayed for.

The essential denials and allegations of the answer are as follows:

Admitting their intention to construct the sewer substantially as described, it is averred: That New Jersey has a shore line of 25 miles on New York Bay and on the Hudson river, and that large cities and towns of that state border upon the bay, so that it has as important an interest as New York has in maintaining the waters free from pollution; that the sewer project objected to was authorized only after it had been recommended and approved by sanitary engineers of highest professional standing and experience and upon their assurance, after careful study of the tidal flow and currents of the bay, that appreciable pollution would not be caused thereby; that the Passaic river empties into Newark Bay and its water, charged, under existing conditions, with the sewage collected from the same communities intended to be served by the projected sewer, in large part reaches New York Bay in the vicinity of Robbins Reef Light, by natural channels, without causing substantial injury to the water; and that the city of New York has long been discharging into the bay at or near to the shore lines thereof, daily, more than seven times as great a volume of sewage (entirely untreated) as the daily discharge of the proposed sewer would be for many years to come. The answers concludes with further denials that the waters of the bay would be corrupted or their usefulness impaired by the use of the proposed intercepting sewer.

After the defendants had answered, the government of the United States, by leave of court, filed a petition of intervention. The warrant assigned for this intervention was, the power and duty of the government with

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respect *to navigation and interstate commerce, and the inherent power which it has to act for the protection of the health of government officials and employees at the Brooklyn Navy Yard, and its duty to protect from damage the government property bordering upon New York Bay.

The projected sewer was described in this petition of intervention, substantially as in the original bill, but it was averred that the plans for the removal of solids from the sewage were so indefinite and inadequate that the use of the sewer would result in the obstruction of navigation by the filling up and shoaling of the channels of the bay, and that the proposed purification of the sewage was so insufficient that the waters would be rendered unsightly and unhealthful to persons using them for commerce or dwelling upon the adjacent shores. It was averred that there were other, better and more advanced methods of sewage disposal than those proposed, and that the threatened injury to commerce and navigation, to the public health and to the property of the United States was not necessary. For these reasons the government joined in the prayer for relief.

The coming of the government into the case was followed by conferences between its officials and the sewerage commissioners, with the result that a method of treatment of the sewage was decided upon much more thorough, comprehensive and definite in character than had been adopted before and the manner of dispersion of it at the outlet was so changed as to secure a much greater diffusion, at a great depth, in the adjacent waters.

These changes were ultimately embodied in a stipulation between the United States, acting through its Attorney General, and the Passaic Valley sewerage commissioners, acting under authority of a special act of the New Jersey Legislature. It was agreed that upon the filing of this stipulation, properly *305 executed, with the *clerk of this court, the petition of intervention of the government should be dismissed, without prejudice—which was done on May 16, 1910.

The stipulation provides, with much detail, that at or near to a pumping station to be located in the Newark Meadows, near Newark Bay, the material coming from the trunk sewer shall first pass through coarse screens to remove floating matter; then through a grit basin or basins, to remove heavy matter, as far as practicable; then through self-cleaning mechanical screens, with openings of not over four-tenths of an inch; and then through sedimentation basins, equipped with "scum boards," at a prescribed velocity of flow. It is provided that the effluent thus screened and settled shall flow into a pumping well, whence it is to be pumped under pressure to a point near Robbins Reef Light, where it is to be discharged at a depth of not less than 40 feet beneath the surface of the water at mean low tide, through 150 outlets, distributed over an area of 3½ acres, and so arranged as to drive the material horizontally across the tidal currents.

The terms of this stipulation were adopted by the government under the advice of army engineers of high rank and by the sewerage commissioners on the advice of distinguished sanitary engineers and it must be accepted as established by the testimony taken in 1919 that at that time screening and sedimentation and thorough dispersion in water through deeply submerged multiple outlets was regarded by the most competent authorities as the most approved method of disposing of sewage in large volume.

But, not satisfied with providing what was thought sufficient treatment to render the sewage innocuous, there was incorporated into the stipulation an agreement on the part of the sewerage commissioners that in the actual operation of the sewer at all times the following *306 *results should be secured, either through compliance with the requirements of the stipulation for treatment of the sewage, "or through requisite additional lawful arrangements," viz.: (1) There will be absence in the New York Bay of visible suspended particles coming from this sewage; (2) there will be absence of deposits caused by it objectionable to the Secretary of War of the United States; (3) there will be absence of odors due to the putrefaction of organic matter contained in the sewage; (4) there will be absence on the surface of the bay of any grease or color due to the sewage; (5) there will be no injury to the public health due to the discharge of the sewage, and no public or private nuisance will be created thereby; (6) no injurious effect shall result to the property of the United States situated upon the bay; (7) there shall not be a reduction in the dissolved oxygen content of the waters, due to this sewage, sufficient to interfere with major fish life. It is agreed that the government shall have unrestricted opportunity to inspect the workings of the sewer system, by designated officials, and that full compliance at all times with the provisions of the stipulation referred to shall be made an express condition of any permit issued by the government for the construction, maintenance or operation of the projected sewer system.

It is obvious that if the conditions of this stipulation are realized and maintained, there will be no occasion or ground for such an injunction as was prayed for.

It is argued, however, and expert witnesses have testified, that the provisions therein stipulated for screening and sedimentation and final dispersion of the sewage in the water, are not sufficient to produce the results which the sewerage commissioners agree with the government to produce and maintain, and that if such results as are feared by the witnesses are produced it would be impossible to determine whether they were caused by this *307 *particular sewage or by that coming from other sources and that therefore the agreement would, in practice, be nugatory. But equally well informed and credible witnesses testify that the proposed treatment would produce the stipulated results and that the source of such pollution, if any should be caused by the Passaic sewage, could readily be traced to its origin, and we think the probabilities greatly in favor of this conclusion, having regard to the opportunity secured to the government for inspection and observation of the treatment plant and for determining the quality and content of effluent before it is discharged into the bay and the effect which it may have on the water in the immediate vicinity of the outlet.

[3] It is also argued that this stipulation is not binding upon the state of New Jersey because executed only by the sewerage commissioners, and that it is invalid for want of power in the Attorney General to so stipulate on behalf of the United States.

But since by act of its Legislature the state of New Jersey specifically authorized the sewerage commissioners to execute the stipulation and by its special counsel entered of record its approval of, and consent to, it, we must and do regard it as the valid obligation of the state as certainly as of the commissioners.

As to the United States: The intervention of the Government was allowed upon allegations that the inadequate treatment of the sewage proposed would result in injury to navigation and commerce; by causing deposits of solid matter, to the extent of thousands of tons annually, which would fill up and shallow the channels of the bay; by rendering the port of New York less serviceable and attractive to commerce and offensive and unwholesome to persons using and living near it; and by causing injury to the hulls of vessels by the character of the effluent to be discharged. It was also averred that *practically irreparable damage would be caused to extensive properties owned by the government adjacent to the bay.

[4, 5] Having regard to the large powers of the government over navigation and commerce, its right to protect adjacent public property, and its officers and employees from damage and disease, and to the duty and authority of the Attorney General to control and conduct litigation to which the government may be a party (R. S. 359, 367, [Comp. St. §§ 533, 542]), we cannot doubt that the intervention of the government was proper in this case and that it was within the authority of the Attorney General to agree that the United States should retire from the case upon the terms stated in the stipulation, which were plainly approved by the Secretary of War, who afterwards embodied them in the construction permit issued to the sewerage commissioners.

Although this stipulation was filed and the government withdrew from the case on May 16, 1910, the remaining parties went forward and took a great volume of testimony, the taking of which was concluded in June, 1913. Five years passed before the case was brought on for argument at the October term, 1918, and upon examination this court, having regard to the long time which had elapsed since the taking of testimony was closed and to the rapid advance in sanitary science then in progress, suggested in the record, directed that additional testimony should be taken in order that the court might be advised: (1) As to any practicable modification of the proposed sewer system which might improve it and reduce any polluting effect upon the water which might be caused by the effluent to be discharged; (2) as to any practicable plan or arrangement for sewage disposal which would lessen the polluting effect derived from the New York City sewage; (3) and as to the present degree of pollution of the waters of New York Harbor *and the change in this respect since the taking of the testimony was closed.

In compliance with this order much additional testimony was taken.

[6] With the record in this state we come to consider the evidence introduced, but subject to the rule that the burden upon the state of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence. Missouri v. Illinois and the Sanitary District of Chicago, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572.

The water of New York Bay is such a brackish combination of salt sea and fresh water that it could not, under any circumstances, be used for drinking or other domestic purposes, and, therefore, the reasons given in the bill to justify the injunction prayed for are restricted, as we have seen, to the claims that the addition of the Passaic Valley sewage to the already polluted waters of the bay would result, in odors offensive and unwholesome to persons bathing in them or passing over them in large vessels or in small boats or living and working upon the adjacent shores, in causing unsightly deposits on the surface of the water and chemical action injurious to the wood and metal of vessels navigating the bay, and in rendering fish and oysters taken from such waters unfit for consumption.

The evidence introduced, as to increase of damaging chemical action upon the hulls of vessels by the proposed addition of sewage, and as to danger from air borne diseases to persons using the water in boats and vessels or working or dwelling upon the shore of the Bay, is much too meager and indefinite to be seriously considered as *ground for an injunction, and when it is considered that for many years all of the sewage from the great population of New York City and its environs and from the large cities on the New Jersey shore (estimated, in 1912, at 900 millions of gallons daily) has been discharged into the harbor, quite untreated, the evidence does not justify the conclusion that persons bathing in or that fish or oysters subsisting in such waters can sustain much further damage from the addition to them of the sewage of the Passaic Valley, after it has been treated in the manner proposed in the stipulation with the government.

[7] There remains to be considered, therefore, only the offensive odors, and unsightly deposits on the surface which it is claimed will be caused by the addition of putrescible matter to the water and it is to this claim that a large part of the evidence introduced by the complainant is directed. Much evidence was introduced tending to prove that sewage collected from so great an area as that of the Passaic Valley sewerage district

would be stale, if not septic, when it reached the treatment plant at Newark Bay and that it would, therefore, hold in solution much organic matter which would not be removed by the screening and sedimentation processes proposed, with the result that it would cause disagreeable deposits on the surface of the water—"oily and sleek fields"—and offensive odors near the place of discharge and upon the wharves and shores adjacent to the bay.

On the other hand, witnesses of seemingly equal candor and learning, and with large practical experience, called by the defendants, testified that they were confidently of the opinion that the treatment of the sewage provided for in the stipulation with the United States would cause such purification of it that the results guaranteed therein would be fully realized.

It is much to be regretted that any forecast as to what the effect would be of the

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treatment and deeply sub*merged discharge through multiple outlets proposed for this large volume of sewage must depend almost entirely upon the conflicting opinions of expert witnesses, for experience with such treatment and dispersion under even approximately like conditions seems entirely wanting. It is, however, of much significance that the authorities of the city of New York, after many years of investigation of the subject of sewage disposal, in their latest plans propose to adopt a treatment of screening and sedimentation and dispersal in deep water very similar to, but not so extensive and thorough as that provided for in the stipulation between the defendants and the United States.

There is only one point upon which all the experts called for the opposing parties agree, viz., that in the present state of learning upon the subject the amount of dissolved oxygen in water is the best index or measure of the degree to which it is polluted by organic substances, it seemingly being accepted by them all that upon the oxygen content in water depends its capacity for digesting sewage —that is for converting organic matter into inorganic and harmless substances by direct oxidation and by sustaining bacteria which assist in such conversion.

The witnesses agree that so long as there is sufficient dissolved oxygen in the water the process of digestion of the sewage will go forward without producing offensive odors and that when it sinks below a required percentage of saturation such odors will appear, but, unfortunately, there is a wide divergence of opinion among them as to what the required lower percentage is. The opinions of seemingly well qualified experts vary in giving from 25 per cent. to 50 per cent. of saturation as the amount of oxygen necessary to prevent the appearance of such offensive odors from decomposition of organic matter.

Measured by this dissolved oxygen standard, the evidence of the complainant is that

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as early as 1906 the *water adjacent to New York City, especially in the Bronx and lower East River was much polluted by sewage, but that the water in other parts of the bay, especially near Robbins Reef Light, was somewhat, but not greatly, contaminated. This condition, the evidence shows, continued with no very pronounced decrease in the oxygen content of the water until 1911 when the investigations embodied in the first testimony taken were concluded. And the evidence taken under the order of the court in 1919 shows an irreconcilable conflict in the testimony as to the then condition of the water, especially near Robbins Reef Light, and as to the probable condition of it to be anticipated in the future. In the interval from 1906 to 1919 the estimated growth of the population of New York City and its suburbs draining sewage into adjacent waters was in excess of 100,000 a year—an increase of population in the aggregate much greater than the total population of the Passaic Valley sewage district at present and approximately equal to its estimated population in 1940—and it is undisputed that this New York sewage, untreated, was discharged from over 450 sewers directly into the adjacent waters, for the most part at or above the line of low tide, and that only in a few instances was it carried even to the pier heads.

It would seem, therefore, that if the anticipations of the experts for the complainants, as to the results likely to be produced by the effluent from the sewer of defendants, were well founded, by the year 1919 conditions in the harbor should have become so pronounced and plain that there could not have been such conflict as the record shows in the testimony of trustworthy and competent scientists as to its then existing condition.

Considering all of this evidence, and much more which we cannot detail, we must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the de-

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fendants intend *to discharge into Upper New York Bay, even if treated only in the manner specifically described in the stipulation with the United States government, would so corrupt the water of the bay as to create a public nuisance by causing offensive odors or unsightly deposits on the surface or that it would seriously add to the pollution of it.

The evidence taken in 1919 also discloses that other means than those specifically described in the government stipulation may be resorted to, if needed, for the purpose of improving the character of the effluent from the sewer, viz. slower and more prolonged sedimentation processes; additional screening; the aeration of the sewage before it reaches the treatment plant and again after treatment and before discharge into the tunnel conveying it to the bay; and finally, if required, chemical treatment.

Having regard to the treatment of the sewage prescribed in what we regard as a valid contract on the part of the defendants with the government of the United States, to the specific agreement therein for protection of the waters of Upper New York Bay from pollution, and to the means which the government will have to secure further purification, if desired, by refusing to permit the discharge of sewage into the bay to continue, we conclude that the prayer for injunction against the operation of the sewer must be denied.

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.

The court, recognizing the importance of the ruling which it is making to the great *314 populations interested, *as well in the state of New Jersey as in the state of New York, will direct that the decree denying the relief prayed for shall be without prejudice to the instituting of another suit for injunction if the proposed sewer in operation shall prove sufficiently injurious to the waters of the bay to lead the state of New York to conclude that the protection of the health, welfare or commerce of its people requires another application to this court.

It results that the bill of complainants will be dismissed without prejudice to a renewal of the application for injunction if the operation of the sewer of defendants shall result in conditions which the state of New York may be advised requires the interposition of this court.

Bill dismissed without prejudice.

(256 U. S. 350)

AMERICAN BANK & TRUST CO. et al. v. FEDERAL RESERVE BANK OF ATLANTA, GA., et al.

(Argued April 13 and 14, 1921. Decided May 16, 1921.)

No. 679.

1. **Removal of causes ⟹19(8) — Suit against federal reserve bank arises under United States laws.**

A suit against a federal reserve bank, which is incorporated under an act of Congress, is one arising under the laws of the United States over which the District Court of the United States has jurisdiction under Judicial Code, § 24 (Comp. St. § 991), so that a suit against that bank begun in a state court can be removed by it to the United States District Court.

2. **Removal of causes ⟹27—Reserve bank is not deemed a citizen of the state where located.**

The provision of Judicial Code, § 24, subd. 16 (Comp. St. § 991), that national banking associations, for the purposes of suits against them are to be deemed citizens of the states in which they are located, does not include federal reserve banks which are incorporated under a subsequent statute and which are not generally included within the designation of national banking associations, and that provision does not prevent removal of a cause by such bank.

3. **Banks and banking ⟹288½, New, vol. 11A Key-No. Series—Federal reserve bank cannot accumulate checks for demand on nonmember banks to force latter to join or cease business.**

A bill, which alleged that a federal reserve bank had adopted the practice of collecting checks drawn on the plaintiff banks until a considerable number were on hand and then demanding payment in cash over counter for the purpose of forcing the banks on which they were drawn either to join the federal reserve system or to cease to do business, states a ground for relief, notwithstanding the right of the holder of a check to demand payment thereof in cash.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the American Bank & Trust Company and others against the Federal Reserve Bank of Atlanta, Ga., and others, begun in the state court and removed to the United States District Court. A decree dismissing the bill was affirmed by the Circuit Court of Appeals (269 Fed. 4), and plaintiffs appeal. Reversed.

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*Mr. Alexander W. Smith, of Atlanta, Ga., for appellants.

Messrs. Hollins N. Randolph and Robert S. Parker, both of Atlanta, Ga., for appellees.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by country banks incorporated by the State of Georgia against the Federal Reserve Bank of Atlanta, incorporated under the laws of the United States, and its officers. It was brought in a State Court but removed to the District Court of the United States on the petition of the defendants. A motion to remand was made by the plaintiffs but was overruled. The allegations of the bill may be summed up in comparatively few words. The plaintiffs are not members of the Federal Reserve System and many of them have too small a capital to permit their joining it—a capital that could not be increased to the required amount in the thinly populated sections of the country where they operate. An important part of the income of these small institutions is a charge for the services rendered by them in paying checks drawn upon them at a distance and forwarded, generally by other banks, through the mail. The charge covers the expense incurred by the paying bank and a small profit. The banks in the Federal Reserve System are forbidden to make such charges to other banks in the System. Federal Reserve Act of December 23, 1913, c. 6, § 13; 38 Stat. 263; amended March 3, 1915, c. 93; 38 Stat. 958; September 7, 1916, c. 461; 39 Stat. 752; and June 21, 1917, c. 32, §§ 4, 5; 40 Stat. 234, 235 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9796). It is alleged that in pursuance of a policy accepted by the Federal Reserve Board the defendant bank has determined to use its power to compel the plaintiffs and others in like situation to become members

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of *the defendant, or at least to open a nonmember clearing account with defendant, and thereby under the defendant's requirements, to make it necessary for the plaintiffs to maintain a much larger reserve than in their present condition they need. This diminution of their lending power coupled with the loss of the profit caused by the above mentioned clearing of bank checks and drafts at par will drive some of the plaintiffs out of business and diminish the income of all. To accomplish the defendants' wish they intend to accumulate checks upon the country banks until they reach a large amount and then to cause them to be presented for payment over the counter or by other devices detailed to require payment in cash in such wise as to compel the plaintiffs to maintain so much cash in their vaults as to drive them out of business or force them, if able, to submit to the defendant's scheme. It is alleged that the proposed conduct will deprive the plaintiffs of their property without due process of law contrary to the Fifth Amendment of the Constitution and that it is ultra vires. The bill seeks an injunction against the defendants collecting checks except in the usual way. The District Court dismissed the bill for want of equity and its decree was affirmed by the Circuit Court of Appeals (November 19, 1920). The plaintiffs appealed, setting up want of jurisdiction in the District Court and error in the final decree.

[1, 2] We agree with the Court below that the removal was proper. The principal defendant was incorporated under the laws of the United States and that has been established as a ground of jurisdiction since Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204; Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Matter of Dunn, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558. We shall say but a word in answer to the appellants' argument that a suit against such a corporation is not a suit arising under those laws within section 24 of the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087 (Comp. St. § 991). The *357 contrary is *established, and the accepted doctrine is intelligible at least since it is part of the plaintiffs' case that the defendant bank existed and exists as an entity capable of committing the wrong alleged and of being sued. These facts depend upon the laws of the United States. Bankers' Trust Co. v. Texas & Pacific Ry. Co., 241 U. S. 295, 306, 307, 36 Sup. Ct. 569, 60 L. Ed. 1010; Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132. See further Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577, February 28, 1921. A more plausible objection is that by the Judicial Code, § 24, sixteenth, except as therein excepted national banking associations for the purposes of suits against them are to be deemed citizens of the States in which they are respectively located. But we agree with the Court below that the reasons for localizing ordinary commercial banks do not apply to the Federal Reserve Banks created after the Judicial Code was enacted and that the phrase 'national banking associations' does not reach forward and include them. That phrase is used to describe the ordinary commercial banks whereas the others are systematically called 'Federal Reserve Banks'. We see no sufficient ground for supposing that Congress meant to open the questions that the other construction would raise.

[3] On the merits we are of opinion that the Courts below went too far. The question at this stage is not what the plaintiffs may be able to prove, or what may be the reasonable interpretation of the defendants' acts, but whether the plaintiffs have shown a ground for relief if they can prove what they allege. We lay on one side as not necessary to our decision the question of the defendants' powers, and assuming that they act within them consider only whether the use that according to the bill they intend to make of them will infringe the plaintiffs' rights. The defendants say that the holder of a check has a right to present it to the bank upon which it was drawn for payment over the counter, and that however many *358 checks *he may hold he has the same right as to all of them and may present them all at once, whatever his motive or intent. They ask whether a mortgagee would be prevented from foreclosing because he acted from disinterested malevolence and not from a desire to get his money. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime.

A bank that receives deposits to be drawn upon by check of course authorizes its depositors to draw checks against their accounts and holders of such checks to present them for payment. When we think of the ordinary case the right of the holder is so unimpeded that it seems to us absolute. But looked at from either side it cannot be so. The interests of business also are recognized as rights, protected against injury to a greater or less extent, and in case of conflict between the claims of business on the one side and of third persons on the other lines have to be drawn that limit both. A man has a right to give advice but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action. Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be demanded on any one day. If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result even if less complete in its *359 effect is to be *expected from the course that the defendants are alleged to intend, and to determine whether they are authorized to follow that course it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the petitioner's business as now conducted is justified by the ulterior purpose in view.

If this were a case of competition in private business it would be hard to admit the justification of self interest considering the now current opinion as to public policy expressed in statutes and decisions. But this is not a private business. The policy of the Federal Reserve Banks is governed by the policy of the United States with regard to them and to these relatively feeble competitors. We do not need aid from the debates upon the statute under which the Reserve Banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the States.

Decree reversed.

(256 U. S. 335)

BROWN v. UNITED STATES.

(Argued Nov. 19, 1920. Decided May 16, 1921.)

No. 103.

1. Indictment and information 🔑86(2)—Allegation as to jurisdiction of United States over scene of crime held sufficient.

Under Penal Code, § 272 (Comp. St. § 10445), specifying the places to which such Code applies, an indictment alleging that a homicide was committed on land acquired from the state by the United States for the exclusive use of the United States for its public purposes, and under the exclusive jurisdiction of the same, was sufficient, though not alleging that it was acquired for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

2. Homicide 🔑244(1), 300(3)—Failure to retreat not categorical proof of guilt; instruction held improper.

The failure of one killing another to retreat is a circumstance to be considered with all others in determining whether he went farther than he was justified in doing, but is not categorical proof of guilt, and it was error to charge that a party assaulted was always under the obligation to retreat so long as retreat was open to him provided he could do so without danger, and that unless retreat would have appeared to a man of reasonable prudence in defendant's position as involving danger he was not entitled to stand his ground, especially where defendant was at a place where he was called to be in the discharge of his duty in superintending excavation work.

3. Courts 🔑383(1)—Evidence of self-defense not disregarded, when instructions thereon erroneous.

Where the instructions on the duty to retreat were erroneous, the Supreme Court, on certiorari to Circuit Court of Appeals, cannot disregard the considerable body of evidence that the shooting was in self-defense, though there was evidence that the last shot was fired after deceased was down.

4. Homicide 🔑117—Unnecessary shot in heat of conflict does not necessarily prevent immunity.

Though the last shot fired by defendant, when attacked by deceased was intentional and apparently unnecessary, when subsequently considered, defendant would not necessarily lose his immunity, if it followed close upon the others, while the heat of the conflict was on, and if defendant believed that he was fighting for his life.

Mr. Justice Pitney and Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Robert B. Brown was convicted of murder in the second degree, and his conviction was affirmed by the Circuit Court of Appeals (257 Fed. 46, 168 C. C. A. 258), and he brings certiorari. Reversed.

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*Messrs. James R. Dougherty, of Beeville, Tex., E. C. Brandenburg, of Washington, D. C., and W. E. Pope, of Corpus Christi, Tex., for petitioner.

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*Mr. Assistant Attorney General Stewart, for the United States.

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*Mr. Justice HOLMES delivered the opinion of the Court.

[1] The petitioner was convicted of murder in the second degree committed upon one Hermis at a place in Texas within the exclusive jurisdiction of the United States, and the judgment was affirmed by the Circuit Court of Appeals. 257 Fed. 46, 168 C. C. A. 258. A writ of certiorari was granted by this Court. 250 U. S. 637, 39 Sup. Ct. 494, 63 L. Ed. 1183. Two questions are raised. The first is whether the indictment is sufficient, inasmuch as it does not allege that the place of the homicide was acquired by the United States "for the erection of a fort, magazine, arsenal, dockyard, or other needful building," although it does allege that it was acquired from the State of Texas by the United States for the exclusive use of the United States for its public purposes and was under the exclusive jurisdiction of the same. Penal Code of March 4, 1909, c. 321, § 272, Third; 35 Stat. 1088

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(Comp. St. § 10445); *Constitution, art. 1, § 8. In view of our opinion upon the second point we think it unnecessary to do more than to refer to the discussion in the Court below upon this.

[2] The other question concerns the instructions at the trial. There had been trouble between Hermis and the defendant for a long time. There was evidence that Hermis had twice assaulted the defendant with a knife and had made threats communi-

cated to the defendant that the next time, one of them would go off in a black box. On the day in question the defendant was at the place above mentioned superintending excavation work for a postoffice. In view of Hermis's threats he had taken a pistol with him and had laid it in his coat upon a dump. Hermis was driven up by a witness, in a cart to be loaded, and the defendant said that certain earth was not to be removed, whereupon Hermis came toward him, the defendant says, with a knife. The defendant retreated some twenty or twenty-five feet to where his coat was and got his pistol. Hermis was striking at him and the defendant fired four shots and killed him. The judge instructed the jury among other things that "it is necessary to remember, in considering the question of self defence, that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm." The instruction was reinforced by the further intimation that unless "retreat would have appeared to a man of reasonable prudence, in the position of the defendant, as involving danger of death or serious bodily harm" the defendant was not entitled to stand his ground. An instruction to the effect that if the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm from Hermis he was not bound to retreat was refused. So the question is brought out with sufficient clearness whether the *343 formula *laid down by the Court and often repeated by the ancient law is adequate to the protection of the defendant's rights.

It is useless to go into the developments of the law from the time when a man who had killed another no matter how innocently had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in Coke, Third Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason. Other examples may be found in the law as to trespass ab initio, Commonwealth v. Rubin, 165 Mass. 453, 43 N. E. 200, and as to fresh complaint after rape. Commonwealth v. Cleary, 172 Mass. 175, 51 N. E. 746. Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self defence. That has been the decision of this Court. Beard v. United States, 158 U. S. 550, 559, 15 Sup. Ct. 962, 39 L. Ed. 1086. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him. Rowe v. United States, 164 U. S. 546, 558, 17 Sup. Ct. 172, 41 L. Ed. 547. The law of Texas very strongly adopts these views as is shown by many cases, of which it is enough to cite two. Cooper v. State, 49 Tex. Cr. R. 28, 38, 89 S. W. 1068. Baltrip v. State, 30 Tex. App. 545, 549, 17 S. W. 1106.

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[3, 4] *It is true that in the case of Beard he was upon his own land (not in his house,) and in that of Rowe he was in the room of a hotel, but those facts, although mentioned by the Court, would not have bettered the defence by the old common law and were not appreciably more favorable than that the defendant here was at a place where he was called to be, in the discharge of his duty. There was evidence that the last shot was fired after Hermis was down. The jury might not believe the defendant's testimony that it was an accidental discharge, but the suggestion of the Government that this Court may disregard the considerable body of evidence that the shooting was in self defence is based upon a misunderstanding of what was meant by some language in Battle v. United States, 209 U. S. 36, 38, 28 Sup. Ct. 422, 52 L. Ed. 670. Moreover if the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on, and if the defendant believed that he was fighting for his life.

The Government presents a different case. It denies that Hermis had a knife and even that Brown was acting in self defence. Notwithstanding the repeated threats of Hermis and intimations that one of the two would die at the next encounter, which seem hardly to be denied, of course it was possible for the jury to find that Brown had not sufficient reason to think that his life was in danger at that time, that he exceeded the limits of reasonable self defence or even that he was the attacking party. But upon the hypothesis to which the evidence gave much color, that Hermis began the attack, the instruction that we have stated was wrong.

Judgment reversed.

Mr. Justice **PITNEY** and Mr. Justice **CLARKE** dissent.

(256 U. S. 395)

FREDERICK v. FIDELITY MUT. LIFE INS. CO. OF PHILADELPHIA.

(Submitted Jan. 3, 1921. Decided May 16, 1921.)

No. 547.

1. **Bankruptcy 🔑143(12)—Benefit of life insurance remains with bankrupt, except to extent of cash surrender value.**

Bankruptcy Act, § 70a (Comp. St. § 9654), relative to the property vesting in the trustee, shows a purpose to pass to the trustee whatever sum was available to the bankrupt at the time of bankruptcy as cash assets to be realized on surrender of a life insurance policy, but otherwise to leave to the insured the benefit of such insurance.

2. **Bankruptcy 🔑143(12)—When trustee did not demand change of beneficiary until after payment of proceeds, company not liable to trustee for surrender value.**

Under Bankruptcy Act, § 70a (Comp. St. § 9654), while a life insurance policy, not in terms payable to the bankrupt, but which could be made so payable at his will by a simple declaration changing the beneficiary, must be regarded as assets, the trustee cannot, as against the company, demand that the surrender value be made assets by a change in beneficiary without timely notice to the company of a demand for such a change, and where no such demand was made until after payment of the proceeds to the designated beneficiary, following the bankrupt's death, without notice of the bankruptcy, the company is not liable to the trustee for the cash surrender value.

On Writ of Certiorari to the Superior Court of the State of Pennsylvania.

Action by Elliott Frederick, trustee in bankruptcy of John E. Schmidt, against the Fidelity Mutual Life Insurance Company of Philadelphia. A judgment for defendant was affirmed by the Superior Court of Pennsylvania (75 Pa. Super. Ct. 77), and an appeal was refused by the Supreme Court of Pennsylvania, and plaintiff brings certiorari. Affirmed.

See, also, 254 U. S. 625, 41 Sup. Ct. 15, 65 L. Ed. —.

Mr. Lowrie C. Barton, of Pittsburgh, Pa., for petitioner.

Mr. George Sutherland, of Washington, D. C., for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

John E. Schmidt having died pending bankruptcy, his trustee, the present petitioner, *396 sued the insurance com*pany, respondent, in the court of common pleas of Allegheny county, Pa., to recover the proceeds of a certain policy of life insurance, with interest from the date of death. By an amended statement plaintiff limited his claim to the surrender value of the policy at the time of the adjudication of bankruptcy. The court of common pleas gave judgment in favor of defendant; on appeal the Superior Court affirmed the judgment (75 Pa. Super. Ct. 77); the Supreme Court of the state refused an appeal, thereby making the judgment of the Superior Court final; and a writ of certiorari brings the case here.

The facts in brief are as follows: September 20, 1902, the insurance company issued a policy of insurance upon the life of John E. Schmidt in the sum of $1,000, payable upon surrender of the policy properly receipted, after acceptance of proof of death; payment to be made to his wife, Annie M. Schmidt, or, if he should survive her, then to his administrators, executors or assigns, subject to certain provisions, one of which was:

> "The insured, with the written approval of the president or vice president, may upon the surrender of this policy, change the beneficiary, or with such approval it may be assigned."

December 19, 1912, a petition in involuntary bankruptcy was filed against Schmidt; on January 8th following he was duly adjudged a bankrupt; and one month later petitioner was elected and duly qualified as his trustee. The policy was not included in the schedule of assets, and petitioner had no knowledge of it until after the proceeds had been paid by the insurance company to the widow. Upon the date of the adjudication of bankruptcy the policy had a cash surrender value of $322. April 4, 1913, the bankrupt died, proof of the fact and cause of his death was duly made and accepted by the company, and May 7, 1913, it paid the face of the policy to the beneficiary named therein and took her *397 receipt therefor. Neither *then nor at any time before had the company knowledge of the adjudication in bankruptcy, or notice that the trustee would claim the whole or any part of the policy.

The trustee's suit to recover the surrender value is grounded upon section 70a of the Bankruptcy Act (Act July 1, 1898, c. 541; 30 Stat. 544, 565 [Comp. St. § 9654]), under which the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, to rights and property not exempt, including:

> "(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. * * * "

[1, 2] This provision shows it was the purpose of Congress to pass to the trustee whatever sum was available to the bankrupt at the time of bankruptcy as cash assets to be realized on surrender of the policy, but otherwise to leave to the insured the benefit of his life insurance. Burlingham v. Crouse, 228 U. S. 459, 473, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154. In two recent cases, Cohen v. Samuels, 245 U. S. 50, 53, 38 Sup. Ct. 36, 62 L. Ed. 143, and Cohn v. Malone, 248 U. S. 450, 39 Sup. Ct. 141, 63 L. Ed. 352, we have held that the surrender value of a policy not in terms payable to the bankrupt, but which could be made so payable at the bankrupt's

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will by a simple declaration changing the *beneficiary, must be regarded as assets to which the trustee in bankruptcy was entitled. In each case the question arose while the policy was in the bankrupt's possession unmatured, and the interest of the insurance company was not affected. Here the question is whether, after the death of the insured and payment of the stipulated amount to the beneficiary named in the policy in strict conformity to its terms, without notice of the bankruptcy, or claim made by the trustee, there is a liability on the part of the insurance company to pay to the trustee the surrender value that, on complying with the terms of the policy, he might have demanded.

It is not enough to sustain the trustee's claim to say that the filing of the petition in bankruptcy was a caveat to all the world, and in effect an attachment and injunction, and that on adjudication title to the bankrupt's property became vested in the trustee. Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405. The asserted right of property arose out of a contract under which the insurance company had rights as well as the insured. The company's contract was to pay the stipulated amount to the beneficiary first named on receiving proof of death of the insured, unless the latter should have surrendered the policy and, with the written approval of the head officer of the company, have changed the beneficiary. The requirement of such surrender and approval was for the protection of the company, so purposed that at least it should have notice before its liability under the policy was modified. Section 70a of the Bankruptcy Act cannot be construed to give to the trustee in bankruptcy a right as against the company to demand that the surrender value be made assets of the estate, as by a change in beneficiary, without timely notice to the company of a demand for such a change; for the section in its very words contemplates that the cash surrender value shall have been "ascertained and stated to the trustee by the company issuing the policy."

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*In the present case, the company, having in good faith performed the contract according to its terms, without the notice that the contract called for as a condition of changing the terms, cannot be called upon to make the further payment demanded by the trustee. Frederick v. Metropolitan Life Ins. Co., 239 Fed. 125, 152 C. C. A. 167.

Judgment affirmed.

(256 U. S. 399)

YEE WON v. WHITE, Immigration Com'r.

(Submitted April 20, 1921. Decided May 16, 1921.)

No. 209.

1. **Aliens 🔑23(2)—Chinese person becoming laborer after entry not entitled to entry of wife and children.**

Under Act April 29, 1902, as amended by Act April 27, 1904, § 5 (Comp. St. § 4337), re-enacting, extending, and continuing prior limitations on the immigration of Chinese laborers, one entering the United States subsequent to the treaty with China of 1894 as a resident merchant's minor son, but subsequently acquiring the status of a laborer, is not entitled to have his wife and minor children, born in China and never residing elsewhere, admitted.

2. **Aliens 🔑24—Acts limiting immigration of Chinese laborers still in force notwithstanding expiration of treaty.**

The legislation limiting the immigration or residence of Chinese laborers re-enacted, extended, and continued by Act April 29, 1902, as amended by Act April 27, 1904, § 5 (Comp. St. § 4337), is in force notwithstanding the expiration in 1904 of the treaty of 1894 with China, prohibiting the coming of Chinese laborers to the United States.

3. **Aliens 🔑24—Chinese laborers not specifically exempted are excluded.**

The statutes limiting the immigration or residence of Chinese laborers excluded all Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted.

Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Habeas corpus by Yee Won against Edward White, as Commissioner of Immigration, Port of San Francisco. The judgment of the court below was affirmed by the Circuit Court of Appeals (258 Fed. 792, 170 C. C. A. 86), and petitioner brings certiorari. Affirmed.

See, also, 251 U. S. 549, 40 Sup. Ct. 180, 64 L. Ed. 409.

Messrs. M. Walton Hendry, of Washington, D. C., John L. McNab, of San Francisco, Cal., and W. E. Harvey, of Washington, D. C., for petitioner.

Mr. Solicitor General Frierson, for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The courts below denied petitioner's application for a writ of habeas corpus to secure release of his wife and minor children, who, having been denied admission upon *400 their *arrival at San Francisco from China, were being held for return. 258 Fed. 792, 170 C. C. A. 86. He must be regarded here as a Chinese person first permitted to enter the United States in 1901 as a resident merchant's minor son, but who subsequently acquired the status of laborer and as such entitled to remain.

In respect of the parties specially concerned the Circuit Court of Appeals said:

> "The father of Yee Won died in San Francisco in 1908. In the latter part of 1910 Yee Won applied to the immigration officers at the port of San Francisco for an identification of his status. He was about to depart for China, and it was his purpose to secure such an identification as would secure his admission upon his return. He made no claim that he was a merchant. His claim was that he was 'a capitalist and property owner.' He was granted such a certificate and departed for China in January, 1911. He returned on May 29, 1914. He was then 33 years of age. He claims to have married Chin Shee in China March 2, 1911, and that a daughter Yee Tuk Oy was born to them November 28, 1912, and a son, Yee Yuk Hing, was born to them on November 2, 1913. These three are the present applicants to enter the United States. They were all born in China, and this is their first application to enter the United States."

The writ was properly denied unless as matter of law such a laborer may properly demand that his wife and minor children be permitted to come into this country and reside with him notwithstanding they were born in China and have never resided elsewhere. In support of such right United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544, is cited, and it is said that the reasoning therein which permitted her to enter because a merchant's wife applies to the family of a Chinese laborer, who lawfully resides here. But that case turned upon the true meaning of section 6, Act of July 5, 1884 (chapter 220, 23 Stats. 115 [Comp. *401 St. § 4293]), which required *every Chinese person other than laborers as condition of admission to present a specified certificate. The conclusion was that the section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go.

The treaty of 1894 (28 Stats. 1210) provided that—

> "The coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited," but this "shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement."

Exclusion of all Chinese laborers, with certain definite, carefully guarded exceptions, was the manifest end in view, and for a long time the same design has characterized legislation by Congress. "In the opinion of the government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." See Act of May 6, 1882, 22 Stats. 58, as amended by Act of July 5, 1884, 23 Stats. 115 (Comp. St. §§ 4290–4302); Act of September 13, 1888, 25 Stats. 476, 477; Act of May 5, 1892, 27 Stats. 25, (Comp. St. §§ 4315–4323); Act of November 3, 1893, 28 Stats. 7 (Comp. St. §§ 4320–4324).

[1-3] The special object of the treaty of 1894 was to secure assent of China to the limitation or suspension by the United States of immigration or residence of Chinese laborers. Prior to that time rather drastic legislation had undertaken to limit such immigration and residence. These statutes were "re-enacted, extended, and continued, without modification, limitation, or condition," by Act of April 29, 1902 (chapter 641, 32 Stats. 176), as amended by Act of April 27, 1904 (chapter 1630, § 5, 33 Stats. 428, [Comp. St. § 4337]), and are now in force notwithstanding the treaty of 1894 expired in 1904. Hong Wing v. United States, 142 *402 Fed. 128, 73 C. C. A. 346. This *well-defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty, as members of an exempt class, and later assumed the status of laborers. We think our statutes exclude all Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children.

The judgment of the court below is Affirmed.

Mr. Justice CLARKE dissents.

(256 U. S. 345)

NEW YORK TRUST CO. et al. v. EISNER.

(Argued April 25 and 26, 1921. Decided May 16, 1921.)

No. 286.

1. **Internal revenue 🔑2—Estate tax not invalid, as interference with state's powers.**

The tax imposed by Act Sept. 8, 1916, c. 463, tit. 2, §§ 201–208 (Comp. St. § 6336½b et seq.), on the value of the net estate of every decedent, is not invalid as an interference with the rights of the states to regulate descent and distribution, or an intrusion upon the processes of the state, though imposed on the transfer, and not on the legacies.

2. **Internal revenue 🔑2—Estate tax not invalid as direct tax not apportioned.**

The estate tax imposed by Act Sept. 8, 1916, c. 463, tit. 2, § 201 (Comp. St. § 6336½b), is not invalid as a direct tax not apportioned as required by the Constitution, as it is a historical fact that such a tax has always been treated as a duty or excise, and not as a direct tax.

3. **Internal revenue 🔑2—Estate tax not invalid because of inequalities.**

The estate tax imposed by Act Sept. 8, 1916, c. 463, tit. 2, § 201 (Comp. St. § 6336½b), is not invalid because of inequalities therein, since in the case of a will these are contemplated by the testator, and, as to intestate successors, the tax is not imposed upon them, but precedes them.

4. **Internal revenue 🔑8—State taxes on right of individual beneficiaries cannot be deducted in computing the estate tax.**

As the estate tax imposed by Act Sept. 8, 1916, c. 463, tit. 2, § 201 (Comp. St. § 6336½b), attaches to the estate before distribution, and is a tax on the right to transmit, or on the transmission at its beginning, it attaches to the whole estate, except so far as the statute sets a limit, and taxes imposed by the states on the right of individual beneficiaries cannot be deducted as charges against the estate allowed by the laws of the jurisdiction, the deduction of which is authorized by section 203 (section 6336½d).

In Error to the District Court of the United States for the Southern District of New York.

Suit by the New York Trust Company and another, as executors of J. Harsen Purdy, against Mark Eisner. The suit was dismissed on demurrer (263 Fed. 620), and plaintiffs bring error. Affirmed.

Mr. George Sutherland, of Washington, D. C., and H. T. Newcomb, of New York City, for plaintiff in error.

Mr. Solicitor General Frierson, for defendant in error.

Mr. John B. Gleason, of New York City, for the Comptroller of the State of New York, by special leave.

Mr. J. Weston Allen, of Boston, Mass., for the State of Massachusetts and others, by special leave.

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*Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought by the executors of one Purdy to recover an estate tax levied under the Act of Congress of September 8, 1916, c. 463, Title II, § 201, 39 Stat. 756, 777 (Comp. St. § 6336½b), and paid under duress on December 14, 1917. According to the complaint Purdy died leaving a will and codicil directing that all succession, inheritance and transfer taxes should be paid out of the residuary estate, which was bequeathed to the descendants of his brother. The value of the residuary estate was $427,414.96, subject to some administration expenses. The executors had been required to pay and had paid inheritance and succession taxes to New York ($32,988.97) and other States ($4,780.91) amounting in all to $37,769.88. The gross estate as defined in section 202 of the Act of Congress (Comp. St. § 6336½c) was $769,799.39; funeral expenses and expenses of administration, except the above taxes, $61,322.08; leaving a net value for the payment of legacies, except as reduced by the taxes of the United States, of $670,707.43. The plaintiffs were compelled to pay $23,910.77 to the United States, no deduction of any part of the above mentioned $37,769.88 being allowed. They allege that the Act of Congress is unconstitutional, and also that it was misconstrued in not allowing a deduction of state inheritance and succession taxes as charges within the meaning of section 203 (section 6336½d). On demurrer the District Court dismissed the suit.

By section 201 of the Act, "a tax * * * equal to the following percentages of the value *347 of the net estate, to be *determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act," with percentages rising from one per centum of the amount of the net estate not in excess of $50,000 to ten per centum of the amount in excess of $5,000,000. Section 202 gives the mode of determining the value of the gross estate. Then, by section 203 it is enacted:

> "That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as

are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and (2) an exemption of $50,000."

The tax is to be due in one year after the decedent's death. Section 204 (section 6336½e). Within thirty days after qualifying the executor is to give written notice to the collector and later to make return of the gross estate, deductions allowed, net estate and the tax payable thereon. Section 205 (section 6336½f). The executor is to pay the tax. Section 207 (section 6336½h). The tax is a lien for ten years on the gross estate except such part as is paid out for allowed charges, section 209 (section 6336½j), and if not paid within sixty days after it is due is to be collected by a suit to subject the decedent's property to be sold, section 208 (section 6336½i). In case of collection from some person other than the executor, the same section provides for contribution from or marshalling of persons subject to equal or prior liability "it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of
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the decedent the tax *shall be paid out of the estate before its distribution." These provisions are assailed by the plaintiffs in error as an unconstitutional interference with the rights of the States to regulate descent and distribution, as unequal and as a direct tax not apportioned as the Constitution requires.

[1] The statement of the constitutional objections urged imports on its face a distinction that, if correct, evidently hitherto has escaped this Court. See United States v. Field, Feb. 28, 1921, 255 U. S. 257, 41 Sup. Ct. 256, 65 L. Ed. 617. It is admitted, as since Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the State itself and therefore is an intrusion upon its processes, whereas a legacy tax is not imposed until the process is complete. An analogy is sought in the difference between the attempt of a State to tax commerce among the States and its right after the goods have become mingled with the general stock in the State. A consideration of the parallel is enough to detect the fallacy. A tax that was directed solely against goods imported into the State and that was determined by the fact of importation would be no better after the goods were at rest in the State than before. It would be as much an interference with commerce in one case as in the other. I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. Ed. 413; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347. Conversely if a tax on the property distributed by the laws of a State, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good.

[2] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, dealt, it is true, with a legacy tax. But the tax was met with the same objection; that it usurped or interfered with the exercise of state powers, and the answer to the objection was based upon general considerations and treated the
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"power to transmit *or the transmission or receipt of property by death" as all standing on the same footing. 178 U. S. 57, 59, 20 Sup. Ct. 747, 44 L. Ed. 969. After the elaborate discussion that the subject received in that case we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by Knowlton v. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretion of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83, 20 Sup. Ct. 747, 44 L. Ed. 969. Upon this point a page of history is worth a volume of logic.

[3] The inequalities charged upon the statute, if there is an intestacy, are all inequalities in the amounts that beneficiaries might receive in case of estates of different values, of different proportions between real and personal estate, and of different numbers of recipients; or if there is a will affect legatees. As to the inequalities in case of a will they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes. As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States.

[4] There remains only the construction of the Act. The argument against its constitutionality is based upon a premise that is unfavorable to the contention of the plaintiffs in error upon this point. For if the tax attaches to the estate before distribution—if it
*350
is a tax on the right *to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. "Charges against the estate" as pointed out by the Court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York

succession tax but those paid to other States, which can stand no better than that paid in New York. What amount New York may take as the basis of taxation and questions of priority between the United States and the State are not open in this case.

Decree affirmed.

(256 U. S. 417)

In re MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION.

(Argued April 11, 1921. Decided May 16, 1921.)

No. 30, Original.

Mandamus 🔑53—Does not lie to compel district court to vacate remand to state court.

Under Judicial Code, § 28 (Comp. St. § 1010), denying appeal or writ of error from an order remanding a case to the state court, and requiring the remand to be immediately carried into execution, a writ of mandamus will not issue to compel the District Judge to vacate the order of remand, though the statute does not expressly prohibit mandamus.

Petition for a Writ of Mandamus.

Petition by the Matthew Addy Steamship & Commerce Corporation, a Delaware corporation, for writ of mandamus directing the District Judge for the Eastern District of Virginia to vacate an order remanding a case to the state court. Rule discharged, and petition dismissed.

See, also, 41 Sup. Ct. 321.

Mr. T. K. Schmuck, of New York City, for petitioner.

Messrs. Edward R. Baird, Jr., and Gilbert R. Swink, both of Norfolk, Va., for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

The Coalmont Moshannon Coal Company, a Pennsylvania corporation, filed its petition in the circuit court of the city of Norfolk, Va., against the petitioner, Matthew Addy Steamship & Commerce Corporation, a Delaware company, for the recovery of damages for the alleged breach of a contract, and, under Virginia practice, garnisheed other defendants. In due time, and in proper form, the defendant, the petitioner herein, filed its petition for the removal of the case to the District Court of the United States for the Eastern District of Virginia. Thereafter the plaintiff in the state court filed a motion to remand the case claiming that it was not removable for the reason that the plaintiff and *418 the principal defendant *were nonresidents of the Eastern District of Virginia. The District Court sustained this motion and ordered the case remanded to the state court.

The petition in this proceeding prays that a writ of mandamus shall be issued, directing the District Judge for the Eastern District of Virginia, to vacate the order remanding the case, to redocket it in the District Court, and that it thereupon be heard and determined according to law. A rule to show cause was issued and the judge has filed his return, in which he asserts that the petition should be dismissed, for the reason that mandamus is not an appropriate remedy, because not permitted by the provisions of section 28 of the Judicial Code (Comp St. § 1010), reading as follows:

> "Sec. 28. * * * Whenever any case shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the case was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

This language of the Judicial Code first appeared in the Act of Congress of March 3, 1887 (24 Stat. 552, c. 373), as re-enacted on August 3, 1888 (25 Stat. 433, c. 866), and it has continued unchanged, except by the substitution of the District for the Circuit Court.

In 1890, in the case of In re Pennsylvania Co., Petitioner, 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738, it was held that the power which this court had before the passage of the acts, supra, to afford a remedy by mandamus when a cause, removed from a state court was improperly remanded thereto, was taken away by these acts. Upon full consideration of the prior legislation, this court in the opinion in that case said of the language of the statute quoted (137 U. S. 454, 11 Sup. Ct. 142 [34 L. Ed. 738]):

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs *419 of mandamus; and *it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the contro-

> versy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

In Fisk v. Henarie, 142 U. S. 459, 468, 12 Sup. Ct. 207, 35 L. Ed. 1080, In re Pennsylvania Company, supra, was cited as authority for the declaration that "review on writ of error, or appeal or by mandamus is taken away" by the statutes cited.

In Missouri Pacific Railway Company v. Fitzgerald, 160 U. S. 556, 581, 16 Sup. Ct. 389, 395 (40 L. Ed. 536) this court said:

> "It was subsequently decided in the case of In re Pennsylvania Company, 137 U. S. 451, 454, that the power to afford a remedy by mandamus when a cause, removed from a state court, is improperly remanded, was taken away by the Acts of March 3, 1887, and August 13, 1888."

In Powers v. Chesapeake & Ohio R. Co., 169 U. S. 92, 98, 18 Sup. Ct. 264, 266 (42 L. Ed. 673) it was said that an order remanding a case such as we have here "is not reviewable by this court."

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*In McLaughlin Brothers v. Hallowell, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. Ed. 835, it is held that an order of the United States Circuit Court, remanding a case to a state court, in not reviewable here, directly or indirectly, citing Missouri Pacific Railway Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536.

It is obvious that this statute, and these decisions interpreting it, rule the case at bar, and require that the petition for mandamus be dismissed.

It is not important to inquire to what extent, if at all, Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, departed from the statute and decisions cited, for the correct rule with respect to the function and use of the writ of mandamus has been so often announced in other later cases that it has become entirely settled. Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; McLaughlin Brothers v. Hallowell, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. Ed. 835; Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 447, 36 Sup. Ct. 637, 60 L. Ed. 1084; Ex parte Park Square Automobile Station, 244 U. S. 412, 37 Sup. Ct. 732, 61 L. Ed. 1231; Ex parte Park & Tilford, 245 U. S. 82, 38 Sup. Ct. 15, 62 L. Ed. 164.

The conflict of opinion in the lower courts with respect to the right of removal from a state court of a case in which the opposing parties are citizens of different states and neither is a resident of the state in which the case is commenced, is much to be regretted, but section 28 of the Judicial Code is controlling, and Congress alone has power to afford relief.

Rule discharged.

Petition dismissed.

(256 U. S. 406)

NEW YORK CENT. & H. R. R. CO. v. YORK & WHITNEY CO.

YORK & WHITNEY CO. v. NEW YORK CENT. & H. R. R. CO.

(Argued April 22, 1921. Decided May 16, 1921.)

Nos. 280, 281.

1. Courts 🔑397½, New, vol. 9A Key-No. Series—Judgment in carrier's action for charges reviewable on certiorari.

In a carrier's action against a consignee to collect a balance of freight charges on interstate shipments in which neither party was wholly successful, the judgment of the state court is reviewable by writ of certiorari.

2. Carriers 🔑35—Consignee receiving goods liable for lawful rates.

A consignee of interstate shipments who received the shipments and paid all charges claimed, which were less than the lawful rates established under the Interstate Commerce Act, as a matter of law assumed liability for the only lawful rate which it had a right to pay or the carrier a right to charge, and could not escape liability therefor through any contract with the carrier, and its liability was not a question of fact to be determined from circumstances tending to show an implied agreement.

In Error and on Writs of Certiorari to the Superior Court of the State of Massachusetts.

Action by the New York Central & Hudson River Railroad Company against the York & Whitney Company. Judgment was rendered for plaintiff for part of the amount sued for by the Supreme Judicial Court of Massachusetts (230 Mass. 206, 119 N. E. 855), and each party brings error and petitions for certiorari. Writ of error dismissed, and judgment affirmed in part, and reversed and remanded in part.

See, also, 253 U. S. 478, 40 Sup. Ct. 481, 64 L. Ed. 1022.

Mr. William L. Parsons, of Boston, Mass., for New York Cent. & H. R. R. Co.

Mr. Amos L. Taylor, of Boston, Mass., for York & Whitney Co.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

[1] Neither party was wholly successful in the courts below. 230 Mass. 206, 119 N. E. *407 855 (May 24, 1918). Each has *asked and obtained a writ of error and also a writ of

certiorari. The latter properly bring the issues before us, and the former must be dismissed.

The railroad company as terminal carrier sued York & Whitney Company, a commission merchant, to recover the balance claimed for freight and refrigeration on nine carloads of melons, vegetables, and fruit consigned to the latter, subject to lawful charges, and delivered at Boston during the years 1911 and 1912. They were shipped in interstate commerce upon straight bills of lading approved as to form by the Interstate Commerce Commission, but none of these came into the consignee's possession and it had no knowledge of their issuance or terms.

When York & Whitney Company accepted the cars it paid all charges claimed. The merchandise was sold at once and the net proceeds remitted to the shippers. Later the railroad company discovered that it had collected less than lawful rates established under the Interstate Commerce Act (24 Stat. 379), and thereupon demanded the balance alleged to be due by reason of such undercharges. Maintaining it had accepted the shipments upon the understanding that the charges were as reported, and had not agreed to pay more, York & Whitney Company refused the demand.

Commission merchants often receive from strangers shipments of perishable articles for sale at market prices. Under a trade custom such things are promptly disposed of and the net proceeds remitted to the consignors. Successful conduct of the business requires prompt settlements. The court below held that whether York & Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances. It accordingly approved a judgment, entered upon a verdict, favorable to that company as to charges upon one car- *408 *load (No. 280), and in behalf of the railroad for those claimed on account of eight carloads (No. 281).

[2] We think the doctrine announced in Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U. S. 577, 40 Sup. Ct. 27, 63 L. Ed. 1151 (November 10, 1919) is controlling, and that the liability of York & Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier.

The judgment of the court below in No. 280, so far as challenged, must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. The judgment in No. 281, so far as challenged, is affirmed.

(256 U. S. 368)

DILLON v. GLOSS, Deputy Collector.

(Argued March 22, 1921. Decided May 16, 1921.)

No. 251.

1. Constitutional law 🔑12—Provisions reasonably implied are part of Constitution.

With the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part thereof as what is expressed.

2. Constitutional law 🔑10 — Ratification of proposed amendment must be completed within reasonable time.

Though Const. art. 5, regulating method of adopting amendments, does not expressly prescribe any limit to the time within which ratification of a proposed amendment must be completed, it is implied thereby that such ratification must be completed within a reasonable time after the amendment is proposed, so that it represents a contemporaneous sentiment of the required number of states.

3. Constitutional law 🔑10—Congress can fix definite period for ratification, within reasonable limitation.

Congress has power, under the broad authority given it by Const. art. 5, regulating the method of adopting amendments, to fix a time within which a proposed amendment shall be ratified to become effective, so long as the time so fixed is a reasonable one.

4. Constitutional law 🔑10 — Seven-year period, fixed for ratification of Eighteenth Amendment, is reasonable.

The period of seven years prescribed by Congress within which the proposed Eighteenth Amendment to the Constitution must be ratified by the requisite number of states to make the amendment effective was a reasonable period, in view of the fact that all amendments which had been adopted theretofore had been ratified in a shorter time.

5. Evidence 🔑34—Court takes judicial notice of consummation of ratification of constitutional amendment.

The Supreme Court takes judicial notice of the date of the consummation of the ratification of an amendment to the United States Constitution.

6. Constitutional law 🔑22—Amendment is effective from date of consummation regardless of date of proclamation.

The Eighteenth Amendment to the Constitution, which was to take effect one year after being ratified, became effective on January 16, 1920, which was one year after the consummation of the ratification, though the Secretary of State did not proclaim the ratification until January 29, 1919.

Appeal from the District Court of the United States for the Northern District of California.

Habeas corpus proceedings by J. J. Dillon against R. W. Gloss, Deputy Collector of Internal Revenue, to secure petitioner's discharge from custody under the National Prohibition Act. From an order denying the petition for the writ (262 Fed. 563), petitioner appeals. Affirmed.

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*Messrs. Levi Cooke, of Washington, D. C., and Theodore A. Bell, of San Francisco, Cal., for appellant.

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*The Assistant Attorney General Adams, for appellee.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from an order denying a petition for a writ of habeas corpus. Ex parte Dillon (D. C.) 262 Fed. 563. The petitioner was in custody under section 26 of title 2 of the National Prohibition Act, c. 85, 41 Stat. 305, on a charge of transporting intoxicating liquor in violation of section 3 of that title, and by his petition sought to be discharged on several grounds, all but two of which were abandoned after the decision in National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946. The remaining grounds are, first, that the Eighteenth Amendment to the Constitution, to enforce which title 2 of the act was adopted, *371 is invalid, because the congressional *resolution (40 Stat. 1050) proposing the amendment declared that it should be inoperative unless ratified within seven years; and, secondly, that, in any event, the provisions of the act which the petitioner was charged with violating, and under which he was arrested, had not gone into effect at the time of the asserted violation nor at the time of the arrest.

The power to amend the Constitution and the mode of exerting it are dealt with in article 5, which reads:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period, or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The proposal for the Eighteenth Amend- *372 ment is the *first in which a definite period for ratification was fixed.[1] Theretofore 21 amendments had been proposed by Congress and seventeen of these had been ratified by the Legislatures of three-fourths of the states —some within a single year after their proposal and all within four years. Each of the remaining 4 had been ratified in some of the states, but not in a sufficient number.[2] Eighty years after the partial ratification of one, an effort was made to complete its ratification, and the Legislature of Ohio passed a joint resolution to that end,[3] after which the effort was abandoned. Two, after ratification in one less than the required number of states had lain dormant for a century.[4] The other, proposed March 2, 1861, declared:

> "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state." [5]

Its principal purpose was to protect slavery and at the time of its proposal and partial ratification it was a subject of absorbing interest, but after the adoption of the Thirteenth Amendment it was generally forgot- *373 ten. Whether an amendment *proposed without fixing any time for ratification, and which after favorable action in less than the required number of states had lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still an open question.

These were the circumstances in the light of which Congress in proposing the Eighteenth Amendment fixed seven years as the period for ratification. Whether this could be done was questioned at the time and debated at length, but the prevailing view in both houses was that some limitation was intended and that seven years was a reasonable period.[6]

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[1] Some consideration had been given to the subject before, but without any definite action. Cong. Globe, 39th Cong. 1st Sess. 2771; 40th Cong. 3d Sess. 912, 1040, 1309-1314.

[2] Watson on the Constitution, vol. 2, pp. 1676-1679; House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, p. 300.

[3] House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, p. 317 (No. 243); Ohio Senate Journal, 1873, pp. 590, 666, 667, 678; Ohio House Journal, 1873, pp. 848, 849. A committee charged with the preliminary consideration of the joint resolution reported that they were divided in opinion on the question of the validity of a ratification after so great a lapse of time.

[4] House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, pp. 300, 320 (No. 295), 329 (No. 399).

[5] 12 Stat. 251; House Doc. 54th Cong. 2d Sess. No. 353, pt. 2, pp. 195-197, 363 (No. 931), 369 (No. 1025).

[1] That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.[7] An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired,[8] it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, *374 without *its consent, of its equal suffrage in the Senate.[9] A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the states Congress shall call a convention for the purpose. When proposed in either mode amendments to be effective must be ratified by the Legislatures, or by conventions, in three-fourths of the states, "as the one or the other mode of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all.[10]

[2] We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as *375 unrelated acts, but as succeeding steps *in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the article lead to the conclusion expressed by Judge Jameson[11] "that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal.

[3, 4] Of the power of Congress, keeping *376 within reasonable *limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters or detail as the public interests

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[6] Cong. Rec. 65th Cong. 1st Sess. pp. 5648-5651, 5652-5653, 5658-5661; 2d Sess. pp. 423-425, 428, 436, 443, 444, 445-446, 463, 469, 477-478.

[7] United States v. Babbit, 1 Black, 55, 61, 17 L. Ed. 94; Ex parte Yarbrough, 110 U. S. 651, 658, 4 Sup. Ct. 152, 28 L. Ed. 274; McHenry v. Alford, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614; South Carolina v. United States, 199 U. S. 437, 451, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Luria v. United States, 231 U. S. 9, 24, 34 Sup Ct. 10, 58 L. Ed. 101; The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592.

[8] Article 5, as before shown, contained a provision that "no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article." One of the clauses named covered the migration and importation of slaves and the other deals with direct taxes.

[9] When the federal convention adopted article 5 a motion to include another restriction forbidding any amendment whereby a state, without its consent, would "be affected in its internal police" was decisively voted down. The vote was: Yeas 3—Connecticut, New Jersey, Delaware; nays 8—New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia. Elliott's Debates, vol. 5, pp. 551, 552.

[10] See Martin v. Hunter's Lessee, 1 Wheat. 304, 324, 325, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. 316, 402-404, 4 L. Ed. 579; Cohens v. Virginia, 6 Wheat. 264, 413, 414, 5 L. Ed. 257; Dodge v. Woolsey, 18 How. 331, 347, 348, 15 L. Ed. 401; Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504; Story on the Constitution (5th Ed.) §§ 362, 363, 463-465.

[11] Jameson on Constitutional Conventions (4th Ed.) § 585.

and changing conditions may require;[12] and article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.

[5, 6] The provisions of the act which the petitioner was charged with violating and under which he was arrested (title 2, §§ 3, 26) were by the terms of the act (title 3, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919.[13] That the Secretary of State did not proclaim its ratification until January 29, 1919,[14] is not material, for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned *377 went into effect January *16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

Final order affirmed.

(256 U. S. 402)

UNITED STATES v. ÆTNA EXPLOSIVES CO.

(Argued April 27 and 28, 1921. Decided May 16, 1921.)

No. 296.

Customs duties 🔑38(5)—Nitric acid, to which sulphuric acid added to prevent corrosion, not dutiable as "preparation" or "mixture."

Under Tariff Act 1913, par. 387, including nitric and sulphuric acid in the free list, and paragraph 5, imposing a duty of 15 per centum ad valorem on all chemical and medicinal compounds, preparations, and mixtures, nitric acid, to which sulphuric acid amounting to 20 per cent. by weight and 5 per cent. according to value has been added solely to prevent corrosion of steel tank cars essential for the transportation of nitric acid in large quantities, is not dutiable as a "preparation" or "mixture."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mixture; Preparation.]

Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Court of Customs Appeals.

Proceedings on protests of the Ætna explosives Company against assessments of duty on imported goods. A decision of the Board of General Appraisers, upholding the action of the Collector of Customs and overruling the protests, was reversed by the Court of Customs Appeals (9 Ct. Cust. App. 298), and the United States brings certiorari. Affirmed.

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*Mr. Assistant Attorney General Hanson for the United States.

Mr. Addison S. Pratt, of New York City, for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

A writ of certiorari to the Court of Customs Appeals was granted (253 U. S. 481, 40 Sup. Ct. 483, 64 L. Ed. 1023) under the Act of August 22, 1914 (chapter 267, 38 Stats. 703 [Comp. St. § 1186]). Ætna Explosives Co. v. United States, 9 Ct. Cust. App. 298.

The question presented is whether the imports came within paragraph 387 of the free list, Tariff Act of 1913 (chapter 16, 38 Stats. 114), which provides:

> "Acids: Acetic or pyroligneous, arsenic or arsenious, carbolic, chromic, fluoric, hydrofluoric, hydrochloric or muriatic, nitric, phosphoric, phthalic, prussic, silicic, sulphuric or oil of vitriol, and valerianic"

—or was dutiable under paragraph 5:

> "Alkalies, alkaloids, and all chemical and medicinal compounds, preparations, mixtures and salts, and combinations thereof not specially provided for in this section, 15 per centum ad valorem."

The imported merchandise was nitric acid, to which approximately 20 per cent. by weight and 5 per cent. according to value of sulphuric acid had been added for the sole purpose of preventing corrosion of steel tank cars essential for transportation of the former acid in large quantities. That the addition of sulphuric acid prevents nitric acid from attacking steel is a well-known fact concerning which there is no very satisfactory explanation. The court below found the sulphuric acid was added solely for transportation purposes, and that the result was not a mixture merchantable as such for use in the United States. It accordingly held that no duty should have been demanded and among other things said:

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[12] Martin v. Hunter's Lessee, 1 Wheat. 304, 326, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579.

[13] Sen. Doc. No. 169, 66th Cong. 2d Sess.; Ark. Gen. Acts 1919, p. 512; Ark. House Journal, 1919, p. 10; Ark. Sen. Journal, 1919, p. 16; Wyo. Sen. Journal, 1919, pp. 26, 27; Wyo. House Journal, 1919, pp. 27, 28; Mo. Sen. Journal, 1919, pp. 17, 18; Mo. House Journal, 1919, p. 40.

[14] 40 Stat. 1941.

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*"The word 'preparations' [in paragraph 5] implies of course that they are something prepared and adapted to particular uses or services. It is no stretch to say that the word 'mixtures' as here employed was used in a similar sense to import mixtures susceptible of commercial use as they exist, or are at least such as are purposely started on their way toward adaption to such use. While not resting this case solely upon this view, it certainly would appeal with great force were it the only consideration involved."

"The testimony fairly tends to show that as a commercial proposition there is only one practical means of transporting strong nitric acid such as that involved in the present importation in quantities sufficient to meet the current demand, and that is to mix it with a sufficient amount of sulphuric acid and ship it in tank cars or drums."

"It is evident that the importer sought to introduce nitric acid and had no desire to import sulphuric acid, or nitric and sulphuric acid as a usable mixture. This small percentage of sulphuric acid which was relatively insignificant in its money value was employed solely for the purpose of making it possible to ship the nitric acid into this country in usable quantities. The result was not a mixture merchantable as such for use in the United States. * * * The merchandise had not reached the state of a commercial mixture contemplated by the statute. It was susceptible of no use other than as nitric acid which must before use be again treated. The mixing of this minimum amount of sulphuric acid should be treated as a means of and part of the shipment, and as an act as essential in the importation of nitric acid as would have been the proper packing of glassware or other goods designed for shipment by rail."

"In the present case we are convinced that there was neither an advantage to the importer in adding the requisite amount of sulphuric acid to admit of safe shipment of the nitric acid nor was there any possible loss of revenue *405 to the *government. The sole purpose for which this addition was made was to admit of shipment. It would be sticking in the bark to say that this was such a mixture as the statute in question contemplates. It is not yet prepared. It has not been advanced as a preparation for actual use except to the extent that a small portion of the requisite amount of sulphuric acid which when added in the proper quantity would result in making a mixture which was usable, is found in this tank instead of some other. The quantity is relatively insignificant."

"We think that the true rule is that the introduction of a quantity of sulphuric acid solely for the purpose of rendering the transportation of nitric acid safe, and which does not result in a usable mixture, is more in the nature of an act of shipment than an admixture, and does not produce a substance which is dutiable under paragraph 5."

We find no reason for disapproving the conclusion reached by the Court of Customs Appeals. The applicable tariff act granted free entry to both nitric and sulphuric acids, and, viewed practically, the commodity in question was nothing more than nitric acid rendered noninjurious to steel tanks by adding sulphuric acid of small value. The two acids do not interact, and the result was a mere mechanical mixture, not intended or adapted as such for commercial use, and not a chemical mixture within the true intent of paragraph 5.

The judgment of the court below must be affirmed.

Mr. Justice DAY took no part in the consideration or decision of this case.

Mr. Justice CLARKE dissents.

(256 U. S. 363)

KRICHMAN v. UNITED STATES.

(Argued March 23, 1921. Decided May 16, 1921.)

No. 260.

1. Bribery 🔑1(2)—Porter of railroad under government control is not "officer of the United States."

A baggage porter, employed by a railroad under the control of the United States government, was not an officer of the United States, within Criminal Code, § 39 (Comp. St. § 10203), making it an offense to bribe an officer to influence his action.

2. Bribery 🔑1(2)—Porter of railroad under government control does not exercise official function.

A baggage porter, in the employ of a railroad while it is under control of the federal government, does not exercise an official function, so that giving him a bribe to induce him to deliver a trunk checked as baggage to one not the owner is not an offense, under Criminal Code, § 39 (Comp. St. § 10203), making it an offense to offer or give anything of value to a person acting on behalf of the United States in an official function to influence his action.

3. Criminal law 🔑13—Ambiguity must not be solved so as to embrace offense not clearly within the law.

The ambiguity in a statute defining a criminal offense is not to be solved so as to embrace offenses which are not clearly within the law.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Harry Krichman was convicted of offering a bribe to a baggage porter to do an act in violation of his duty to the United States, which was in control of the railroad. The denial of his motion in arrest of judgment (256 Fed. 974) was affirmed by the Circuit Court of Appeals (263 Fed. 538), and defendant brings certiorari. Reversed.

Mr. Edward Schoen, of Newark, N. J., for petitioner.

Mr. W. C. Herron, of Washington, D. C., for the United States.

Mr. Justice DAY delivered the opinion of the Court.

Krichman, petitioner, was convicted upon an indictment which charged that while the Pennsylvania Railroad was under the control *364 of and being operated by the *United States, he offered a bribe to a baggage porter to do an act in violation of his duty, contrary to Section 39 of the Criminal Code of the United States (35 Stat. 1096, 10 Comp. Stats. § 10203). The section is in the margin.[1]

It appears that the porter was employed at the Pennsylvania terminal in the city of New York. The petitioner offered to bribe the porter to deliver to him certain trunks containing furs, which were checked from the Pennsylvania station to points outside the state of New York, and paid the porter a sum of money, and procured from him delivery of a trunk containing valuable furs.

Petitioner moved in arrest of judgment, claiming that neither the indictment nor the evidence made out any offense under the statute. The District Court denied the motion. United States v. Krichman, 256 Fed. 974. The judgment was affirmed by the Circuit *365 Court of Appeals for the Second Circuit. *263 Fed. 538. The case then came to this court by writ of certiorari, 252 U. S. 576, 40 Sup. Ct. 344, 64 L. Ed. 724.

The statutes and executive orders concerning railroads are stated in Northern Pacific Railway Co. v. North Dakota, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. By the statute of August 29, 1916 (39 Stat. 645 [Comp. St. § 1974a]), c. 418, § 1, the President was given power to take possession and assume control of the transportation systems of the country. After the declarations of war with Germany (April 6, 1917) and Austria (December 7, 1917), the President issued a proclamation of December 26, 1917, taking possession of the transportation systems within the boundaries of the United States. 40 Stats. 1733, Comp. Stats. 1918, § 1974a. The proclamation appointed a Director General of Railroads with full authority to take control of the systems, and to operate and administer them. See Act of March 21, 1918, 40 Stat. 451, for the full authority given the Director General by the proclamation of the President of March 29, 1918. Comp. Stats. 1918, § 3115¾h.

In order to sustain the conviction the bribe must have been given to an officer of the United States, or to a person acting for or on behalf of the United States in an official function under or by the authority of a department or office of the government.

[1] Clearly Krichman was not an officer of the United States. United States v. Maurice, 26 Fed. Cas. 1211, No. 15747; United States v. Hartwell, 6 Wall. 385, 393, 18 L. Ed. 830. We need not dwell upon this point, as the government concedes that the porter was not an officer within the meaning of the statute.

[2] The point to be decided depends upon whether, when the bribe was offered to the porter, he was acting for the United States in an official function. The decided cases do not afford much aid in reaching a solution of this problem, and in our view the cases cited in the opinions in the courts below throw little *366 light upon the subject. *The statute creating the offense was passed long before there was any thought of the government taking over the railroads. That does not prevent its application if the thing done offends against it. It is however, a circumstance proper to be considered in determining whether the situation is one intended to be dealt with by Congress.

The act aims to punish the attempted bribery or bribery of officials and those exercising official functions under or by the authority of a department or office of the government. Not every person performing any service for the government, however humble, is embraced within the terms of the statute. It includes those, not officers, who are performing duties of an official character. As was well suggested by Judge Ward in his dissenting opinion in the Circuit Court of Appeals, not every employee of the government is covered by the act, but a limitation is made applying to those acting in official functions. And he added:

> "The construction adopted by the court gives these words no meaning. They might as well, or indeed better, have been omitted, because window cleaners, scrub women, elevator boys, doorkeepers, pages—in short, any one employed by the United States to do anything—is included."

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[1] Section 39 is as follows:

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money, or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the government thereof, or to any officer or person acting for or on behalf of either house of Congress, or of any committee of either house, or both houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."

The government admits that the construction contended for will include the employees suggested by Judge Ward. Indeed, the construction given by the courts below would bring within the statute every employee acting under the Director General in the operation of the railroads. We are unable to accept this construction of a criminal statute.

In United States v. Strang, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. —, decided at this term, January 3, 1921, this court held that the Emergency Fleet Corporation, organized by the Shipping Board, and authorized by the President to exercise a portion of the power granted to him under the Act of June 15, *367 1917, 40 Stat. 182, *was a separate entity from the government which owned all of its stock, and that an inspector of the Shipping Board was not an agent of the United States within the meaning of section 41 of the Criminal Code (Comp. Stats. § 10205), making it an offense for any officer or agent of any corporation, etc., and any member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, etc., to be employed or to act as an officer or agent of the United States for the transaction of business with such corporation, etc. Subsequently the statute was amended so as to bring the United States Shipping Board Emergency Fleet Corporation within its terms as a governmental establishment, and, later, to make it an offense to defraud or to conspire to defraud any corporation in which the United States owned stock. So, in our view, if section 39 is to include every governmental employee, it must be amended by act of Congress.

It is true that in the emergencies of war the government took over the operation of the railroads, and placed them under the control of the President, acting by his chosen Director General, who was given full authority to avail himself of the services of railroad officials, directors, employees, etc., with ample authority over all. But we cannot believe that this action brought every service, however remote from the exertion of official authority, into the exercise of an official function within the meaning of the statute. We are constrained to the conclusion that the construction given in the courts below, and insisted upon by the government, practically recasts the statute from one embracing officials, and those discharging official functions, into one including every person discharging any sort of duty while the government is in control of the work.

[3] The government admits that the statute is ambiguous. While criminal statutes *368 are to be given a reasonable con*struction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government.

It follows that the judgment of the Circuit Court of Appeals must be

Reversed.

(256 U. S. 327)

PHILADELPHIA & R. RY. CO. v. DI DONATO.

(Argued April 28, 1921. Decided May 16, 1921.)

No. 297.

Commerce 🔑27(5)—Flagman held employed in "interstate commerce," whether particular train is interstate or intrastate.

A flagman, employed by a railway company which was engaged in both interstate and intrastate commerce, is employed in interstate commerce while engaged in flagging a train, regardless of whether that train was engaged in interstate or intrastate commerce, since his duties were essential to the safety of all trains and therefore his widow cannot recover compensation for his death under the Pennsylvania Workmen's Compensation Law (Act June 2, 1915 [P. L. p. 736]).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Mr. Justice Clarke dissenting.

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Proceeding under the Workmen's Compensation Law of Pennsylvania (P. L. 1915, p. 736) by Maria Domenica Di Donato against the Philadelphia & Reading Railway Company to recover compensation for the death of Pasquale Di Donato, employee. An award of compensation by the Workmen's Compensation Board was affirmed by the court of common pleas and by the Supreme Court of the state (266 Pa. 412, 109 Atl. 627), and the employer brings certiorari. Reversed and remanded. See, also, 253 U. S. 480, 40 Sup. Ct. 482, 64 L. Ed. 1023.

Mr. George Gowen Parry, of Philadelphia, Pa., for petitioner.

Mr. Francis H. Bohlen, of Philadelphia, Pa., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Certiorari directed to the review of a judgment of the Supreme Court of Pennsylvania *328 affirming a judgment *of the court of common pleas of the county of Philadelphia, which affirmed an award of the Workmen's Compensation Board of the state of Pennsylvania, allowed respondent, as widow of Pasquale Di Donato who, in the course of his employment by the railway company, was killed. Her petition was presented in the legal course to the board, and assigned for an investigation to a referee who reported an award in accordance with it.

The company prosecuted an appeal to the board which affirmed the award and dismissed the appeal. The judgment was successively affirmed, as we have said, by the court of common pleas and by the Supreme Court.

There is no connected finding of facts aside from conclusions of law. The referee found that Di Donato was employed by the company "as a crossing watchman" at a particular public crossing, and that on March 18, 1918, at about 7:15 p. m., "while acting in the course of his employment while flagging a train * * * was struck by a train of the company and instantly killed." The findings then recite that the company contended that at the time of the occurrence of the injury Di Donato "was engaged in interstate commerce," but it is added that the company "failed to prove by the weight of the evidence that such was the fact," and, further, that the company "showed that many interstate shipments and trains passed over the rails of the defendant company, * * * but they did not offer any evidence whatever to show that at the time of the occurrence of the injury Pasquale Di Donato was engaged in performing some duty incident to the passage of an interstate train; and since the burden is on the defendant to show by the weight of the evidence that the injured employee was at the time of the occurrence of the injury engaged in interstate commerce, we find as a fact" that at such time Di Donato "was not engaged in work incident to interstate commerce." It was further

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*found that the company was "engaged in both intrastate and interstate commerce."

The finding by the board was that Di Donato "was killed in the course of his employment for the defendant" while he "was employed as a watchman upon a public crossing" where a public street "crosses the tracks" of the company, and that "an agreement was placed upon record that the defendant was engaged in both intrastate and interstate traffic." The deduction of the board was the same as that of the referee, that the defense of interstate commerce, when set up by the defendant, became a matter of proof by competent and reliable testimony, and that the burden of proof of the same was thrown upon the defendant, and "that the character of the employment undertaken in that respect must be determined by the work he had actually been engaged in at the very time of the accident."

The facts and the conclusions thus expressed by the referee and the board were, in effect, repeated by the Supreme Court and made the grounds of decision.

The facts as found we may assume to exist, facts, however, disassociated from legal deductions from them. These facts are only that Di Donato was employed by the company as a flagman at a public crossing to signal both intrastate and interstate trains. In other words, his employment concerned both kinds of trains without distinction between them or character of service. He was an instrument of safety for the conduct of both. And in the course of his employment he was killed by a train whose character is not disclosed. These are the facts, all else the assertion of legal propositions. We are brought, therefore, to a consideration of the soundness and determining quality of the legal propositions.

In Pedersen v. Delaware, etc., R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, this court had occasion to consider the instrumentalities of commerce and to determine whether they should have

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intrastate or interstate character. The *case was concerned with mechanism—tracks and bridges, but there was a human element as well, one that was engaged in keeping the mechanisms in repair, and, it was decided, that as they were instruments of interstate as well as of intrastate commerce he was engaged in interstate commerce. It was said, "true a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or keeping it in suitable condition for use from being an employment in interstate commerce."

Being the same in principle if not in instances the following cases are urged to be of pertinent illustration, Southern Pacific Co. v. Industrial Accident Comm'n of the State of California, 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262; Graber v. Duluth, S. S. & A. Ry. Co., 159 Wis. 414, 150 N. W. 489; Chicago & A. R. R. Co. v. Industrial Comm'n, 288 Ill. 603, 124 N. E. 344; Flynn v. N. Y. S. & W. R. R. Co., 90 N. J. Law, 451, 101 Atl. 1034; also Southern Railway Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69, and cases cited.

Respondent resists the application of the Pedersen Case and contends that the other cases do not militate against the judgment in the pending case. They, and the Pedersen Case, it is said, represent different classes —the Pedersen Case, "those in which it is impossible to assign the service to any particular traffic movement, since the work is done on some instrumentality which is used indiscriminately in the general traffic of the road"; the other cases, "those in which the service is given to expedite or secure the safety of some particular traffic movement." To the latter class counsel for respondent assign the present case, and the Supreme Court accepted that view. Counsel, however, feel an impediment to their view in the fact that this court has given the Pedersen Case as authority for cases which counsel assign to the other class; that is, whose instance was the safety of some particular *331 movement. But grant*ing there is a basis for the classification that counsel make, we think the present case falls within the Pedersen Case. The service of a flagman concerns the safety of both commerces and to separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies.

And besides, as observed by the Supreme Court of the state of California in Southern Pacific Co. v. Industrial Accident Comm'n, supra, Di Donato's duty had other purpose than the prevention of a disaster to a particular train. It had purpose as well to the condition of the tracks and their preservation from disorder and obstructions. This service and the other service cannot be separated in duty and responsibility. It is to be remembered that not only the remedy of one employee is involved in a particular duty but that other employees and other remedies are to be considered as well and the defenses to them, and that behind them are the respective powers that may have ordained them. Therefore, whether they be of state or congressional power, there is an equal necessity for their accurate delimitation. This case, therefore, has importance beyond the interest of the parties to it. Its principle and example, reinforcing the Pedersen Case and the cases based upon it, make a test by which future cases may be assigned to intrastate or interstate commerce and mark the power and policies that may be necessary or convenient to either.

As we deduce from the duty of Di Donato his employment to have been in interstate commerce, we have no occasion to consider what presumptions might be indulged if his employment were not thereby established, whether for or against intrastate commerce.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice CLARKE dissents.

(256 U. S. 332)

PHILADELPHIA & R. RY. CO. v. POLK.

(Argued April 28, 1921. Decided May 16, 1921.)

No. 298.

1. Master and servant 🔑405(1)—Workmen's compensation award cannot rest on speculation that employee's duties may have been directed to intrastate commerce.

An award under the Workmen's Compensation Law (Pa. St. 1920, § 21916 et seq.), for the death of one employed on a freight train loaded with both interstate and intrastate shipments, cannot rest on speculation that there may have been some duties on his part directed to the intrastate cars and freight.

2. Master and servant 🔑403—Claimant under state Compensation Act has burden of proving employment in intrastate commerce.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.), for the death of one employed on a freight train loaded with interstate and intrastate shipments, there is no presumption that the duties performed by him were performed in intrastate commerce, and the claimant has the burden of explanation and avoidance of liability determinable under the federal act.

Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

Proceeding under the Workmen's Compensation Law of Pennsylvania by Marie E. Polk for compensation for the death of her husband, John M. Polk, opposed by the Philadelphia & Reading Railway Company, employer. Compensation was awarded, and the award affirmed by the court of common pleas and Supreme Court of Pennsylvania (266 Pa. 335, 109 Atl. 627), and the employer brings certiorari. Reversed and remanded.

See, also, 253 U. S. 480, 40 Sup. Ct. 482, 64 L. Ed. 1023.

Mr. George Gowen Parry, of Philadelphia, Pa., for petitioner.

Mr. Francis M. McAdams, of Philadelphia, Pa., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Certiorari to review a judgment of the Supreme Court of the state of Pennsylvania affirming an award made under the Workmen's Compensation Board of the state in favor of respondent who is the widow of John M. Polk, who died as the result of an accident, occurring in the course of his employment by the railway company.

The matter of her petition proceeded in due course from referee of the board to the board, from the latter to the court of common pleas, and thence to the Supreme Court of the state, she being adjudged by all of them *333 en*titled to an award under the Workmen's Compensation Act of the state (Pa. St. 1920, § 21916 et seq.).

The facts as found are that Polk on August 28, 1917, while employed by the railway company on a freight train, in its Port Richmond Yard, handled by engine No. 832 was caught between two cars, and as a result thereof sustained injuries from which he died.

At the time of the occurrence of the injury the company was a common carrier, by rail, engaged in interstate and intrastate commerce, and that at such time there was a draft of freight cars attached to the engine which was in charge of the crew of which Polk was a member. Some of these cars were bound from points within the state to other points within the state and the others were loaded with various commodities, some of which were bound from points outside of the state to points within the state, and others of which were bound from points within the state to points outside of the state, and there was at least one car of this draft which was passing through the state from a point in New York to a point in Illinois.

The board, upon the appeal of the company, adopted the findings of fact and conclusions of law of the referee and affirmed his award. This action was affirmed by the court of common pleas and the latter's judgment by the Supreme Court. 266 Pa. 335, 109 Atl. 627.

The referee did not find definitely as a fact that Polk was engaged in intrastate commerce at the time of his injury, but assumed that the fact might be so; therefore, regarded it as so, because in his (the referee's) opinion the burden of proving the contrary; that is, that Polk "was actually engaged in work incident to interstate commerce," was upon the company and the company had "not met the burden required of it" and further, that the company "offered no testimony whatever to show what work John M. Polk was performing at the time he was injured. * * *"

[1] The Supreme Court approved the findings and the *deductions from them. It is manifest therefore that the case is within the rule of Philadelphia & Reading Railway Co. v. Maria Domenica Di Donato, 256 U. S. 327, 41 Sup. Ct. 516, 65 L. Ed. —, just decided. Here, as there, the employment concerned both kinds of commerce and was to be exercised as much on one as on the other. In other words, was as much and as intimately directed to the interstate cars and freight as to the intrastate cars and freight, and that there might have been some duties directed to the latter though there is no evidence of it, is the suggestion of a speculation that has no tangible prompting in the case.

[2] Besides, we cannot accede to the view that there is a presumption that duties performed on a train constituted of interstate and intrastate commerce were performed in the latter commerce. The presumption, indeed, might be the other way. It is to be remembered that it is the declaration of the cases that if there is an element of interstate commerce in a traffic or employment it determines the remedy of the employee. Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; New York Central Railroad Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, N. P. Ry. v. State of Washington, 222 U. S. 370, 375, 32 Sup. Ct. 160, 56 L. Ed. 237, declares and illustrates the principle. Expressing the facts and the law applicable to them, it was said:

> "The train, although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state destined to points within the state and from points within the state to points in British Columbia. * * * This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling. Southern Ry. v. United States, 222 U. S. 20," 32 Sup. Ct. 2, 56 L. Ed. 72.

*It would seem indisputable, therefore, if there be an assertion of the claim or remedy growing out of an occurrence in which there are constituents of interstate commerce the burden of explanation and avoidance is on him who asserts the claim or remedy, not on the railway company to which it is directed, and there is nothing in Osborne v. Gray, 241 U. S. 16, 36 Sup. Ct. 486, 60 L. Ed. 865, in opposition. Indeed, the court was asked in that case to do what the referee and the Supreme Court in this case have done; that is, to assume to know things of which there is no evidence.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice CLARKE dissents.

(256 U. S. 319)

BLANSET v. CARDIN et al.

(Argued April 20, 1921. Decided May 16, 1921.)

No. 244.

1. Indians 🔑15(1) — Death of allottee does not remove restrictions, so as to make state statute controlling over act of Congress.

The death of an Indian allottee, who had made a will conforming to the requirements of Act Feb. 14, 1913, § 2 (Comp. St. § 4228), and the regulations thereunder, did not automatically remove the restrictions on alienation of the allotment, so as to subject the land to the rules of descent prescribed by Rev. Laws Okl. 1910, §§ 8341, 8418, 8419, under which a wife could not will more than two-thirds of her property away from her husband.

2. Indians 🔑15(1)—State statute of descent effective in contingency is immaterial, when contingency did not happen.

The provision of Act Feb. 14, 1913, § 2 (Comp. St. § 4228), regulating wills of Indian allottees, that in the event the Secretary of the Interior disapproved the will the property should descend under the statutes of the state, does not entitle the husband of an allottee, who willed her entire property to her children, to the one-third interest he would have under the state statute notwithstanding the will, where the Secretary of the Interior approved, instead of disapproving, the will.

3. **Indians 🔑15(1)—Act of Congress controlling devise of allotment is complete and exclusive.**

Act Feb. 14, 1913, § 2 (Comp. St. § 4228), regulating the devise of Indian allotments, with careful provisions for various contingencies, is complete in its control and administration of the allotment, and is exclusive of any interest under the state statute.

4. **Statutes 🔑219—Construction by Interior Department, which suggested statute regulating devise of Indian allotments, considered.**

The construction of Act Feb. 14, 1913, § 2 (Comp. St. § 4228), regulating devise of Indian allotments by the Interior Department, which suggested the act, is an assistant, if not demonstrative criterion, of the meaning and purpose of the act, and the regulations of the department administrative of the act partake of its legal force.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Mike Blanset against Oscar Cardin, as guardian of Jesse Daylight, a minor, and others. Decree dismissing the bill for want of equity was affirmed by the Circuit Court of Appeals (261 Fed. 309), and complainant appeals. Affirmed.

Messrs. Henry C. Lewis, of Washington, D. C., and Paul A. Ewert, of Joplin, Mo., for appellant.

Mr. A. C. Wallace, of Miami, Okl., for appellees.

Mr. Leslie C. Garnett, of Washington, D. C., for United States, by special leave.

*320

*Mr. Justice McKENNA delivered the opinion of the Court.

Appellant brought this suit to have himself declared to be owner of an undivided one-third interest in all lands (they are described in the bill) and other property of which his wife, Fannie Crawfish Blanset, died seised or possessed, free and clear of all claims and demands of the appellees, and to declare void a will of his wife and its approval by the Secretary of the Interior.

The basis of the bill is the contention that under the laws of Oklahoma no man and no woman while married shall bequeath more than two-thirds of his or her property away from the other and that the prohibition extends to an Indian woman's allotment, under acts of Congress, of restricted lands.

The bill is quite involved and contains many repetitions. Its ultimate propositions may be paraphrased as follows: Appellant is a white man, and his wife, Fannie Crawfish Blanset, was an Indian woman of the Quapaw Tribe. She was an allottee of the lands herein involved which were restricted lands so called; that is, nonalienable for the period of 25 years. She made a will devising her land to appellees, they being her children or grandchildren, and bequeathed to them also all trust funds which might be held by the United States for her. The will was approved by the Assistant Commissioner of Indian Affairs and by the Assistant Secretary of the Interior under and in pursuance of the provisions of an Act of Congress of June 25, 1910 (36 Stat. 858, 859), as amended February 14, 1913 (37 Stat. 678 [Comp. St. § 4228]), and filed in the office of the Secretary of the Interior, where such wills are properly and lawfully filed, and are of record.

Congress, by the foregoing and other legislation, provided:

> "That the state laws of descent should apply *321 to *Indian allotments and to interests therein, and that the Secretary of the Interior should be governed by the same," and that "section 8341 of the Code of Oklahoma created an indefeasible descent in favor of the husband and that the will of a wife which attempts to will away from her husband more than two-thirds of her estate is therefore void, and of no effect to the extent to which it attempts so to do, and that in such case the husband takes by descent to the same extent."

By that section appellant is made heir to property worth $40,000 of the estate of his wife, while the will gives him only $5; that the will is null and void, and that to the extent of his heirship his wife died intestate, and that he is an heir at law of one-third of her estate, that notwithstanding section 8341 each of the appellees is claiming to be the owner of a one-third undivided interest in and to all of the remaining restricted lands, inherited or otherwise, of which Fannie Crawfish Blanset died possessed and of a one-third interest to all trust funds held by the United States to her use and benefit, such claims being made under and by virtue of the will.

There is an allegation in the bill to the effect that appellant's wife left little or no personal property except moneys held in trust for her from the sale of inherited Indian lands by the United States; that by section 8419 dower and curtesy were abolished, and by section 8418 it was provided as follows:

> "If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child [the estate must be distributed], in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation."

*322
And by *section 6328 it is provided:

> "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead, which shall not in any event be subject to administration proceedings, until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age."

It is alleged:

> "That section 1 of the Act of June 25, 1910 [Comp. St. § 4226], of which the Act of February 14, 1913, is amendatory, is as follows: 'That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent.'"

On motion of defendants (appellees here) the bill was dismissed for want of equity. The ruling was affirmed by the Circuit Court of Appeals.

The case is not in broad compass and presents as its ultimate question the accordance or discordance of the laws of Congress and the laws of the state; and whether there is accordance or discordance depends upon a comparison of section 8341 of the Oklahoma Code, upon which appellant relies, and the acts of Congress referred to in the bill and what was done under them.

That comparison we proceed to make. By section 8341 of the Code:

> "Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married *323 be*queath more than two-thirds of her property away from her husband. * * *"

The provision of the Code is determinative, appellant contends, because the law of "descents and distributions" of Arkansas was made applicable to the Indian Territory May 2, 1890 (26 Stat. 94, 95), and extended in its application in 1904 (33 Stat. 573), and, while at those times "testamentary power had not been given to restricted allottees [the property in this case was a restricted allotment and the period of restriction had not expired] of any tribe but property descended, as to all tribes, wherever located, according to the local law," yet when Oklahoma was admitted as a state the Arkansas law was superseded by the Oklahoma Code. For this Jefferson v. Fink, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117, is adduced.

But against the contention and conclusion the act of Congress approved February 14, 1913 (37 Stat. 678), is opposed. Section 2 of that act is as follows:

> "Sec. 2. That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee-simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved *324 and it is subse*quently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the state wherein the property is located: Provided further, that the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, that sections one and two of this act shall not apply to the Five Civilized Tribes or the Osage Indians."

The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him and the execution of the act of Congress and it would seem that no comment is necessary to show that section 8341 is excluded from pertinence or operation.

But this conclusion counsel resists. He says:

> "As long as restrictions have not been removed the allotment is subject to the plenary power of Congress," but "when restrictions are removed the allotment automatically becomes subject to the state law."

That is, and to make application to the pending case, at the instant his wife died, appellant became heir at law to one-third of her property under the laws of the state. Appellant's reasoning is direct and confident. By his wife's death he asserts her allotment was emancipated from government control; that under section 8341 her will was void, she *325 there*fore died intestate, and he became her heir of an undivided one-third of her allotment under section 8418 set out in the bill.

And the further contention is that section 8341 is continued because the act of Congress does not expressly provide how the land shall be devised, and because it recognizes that the state laws of descent are applicable in case the Secretary disapproves the will after the death of the testator.

[1] If the first contention be true, the act of Congress is reduced to impotence by its contradictions. According to the contention it permits a will and immediately provides for its defeat at the very instant it is to take effect and can only take effect. Such antithetical purpose cannot be imputed to Congress and it is repelled by the words of section 2. They not only permit a will but define its permissible extent, excluding any limitation or the intrusion of any qualification by state law. They provide that one having an interest "in any allotment held under trust or other patent containing restrictions on alienation * * * shall have the right prior to the expiration of the trust or restrictive period and before the issuance of a fee simple patent or the removal of restrictions to dispose of *such property* (italics ours) by will in accordance with regulations to be prescribed by the Secretary of the Interior." And it is further provided "that the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator" and that neither circumstance shall "operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, * * * cause patent in fee to be issued to the devisee or devisees."

[2] To the other contention (if it may be called such) the answer is that the contingency (disapproval of the will after the death of the testator) did not occur, and besides there were alternatives to the contingency irreconcilable with the disposition of the property under the state Code.

[3, 4] *The act of Congress is careful of conditions. In the first instance it is concerned with testacy, that is, the existence of a will. A will existing, the allotment is disposed of by it. A will not existing—either not executed or, if executed, canceled—there is intestacy, and the state laws of descent and distribution obtain. In the present case there is a will and it is uncanceled, and therefore the contention of appellant is untenable. And it will also be observed, by recurring to the act of Congress, powers are invested in the Secretary which preclude interference or control by anybody, or right in anybody to have canceled "the patent in fee" which is empowered "to be issued to the devisee or devisees," a right appellant asserts in the present case. In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. And we agree with the Court of Appeals that the act of Congress was the prompting of prudence to "afford needed protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state laws." And there can be no doubt that the act was the suggestion of the Interior Department, and its construction is an assistant, if not demonstrative criterion, of the meaning and purpose of the act. Swigart v. Baker, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143; Jacobs v. Prichard, 223 U. S. 200, 32 Sup. Ct. 289, 56 L. Ed. 405; United States v. Hermanos, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821. And the regulations of the department are administrative of the act and partake of its legal force.

Our conclusion is the same as that of the Court of Appeals:

> "That it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part

> of the state as to the portions to be *conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior."

The court added that the conclusion was in accord with the views of the Supreme Court of the state, referring to Brock v. Keifer, 59 Okl. 5, 157 Pac. 88.

Decree affirmed.

(256 U. S. 359)

HEITMULLER v. STOKES.

(Argued April 21 and 22, 1921. Decided May 16, 1921.)

No. 279.

1. **Appeal and error ⚷436—Intermediate appellate court loses jurisdiction on allowance of writ of error.**

After the allowance of a writ of error from the United States Supreme Court to the Court of Appeals of the District of Columbia, the cause had passed beyond the jurisdiction of the Court of Appeals.

2. **Appeal and error ⚷19—Merits not decided when case moot by reason of sale of property.**

Where, pending a writ of error from the United States Supreme Court to review a judgment in a landlord's suit to recover possession of premises, the landlord sold the premises, the case became moot, as a judgment in his favor would not give him possession, and the merits of the case will not be decided.

3. Appeal and error 🔑19—Merits not passed on when only controversy is as to costs.

Where no controversy remains, except as to costs, the United States Supreme Court will not pass on the merits.

4. Appeal and error 🔑1116—Court may make order consonant to justice in moot case.

Though, owing to the moot character of the issue involved on writ of error, the Supreme Court may not consider the merits, it is at liberty to make such order as is most consonant to justice, in view of the conditions and circumstances of the case.

5. Costs 🔑238(1)—Assessed against defendant in error, whose sale of property rendered case moot.

Where, pending a writ of error from the United States Supreme Court to review the judgment for a landlord in his suit to recover possession, he sold the premises, thereby rendering the case moot, the costs incurred on the writ of error should be paid by him.

In Error to the Court of Appeals of the District of Columbia.

Action by Sylvanus Stokes against Anna Heitmuller, brought in the municipal court of the District of Columbia and appealed to the Supreme Court. A judgment for plaintiff was affirmed by the Court of Appeals (49 App. D. C. 391, 266 Fed. 1011), and defendant brings error. Reversed and remanded, with directions.

*360

*Mr. Chapin Brown, of Washington, D. C., for plaintiff in error.

Mr. Wharton E. Lester, of Washington, D. C., for defendant in error.

Mr. Justice DAY delivered the opinion of the Court.

Sylvanus Stokes brought suit in the municipal court of the District of Columbia to recover from Anna Heitmuller possession of premises No. 1505 Twenty-Second street, Northwest, in the city of Washington, D. C. Stokes claimed to be the purchaser of the premises, and the action was brought against Anna Heitmuller as tenant thereof. Trial was had in the municipal court, and judgment rendered in favor of the defendant. Stokes appealed to the Supreme Court of the District of Columbia, and filed an affidavit after the docketing of the appeal as required by rule 19 of that court. Defendant filed an affidavit setting forth grounds of defense. The Supreme Court entered judgment for the plaintiff, Stokes, upon the ground that the defense as set forth by the defendant was insufficient to defeat the plaintiff's recovery. The case was taken to the Court of Appeals of the District of Columbia, where the judgment of the Supreme Court was affirmed. 49 App. D. C. 391, 266 Fed. 1011. A writ of error brings the case to this court.

The errors assigned raise constitutional questions as to the validity of the so-called Saulsbury Resolution (40 Stat. 593), and of rule 19 of the Supreme Court of the District of Columbia. Other errors, not necessary to notice, are also assigned.

*361

[1] *The judgment of the Court of Appeals of the District, affirming that of the Supreme Court, was rendered on January 5, 1920, and on January 15, 1920, a writ of error was allowed bringing the case to this court. On February 5, 1920, Stokes, appellee in the Court of Appeals, and defendant in error here, filed a motion to dismiss the writ of error upon the ground that he had sold and conveyed the real estate, the possession of which was the subject-matter in dispute, and had no further interest in the cause, except to recover costs and rental due because of the wrongful detention of the property, and upon the further ground that no appeal bond had been filed by the appellant. The Court of Appeals denied the motion. After the allowance of the writ of error, the cause had passed beyond the jurisdiction of that court.

In this court the defendant in error, Stokes, moves to dismiss the writ of error, setting forth as grounds for the motion:

1. The cause of action between the parties hereto has ceased to exist, for that after the judgment of the Court of Appeals of the District of Columbia, appellee sold and conveyed the real estate, the subject-matter of this suit, and therefore is not now entitled to the relief herein sought, namely, the possession of said premises.
2. There is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate.
3. The only question now involved in this appeal, is that of costs.

[2] As the action was brought to recover the possession of real estate, and as the defendant in error has, pending review in this court, sold it, we agree with the contention that the case has become moot. The plaintiff in error, so far as the record discloses, *362 is in possession, and, the de*fendant in error having sold and conveyed the property, a judgment, if in his favor, will not give him possession of the premises. It has been often held that this court will not decide moot cases. The rule was stated in Mills v. Green, 159 U. S. 651, 653, 16 Sup. Ct. 132, 133 (40 L. Ed. 293):

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and

without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. Lord v. Veazie, 49 U. S. (8 How.) 251; California v. San Pablo & T. R. Co., 149 U. S. 308."

See, also, United States v. Hamburg-American Co., 239 U. S. 476, 36 Sup. Ct. 212, 60 L. Ed. 387, and cases cited.

[3] Where no controversy remains, except as to costs, this court will not pass upon the merits. Paper-Bag Cases, 105 U. S. 766, 772, 26 L. Ed. 959.

[4] It remains to be considered what order should be made. Although, owing to the moot character of the issue involved, we may not consider the merits, we are at liberty to make such order as is " 'most consonant to justice' in view of the conditions and circumstances of the particular case." United States v. Hamburg-American Co., supra, 239 U. S. 467, 478, 36 Sup. Ct. 217, 60 L. Ed. 387.

[5] In the case now before us, without fault of the plaintiff in error, the defendant in error, after the proceedings below, practically ended the controversy by parting with title to the premises, thus causing the case to *363 become moot. *In such case the costs incurred upon the writ of error should be paid by the defendant in error.

Reversed, and remanded to the Court of Appeals of the District of Columbia, with direction to remand to the Supreme Court of the District of Columbia, with instructions to dismiss the complaint.

(256 U. S. 408)

VICKSBURG, S. & P. RY. CO. et al. v. ANDERSON-TULLY CO.

(Argued March 24, 1921. Decided May 16, 1921.)

No. 270.

1. Commerce 🔑92—Trackage arrangements held equivalent to lease, so as to establish venue, under Interstate Commerce Act.

An arrangement between two railroad companies, one of which owned no lines within the district, whereby the cars of the latter were carried over the tracks of the other within the district for payments computed on the mileage basis and on a through tariff, is equivalent to a lease of the tracks within the district, so as to authorize suit in that district under Interstate Commerce Act, § 16, as amended by Act June 18, 1910, § 13 (Comp. St. § 8584), allowing such action in any district through which the road of the carrier runs.

2. Commerce 🔑92—Carrier need not own railroad in district to give venue over suit on reparation order of Interstate Commerce Commission.

Interstate Commerce Act, § 16, as amended by Act June 18, 1910, § 13 (Comp. St. § 8584), authorizing action to enforce an order of the Commission requiring a carrier to refund excessive charges to the insurer, does not require that the carrier shall be the owner of a railroad within the district, to sustain venue under the provision allowing suit in any district through which the road runs.

3. Railroads 🔑5½, New, vol. 6A Key-No. Series—Return of service of process proof of agency of person served during federal control.

The return of the marshal that he served the process on an agent of defendant is sufficient showing of the agency of the person served, where the only denial was a stipulation that the railroad of defendant at the time was under government control, since the agent may not have been in the employ of the Director General of Railroads at all, or may have been serving as agent for both the Director and the company.

4. Railroads 🔑5½, New, vol. 6A Key-No. Series—Suit for excessive charges maintainable during federal control.

Under Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), allowing actions at law against carriers without defense that the carrier is an instrumentality of the federal government, an action to enforce an order by the Interstate Commerce Commission, requiring the carrier to repay to the shipper excessive charges collected before the government took control, can be maintained against the company during the period of government control.

5. Commerce 🔑92 — Repeal of Commerce Court Act did not repeal provision of Interstate Commerce Act relating to venue of reparation action.

The provision of the act abolishing the Commerce Court (Comp. St. §§ 992, 994), fixing the venue of any suit to enforce, suspend, or set aside an order of the Interstate Commerce Commission, did not impliedly repeal the provision of Interstate Commerce Act, § 16, as amended by Act June 18, 1910, § 13 (Comp. St. § 8584), allowing actions to enforce a reparation order by the Commission in any district through which the carrier's road ran, since the amendments of the Interstate Commerce Act indicated an intention to broaden the venue for the latter remedy, and the repealing provisions in the act abolishing the Commerce Court were restricted to acts or parts of acts in so far as they related to the establishment of the Commerce Court, which never had jurisdiction over a reparation action.

6. Appeal and error 🔑671(1)—Review held limited to sufficiency of complaint.

Where there were no special findings of fact by the court, its general finding, which has the effect of a verdict under Rev. St. § 649 (Comp. St. § 1587), is conclusive on all matters of fact, and, if there were no exceptions to rulings of law in the progress of the trial, authorizing review under Rev. St. § 700 (Comp. St. § 1668), the review is limited to the sufficiency of the complaint.

7. Commerce ⚷94 — Petition for reparation for excessive charges held sufficient.

A petition alleging that the Interstate Commerce Commission, on the shipper's petition and upon hearing, entered an order for the payment of reparation on account of an unreasonable rate exacted for the transportation of freight, that the order required payment by a specified date, that the carriers had refused payment, and that the suit was instituted under the Act to Regulate Commerce and its amendments, to which petition copies of the report and order of the Commission were attached, was amply sufficient to meet the requirement of the statute (Act June 18, 1910, § 13 [Comp. St. § 8584]) that the petition shall set forth in brief the causes for which the damages are claimed and the order of the Commission in the premises.

8. Commerce ⚷86—Application for relief does not suspend recovery of reparations for excessive charge voluntarily reduced.

The fact that the carriers had filed an application for relief under Interstate Commerce Act, § 4, as amended in 1910 (Comp. St. § 8566), which section provided that no rates existing at the passage of the amendment should be changed until the determination of the application by the Commission does not suspend the right of a shipper to an order by the Commission, before the carriers' application is determined, requiring refund to the shipper of excessive charges collected under a rate which the carriers had amended their tariffs to correct under section 3 of the act. (Comp. St. § 8565).

9. Appeal and error ⚷265(1) — Findings by Commission held not adopted as special findings by court.

A finding by the District Court that the report and order of the Interstate Commerce Commission, requiring a refund of excessive charges to the shipper, was prima facie evidence of the facts therein stated, did not adopt the findings by the Commission as special findings by the court, which might be reviewed by the Supreme Court without exception taken to them.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by the Anderson-Tully Company against the Vicksburg, Shreveport & Pacific Railway Company and others, to recover reparation for an unreasonable rate exacted. Judgment for the plaintiff was affirmed by the Circuit Court of Appeals (261 Fed. 741), and defendants bring error. Affirmed.

*Messrs. S. W. Moore, of New York City, and J. Blanc Monroe, of New Orleans, La., for plaintiffs in error.

Mr. Harry B. Anderson, of Memphis, Tenn., for defendant in error.

*Mr. Justice CLARKE delivered the opinion of the court.

This is an action instituted by a shipper under the provisions of section 16 of the Interstate Commerce Act, as amended June 18, 1910 (36 Stat. 539, 554, § 13 [Comp. St. § 8584]), against various carriers, based upon an order of the Interstate Commerce Commission for the payment of money found due as reparation for the exacting of an unreasonable rate for the transportation of "box shooks" in carload lots from Vicksburg, Miss., to Port Arthur, Tex., which the carriers refused to pay.

It will be necessary to consider only the liability of the defendant, the Vicksburg, Shreveport & Pacific Railway Company, hereinafter referred to as the Vicksburg Company.

The petition in the case was filed in the United States District Court for the Western Division of the Southern District of Mississippi, and the plaintiff therein, defendant in error, for the purpose of showing the venue, allowed in section 16 of the Interstate Commerce Act, supra, alleged that the defendant, the Vicksburg Company, was operating a part of its road within that district. The Vicksburg Company challenged the jurisdiction of the District Court by a plea in abatement, denying that it owned or operated a railroad in the district at the time or for many months before the petition was filed, and averred that the person on whom summons was served was not at the time its agent.

The shipper prevailed in both lower courts.

The venue provision of the Interstate Commerce Act allows such an action as we have here to be commenced in any district "through which the road of the carrier runs," and it is contended, first, that the Vicksburg Company did not have a road running through the district of suit, and that, therefore, the court did not have jurisdiction over the case.

[1] *It is stipulated that the Vicksburg Company is a Louisiana corporation and that at the times involved it owned a railroad extending through Louisiana to Delta Point, a station on the west bank of the Mississippi river, opposite Vicksburg. Its cars were ferried to and fro across the river and were hauled by the Alabama & Vicksburg Railroad Company, hereinafter called the Alabama Company, over its rails to freight and passenger stations in Vicksburg. The Vicksburg and the Alabama Companies shared the expense of freight and ticket offices in Vicksburg, at which tickets were sold and bills of lading issued by the Vicksburg Company from Vicksburg to various points on its line. The Vicksburg Company filed passenger and freight tariffs with the Interstate Commerce Commission without any division of rates

with the Alabama Company, that company being paid on a mileage basis for the service which it rendered east of the river. It is also stipulated "that exactly the same arrangement is now in force between" the Vicksburg and Alabama Companies "as was in effect before the United States government took control of these two roads."

[2] Thus the mileage, passenger, freight and tariff publication arrangements which the Vicksburg Company had with the Alabama Company plainly were equivalent in practice to a lease of the road of that company to the Vicksburg Company for its transportation purposes, and the dealings of the Vicksburg Company with the public and with the Interstate Commerce Commission with respect to traffic to and from Vicksburg were precisely the same as if it had owned or had leased the Alabama Company's tracks. The applicable venue provision of the Interstate Commerce Act does not require that the carrier shall be the owner of a railroad in the district, but only that its road must run through it, and we agree with the Circuit Court of Appeals in concluding that the tracks of the Alabama Company east of the river, in the district *of suit, under the circumstances of operation as the parties stipulated them to be, constituted them the road of the Vicksburg Company within the meaning of the act.

It is next contended that the person on whom summons was served was not, at the time, an agent of the Vicksburg Company.

[3] The return of the marshal is that he executed the writ "by handing a true copy of this summons and petition for judgment to Austin King, freight agent for the Vicksburg, Shreveport & Pacific Railway Company." The plea in abatement denied on "information, knowledge and belief" of counsel that King was at the time of service an agent of either of the defendants. No evidence whatever was introduced to sustain this plea and in support of it sole reliance is placed upon the stipulation that the government was in control of the lines of the Vicksburg Company at the time the petition was filed.

The unreasonable rate for which the reparation order was made was exacted on shipments moving long prior to the taking over of the railroads by the government in December, 1917, and there being no evidence that King was not the agent of the Vicksburg Company, the return of the marshal was properly accepted by both lower courts as conclusive. He may not have been in the employ of the Director General of Railroads at all and it was entirely possible for him to have been serving as agent for both the Director and the company.

[4] Since the shipment for which reparation was allowed moved prior to the taking over of the railroads by the United States government, as against the objection of government control, we think the provision of section 10 of the Federal Railroad Control Act (40 Stat. 451, 456 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j]) is applicable and ample to support the jurisdiction, viz. that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity *against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

[5] It is further claimed that the act of Congress abolishing the Commerce Court (38 Stat. 208, 219 [Comp. St. §§ 992, 994]), repealed by implication the provisions of section 16, supra, permitting such reparation suits as we have here to be filed in the District Court for any district "through which the road of the carrier runs" and that for this reason the District Court was without jurisdiction.

The plaintiff was a Michigan corporation and if the provisions of section 16 referred to had been repealed at the time the case was commenced the venue was improperly laid and the court was without jurisdiction.

The argument is that the act of Congress abolishing the Commerce Court, in restoring to the District Courts the jurisdiction which had been vested exclusively in that court provided that "the venue of any suit hereafter brought to enforce, suspend, or set aside * * * any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party of any of the parties upon whose petition the order was made" (38 Stat. 219 [Comp. St. § 994]), and that this provision for venue is so inconsistent with that of section 16, supra, allowing suit to be commenced, on an order for the payment of money, in any district through which the road of the carrier runs, that the latter must be regarded as repealed by implication.

This contention is much too artificial and unsubstantial for us to consider it in much detail. It is enough to say that the two principal amendments to the Interstate Commerce Act of 1887 show that it has been the plainly expressed policy of Congress to make the prosecution of suits upon reparation orders for the payment of money progressively easier and less expensive for the shipper by enlarging the venue provisions of them, doubtless because *many such claims are so small that if suit could be maintained by the owners only in distant jurisdictions a large part of them would be abandoned. Act 1887, 24 Stat. 379, 384, § 16; Act 1906, 34 Stat. 584, 590, § 5; Act 1910, 36 Stat. 539, 554, § 13 (Comp. St. § 8584). The Commerce Court repealing act was a section of an appropriation act and dealt with venue only to the extent necessary to redistribute the jurisdiction of the court abolished and in terms it repealed only acts or parts of acts in so far "as they relate to the establishment of the Commerce Court" and again so far as "inconsistent with the foregoing provisions relating to the Commerce Court." 38 Stat. 219, 221 (Comp. St. § 1003). The venue provided for, and relied upon in this suit, was for suits in the Circuit (District) Court on an order for the payment of money, and of such suits the Commerce Court never had jurisdiction.

The contention that Congress intended by implication to repeal and cut down to such narrow limits the venue which has gradually been so liberally extended cannot be entertained. The terms of the repealing act do not justify it and we cannot doubt that if such purpose had been intended it would not have been left to inference and implication but would have been clearly expressed.

Coming to the essentials of the case. When the cause came on for trial on its merits, a jury being duly waived, it is recited in the entry of the judgment that it was stipulated that either party might use in evidence any part of the record and evidence introduced in the hearings before the Interstate Commerce Commission, which resulted in the order relied upon, and that any of the printed reports and findings of the Commission might be used. It is also recited that the plaintiff introduced the report of the Interstate Commerce Commission and the order of the Commission directing the payment of the money sued for, and rested its case, and that "the defendant introduced no *415 evidence." Thereupon the *court found that the report and order of the Commission constituted prima facie evidence of the facts therein stated and entered judgment in favor of the plaintiff for the amount of the order with interest and an attorney's fee.

[6] There was no request made by the carriers for any ruling of law, and no exception whatever was taken during the trial. There being no special findings of fact by the court, its general finding has the effect of a verdict of a jury (R. S. 649 [Comp. St. § 1587]), is conclusive upon all matters of fact, and there not being any exceptions to rulings of law in the progress of the trial, the review in this court is limited to the sufficiency of the complaint (R. S. 700 [Comp. St. § 1668]). Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; St. Louis v. Western Union Telegraph Co., 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373.

[7] The contention that the petition does not state a cause of action against the carriers first appears in the assignment of errors in the Circuit Court of Appeals, after an elaborate answer and adverse judgment in the District Court. However, the petition avers that the shipper filed its petition with the Interstate Commerce Commission, claiming that it had been charged an unreasonable rate, that upon hearing the Commission entered an order for the payment of money "as reparation on account of unreasonable rate exacted for the transportation" of its freight, that the order required payment to be made by a date named, that the carriers had refused payment when demanded, and that the suit was instituted under the Act to Regulate Commerce of 1887, and amendments thereof. To this petition copies of the report and order of the Commission were attached. These allegations were amply sufficient to meet the requirements of the statute, that the petition in such a case shall set forth briefly the causes for which damages are claimed and the order of the Commission in the premises. 36 Stat. 539, 554, § 13.

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[8] *It is also contended that it was not competent for the Interstate Commerce Commission to enter the order which was made for the reason that before the hearing by the Commission the carriers had filed an application for relief under section 4 of the Interstate Commerce Act, as amended in 1910 (Comp. St. § 8566), which had not been disposed of at the time the order was made, and that therefore the provision of that act that no rates or charges lawfully existing at the time of the passage of the amendment should be required to be changed until the determination of such application by the Commission, was applicable. To this it is sufficient to say that it appears from the Commission's first report that immediately after the filing of the complaint with the Commission the carriers amended their tariffs so as to correct the unreasonable rate which was complained of under section 3 of the act (Comp. St. § 8565), and we quite agree with the Commission that whatever the application under section 4 may have been (there is no copy of it in the record), such amendment removed the occasion for further suspension of action by the Commission under the provision quoted. The Commission aptly says that the rate then on file conformed "to the requirements of the fourth section and defendants' application in so far as this adjustment is concerned has no further office to perform."

[9] The final contention that the facts found by the Interstate Commerce Commission were so adopted by the District Court as to become special findings of fact by that court which may be reviewed by this court without exception being taken to any of them is too trivial to deserve discussion.

It results that the judgment of the Circuit Court of Appeals is

Affirmed.

(256 U. S. 377)

LA BELLE IRON WORKS v. UNITED STATES.

(Argued Jan. 6 and 7, 1921. Decided May 16, 1921.)

No. 453.

1. Internal revenue 🔑7—Excess profits tax intended to impose burden on supernormal returns on capital risked; "invest."

Revenue Act Oct. 3, 1917, tit. 2, § 207 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜h), defining "invested capital," as used in the excess profits tax provisions of that act, manifests a purpose to place the burden of that tax on the income of trades and businesses exceeding what was deemed a normally reasonable return on the capital actually embarked, not only by its provisions for the computation of invested capital, but by the use of the term "invested," which imports a laying out of money or money's worth, either by an individual acquiring an interest in the concern or by the concern in acquiring something of permanent use in the business, in either case involving a conversion of wealth from one form into another suitable for employment in the making of the hoped-for gains.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invest—Investment.]

2. Internal revenue 🔑7—"Invested capital" does not include appreciation of values.

The term "invested capital," as used in Revenue Act 1917, tit. 2, § 207 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜h), relating to the excess profits tax, does not include the appreciation in value of property after its acquisition.

3. Internal revenue 🔑7—Distinction between capital and surplus and between capital and income immaterial.

In view of the special language employed by Revenue Act 1917, tit. 2, § 207 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜h), defining "invested capital" for the purpose of assessing the excess profits tax, the distinction in the terminology of corporation and partnership accounting between capital and surplus and the distinction between capital and income have no bearing in determining the invested capital.

4. Internal revenue 🔑7—Stock taken in exchange for new issue not invested capital.

Under the treasury regulation, whereby stocks would be regarded as tangible property, when paid in for stock or shares of a corporation, the stock of the corporation itself, which was surrendered to the corporation in exchange for a new issue, cannot be considered as having been paid in, within Revenue Act 1917, tit. 2, § 207 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜h), even if they were stocks within the meaning of that regulation.

5. Internal revenue 🔑7—Taxpayer must show cost of development work resulted in appreciation.

Though the increased value of ore lands of the corporation resulting from exploration or development work thereon may be considered as earned surplus, which is part of the invested capital within the excess profits tax provisions, no allowance for such increase can be made in computing the invested capital, where the taxpayer made no showing as to the extent of such earned surplus.

6. Internal revenue 🔑2—Only territorial uniformity is required for taxes.

Since Const. Amend. 5, does not require equal protection of the laws, as does Amendment 14, applying to state action, cases decided under Amendment 14 have no application to federal taxes, where the only uniformity prescribed is the territorial uniformity required by article 1, § 8.

7. Constitutional law 🔑286—Internal revenue 🔑2—Excess profits tax, based on cost of assets to exclusion of appreciation, is not contrary to due process.

The construction of the excess profits tax provisions as basing the tax on invested capital, which is determined only by the value of the assets at the time of their acquisition, to the exclusion of subsequent increase of value, does not deprive the taxpayer of due process of law, since equality of taxation can never be attained, and the tax in question applies equally to all corporations similarly situated.

Appeal from the Court of Claims.

Claim by La Belle Iron Works against the United States for a refund of a sum alleged to have been erroneously assessed and exacted as an excess profits tax. Claimant's petition was dismissed by the Court of Claims (55 Ct. Cl. 462), and claimant appeals. Affirmed.

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*Messrs. Charles McCamic and James Morgan Clarke, both of Wheeling, W. Va., Charles E. Hughes, of New York City, and J. Harry Covington, Edward B. Burling, Spencer Gordon, and Oscar W. Underwood, Jr., all of Washington, D. C., for appellant.

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*Mr. Solicitor General Frierson, for the United States.

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*Mr. Justice PITNEY delivered the opinion of the Court.

The Court of Claims dismissed appellant's petition which claimed a refund of $1,081,184.61, alleged to have been erroneously assessed and exacted as an "excess profits tax" under title 2 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 302 et seq. [Comp. St. 1918, Comp. St. Ann. Supp. 1919; § 6336⅜a et seq.]). The case involves the construction and application of those provisions by which the deduction from income, for the purposes of the tax, is measured by the "invested capital" of the taxpayer; and a question is raised as to the constitutionality of the act as construed and applied.

Title 1 of the act imposed "war income taxes" upon individuals and corporations in addition to those imposed by Act of September 8, 1916, c. 463, 39 Stat. 756. Title 2 provided for the levying of "war excess profits taxes" upon corporations, partnerships, and individuals. As applied to domestic corporations, the scheme of this title was that, after providing for a deduction from income (section 203, p. 304 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜d]), equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period (the years 1911, 1912, and 1913) was of the invested capital for that period, but not less than 7 nor more than 9 per cent., plus $3,000, it imposed (section 201, p. 303 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜b]), in addition to other taxes, a graduated tax upon the net income beyond the deduction, commencing with 20 per centum of such net income above the deduction, but not above 15 per centum of the invested capital for the taxable year, and running as high as 60 per centum of the net income in excess of 33 per centum of such capital. It applied to "all trades or businesses," with exceptions not now material (page 303).

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*What should be deemed "invested capital" was defined by section 207 (page 306 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336⅜h]), which, so far as pertinent, is set forth in the margin.[1]

The case was decided upon a demurrer to the petition, in which the facts were stated as follows: Appellant is a domestic corporation and, prior to the year 1904, acquired ore lands for which it paid the sum of $190,000. Between that time and the year 1912 extensive explorations and developments were carried on (the cost of which is not stated), and it was proved that the lands contained large bodies of ore and had an actual cash value *385 *not less than $10,105,400, and at all times during the years 1912 to 1917, inclusive, their actual cash value was not less than the sum last mentioned. In the year 1912 the company increased the valuation of said lands upon its books by adding thereto the sum of $10,000,000, which it carried to surplus, and thereupon, in the same year, declared a stock dividend in the sum of $9,915,400, representing the increase in value of the ore lands. Theretofore appellant's capital stock had consisted of shares issued, all of one class, having a par value of $9,915,400. The declaration of the stock dividend was carried out by the surrender to the company of all the outstanding stock, and its cancellation, and the exchange of one share of new common and one share of new preferred stock for each share of the original stock.

In returning its annual net income for the year 1917 the company stated its invested capital to be $26,322,904.14, in which was included the sum of $10,105,400 as representing the value of its ore lands. The Commissioner of Internal Revenue caused a reassessment to be made, based upon a reduction of the invested capital to $16,407,507.14; the difference ($9,915,400) being the increase in the value of the ore lands already mentioned. The result was an additional tax of $1,081,184.61, which, having been paid, was made the subject of a claim for refund; and this *386 having been considered and rejected by *the Commissioner, there followed a suit in the Court of Claims, with the result already mentioned.

Appellant's contentions, in brief, are: First, that the increased value of the ore lands, placed upon the company's books in 1912, ought to be included in invested capital under section 207 (a) (3), as "paid in or earned surplus and undivided profits." Second, that within the meaning of clause (2), which provides that invested capital shall include "the actual cash value of tangible property paid in other than cash, for stock or shares in such corporation," the stock of the company issued in 1912, consisting of $9,915,400 of preferred stock and an equal amount of common, was fully paid for: Either (a) by the tangible assets, including the ore properties at their increased value, or (b) by the surrender of all the certificates representing the old common stock, which, it is said, had an actual cash value equal to double its par. And, third, that the construction put upon the act by the Treasury Department, based as it is said not upon value but upon the single feature of cost, disregarding the time of acquisition, would render the act unconstitutional as a deprivation of property without due process under the Fifth Amendment, because so arbitrary as to amount in effect to confiscation, and hence that this construction must be avoided.

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[1] Sec. 207. That as used in this title, the term "invested capital" for any year means the average invested capital for the year, as defined and limited in this title, averaged monthly.

As used in this title "invested capital" does not include stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to the tax imposed by this title, nor money or other property borrowed, and means, subject to the above limitations:

(a) In the case of a corporation or partnership: (1) Actual cash paid in; (2) the actual cash value of tangible property paid in other than cash, for stock or shares in such corporation or partnership, at the time of such payment (but in case such tangible property was paid in prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen, but in no case to exceed the par value of the original stock or shares specifically issued therefor); and (3) paid in or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year: Provided, that (a) the actual cash value of patents and copyrights paid in for stock or shares in such corporation or partnership, at the time of such payment, shall be included as invested capital, but not to exceed the par value of such stock or shares at the time of such payment, and (b) the good will, trade-marks, trade brands, the franchise of a corporation or partnership, or other intangible property, shall be included as invested capital if the corporation or partnership made payment bona fide therefor specifically as such in cash or tangible property, the value of such good will, trade-mark, trade brand, franchise, or intangible property, not to exceed the actual cash or actual cash value of the tangible property paid therefor at the time of such payment; but good will, trade-marks, trade brands, franchise of a corporation or partnership, or other intangible property, bona fide purchased, prior to March third, nineteen hundred and seventeen, for and with interests or shares in a partnership or for and with shares in the captial stock of a corporation (issued prior to March third, nineteen hundred and seventeen), in an amount not to exceed, on March third, nineteen hundred and seventeen, twenty per centum of the total interests or shares in the partnership or of the total shares of the capital stock of the corporation, shall be included in invested capital at a value not to exceed the actual cash value at the time of such purchase, and in case of issue of stock therefor not to exceed the par value of such stock. * * *

Reading the entire language of section 207 in the light of the circumstances that surrounded the passage of the act, we think its meaning as to "invested capital" is entirely clear. The great war in Europe had been in progress since the year 1914, and the manufacture and export of war supplies and other material for the belligerent powers had stimulated many lines of trade and business in this country, resulting in large profits as compared with the period before the war, and as compared with ordinary returns upon the capital embarked. The United States had become directly involved in the conflict *387 in the spring *of 1917, necessitating heavy increases in taxation; at the same time manufactures and trade of every description were rendered even more active, and in certain lines more profitable, than before, so that the unusual gains derived therefrom formed a natural subject for special taxation.

On the eve of our entry, and in order to provide a "special preparedness fund" for army, navy, and fortification purposes, Act March 3, 1917, c. 159, 39 Stat. 1000, was passed, which, in title 2, provided for an excess profits tax on corporations and partnerships equal to 8 per centum of the amount by which their net income exceeded $5,000 plus 8 per centum of the "actual capital invested"; and, in section 202 (p. 1001), defined this term to mean "(1) actual cash paid in; (2) the actual cash value, at the time of payment, of assets other than cash paid in; and (3) paid in or earned surplus and undivided profits used or employed in the business," but not to include money or other property borrowed.

[1] The Revenue Act of October 3, 1917, passed after we had become engaged in the war, took the place of the Act of March 3, and embodied a "war excess profits tax," with higher percentages imposed upon the income in excess of deductions and a more particular definition of terms. A scrutiny of the particular provisions of section 207 shows that it was the dominant purpose of Congress to place the peculiar burden of this tax upon the income of trades and businesses exceeding what was deemed a normally reasonable return upon the capital actually embarked. But if such capital were to be computed according to appreciated market values based upon the estimates of interested parties (on whose returns perforce the government must in great part rely), exaggerations would be at a premium, corrections difficult, and the tax easily evaded. Section 207 shows that Congress was fully alive to this and designedly adopted a term—"invested capital"— *388 and a definition of it, that would *measurably guard against inflated valuations. The word "invested" in itself imports a restrictive qualification. When speaking of the capital of a business corporation or partnership, such as the act deals with, "to invest" imports a laying out of money, or money's worth, either by an individual in acquiring an interest in the concern with a view to obtaining income or profit from the conduct of its business, or by the concern itself in acquiring something of permanent use in the business; in either case involving a conversion of wealth from one form into another suitable for employment in the making of the hoped-for gains. See Webster's New Internat. Dict. "Invest," 8; Century Dict. "Invest," 7; Standard Dict. "Invest," 1.

In order to adhere to this restricted meaning and avoid exaggerated valuations, the draftsman of the act resorted to the test of including nothing but money, or money's worth, actually contributed or converted in exchange for shares of the capital stock, or actually acquired through the business activities of the corporation or partnership (involving again a conversion) and coming in ab extra, by way of increase over the original capital stock. How consistently this was carried out becomes evident as the section is examined in detail. Cash paid in, and tangible property paid in other than cash, are confined to such as were contributed for stock or shares in the corporation or partnership; and the property is to be taken at its actual cash value "at the time of such payment"—distinctly negativing any allowance for appreciation in value. There is but a single exception: Tangible property paid in prior to January 1, 1914, may be taken at its actual cash value on that date, but in no case exceeding the par value of the original stock or shares specifically issued for it; a restriction in itself requiring the valuation to be taken as of a date prior to the war period, and in no case to exceed the stock valuation placed up- *389 on it at the *time it was contributed. The provision of clause (3) that includes "paid in or earned surplus and undivided profits used or employed in the business" recognizes that in some cases contributions are received from stockholders in money or its equivalent for the specific purpose of creating an actual excess capital over and above the par value of the stock; and, in view of the context, surplus "earned" as well as that "paid in" excludes the idea of capitalizing (for the purposes of this tax) a mere appreciation of values over cost.

The same controlling thought is carried into the proviso, which relates to the valuation of patents, copyrights, trade-marks, good will, franchises, and similar intangible property. Every line shows evidence of a legislative purpose to confine the account to such items as were paid in for stock or shares, and to their values "at the time of such payment"; but. with regard to those bona fide purchased prior to March 3, 1917, there is a special provision, limiting the effect of any adjustments that might have been made in view of the provisions of the act of that date.

[2] It is clear that clauses (1) and (2) refer to actual contributions of cash or of tangible property at its cash value contributed in exchange for stock or shares specifically issued for it; and that neither these clauses, nor clause (3) which relates to surplus, can be construed as including within the definition of invested capital any marking up of the valuation of assets upon the books to correspond with increase in market value, or any paper transaction by which new shares are issued in exchange for old ones in the same corporation, but which is not in substance and effect a new acquisition of capital property by the company.

It is clear enough that Congress adopted the basis of "invested capital" measured according to actual contributions made for *390 stock or shares and actual accessions *in the way of surplus, valuing them according to actual and bona fide transactions and by valuations obtaining at the time of acquisition, not only in order to confine the capital, the income from which was to be in part exempted from the burden of this special tax, to something approximately representative of the risks accepted by the investors in embarking their means in the enterprise, but also in order to adopt tests that would enable returns to be more easily checked by examination of records, and make them less liable to inflation than if a more liberal meaning of "capital and surplus" had been adopted; thus avoiding the necessity of employing a special corps of valuation experts to grapple with the many difficult problems that would have ensued had general market values been adopted as the criteria.

[3] In view of the special language employed in section 207, obviously for the purpose of avoiding appreciated valuations of assets over and above cost, the argument that such value is as real as cost value, and that in the terminology of corporation and partnership accounting "capital and surplus" mean merely the excess of all assets at actual values over outstanding liabilities, and "surplus" means the intrinsic value of all assets over and above outstanding liabilities plus par of the stock, is beside the mark. Nor has the distinction between capital and income, discussed in Doyle v. Mitchell Bros. Co., 247 U. S. 179, 187, 38 Sup. Ct. 467, 62 L. Ed. 1054, Hays v. Gauley Mtn. Coal Co., 247 U. S. 189, 193, 38 Sup. Ct. 470, 62 L. Ed. 1061, and Southern Pacific Co. v. Lowe, 247 U. S. 330, 334, 335, 38 Sup. Ct. 540, 62 L. Ed. 1142, any proper bearing upon the questions here presented.

[4] Upon the strength of an administrative interpretation contained in a Treasury Regulation pertaining to the Revenue Act of 1917, under which "stocks" were to be regarded as tangible property when paid in for stock or shares of a corporation, it is insisted that appellant's stock dividend distribution of 1912 *391 ought to be treated *as paid for in tangible property, the old stock surrendered being regarded as tangible for the purpose. But that distribution, in substance and effect, was an internal transaction, in which the company received nothing from the stockholders any more than they received anything from it (see Eisner v. Macomber, 252 U. S. 189, 210, 211, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570), and the old shares cannot be regarded as having been "paid in for" the new ones within the meaning of section 207 (a) (2), even were they "stocks" within the meaning of that regulation, which is doubtful.

[5] It is said that the admitted increase in the value of appellant's ore lands is properly to be characterized as earned surplus, because it was the result of extensive exploration and development work. We assume that a proper sum, not exceeding the cost of the work, might have been added to earned surplus on that account; but none such was stated in appellant's petition, nor, so far as appears, in its return of income. In the absence of such a showing it was not improper to attribute the entire $9,915,400, added to the book value of the ore property in the year 1912, to a mere appreciation in the value of the property; in short, to what is commonly known as the "unearned increment," not properly "earned surplus" within the meaning of the statute.

The foregoing considerations dispose of the contention that either the increased value of appellant's ore lands, or the surrender of the old stock in exchange for the new issues based upon that value, can be regarded as "tangible property paid in other than cash, for stock or shares in such corporation" within the meaning of section 207 (a) (2), and of the further contention that such increased value can properly be regarded as "paid in or earned surplus and undivided profits" under section 207 (a) (3).

[6] It is urged that this construction, de-

fining invested capital according to the original cost of the property instead of its present value, has the effect of rendering the *392 *act "glaringly unequal" and of doubtful constitutionality; the insistence being that, so construed, it operates to produce baseless and arbitrary discriminations, to the extent of rendering the tax invalid under the due process of law clause of the Fifth Amendment. Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment (Southern Ry. Co. v. Greene, 216 U. S. 400, 418, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 255, 60 L. Ed. 526); but clearly they are not in point. The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by article 1, § 8. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 557; 15 Sup. Ct. 673, 39 L. Ed. 759; Knowlton v. Moore, 178 U. S. 41, 98, 106, 20 Sup. Ct. 747, 44 L. Ed. 969; Flint v. Stone Tracy Co., 220 U. S. 107, 150, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 34 Sup. Ct. 421, 58 L. Ed. 596; Brushaber v. Union Pacific R. R., 240 U. S. 1, 24, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. That the statute under consideration operates with territorial uniformity is obvious and not questioned.

Appellant cites Looney v. Crane Co., 245 U. S. 178, 188, 38 Sup. Ct. 85, 62 L. Ed. 230, and International Paper Co. v. Massachusetts, 246 U. S. 135, 145, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617, but these cases also are inapplicable, being based upon the due process clause of the Fourteenth Amendment, with which state taxing laws were held in conflict because they had the effect of imposing taxes on the property of foreign corporations located and used beyond the jurisdiction of the taxing state. There is no such infirmity here.

[7] Nor can we regard the act—in basing "invested capital" upon actual costs to the exclusion of higher estimated values—as productive of arbitrary discriminations raising a doubt about its constitutionality under the due process clause of the Fifth Amendment. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the states under the *393 equal protection *clause, much less of Congress under the more general requirement of due process of law in taxation. Of course it will be understood that Congress has very ample authority to adjust its income taxes according to its discretion, within the bounds of geographical uniformity. Courts have no authority to pass upon the propriety of its measures; and we deal with the present criticism only for the purpose of refuting the contention, strongly urged, that the tax is so wholly arbitrary as to amount to confiscation.

The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. As to one and all, Congress adjusted this tax, generally speaking, on the basis of excluding from its operation income to the extent of a specified percentage (7 to 9 per cent.) of the capital employed, but upon condition that such capital be valued according to what actually was embarked at the outset or added thereafter, disregarding any appreciation in values. If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the tests applied.

Minor distinctions—such as those turning upon the particular dates of January 1, 1914, and March 3, 1917—are easily explained, as we have seen. The principal line of demarcation—that based upon actual costs, excluding estimated appreciation—finds reasonable support upon grounds of both theory and practice, in addition to the important consideration of convenience in administration, already adverted to. There is a logical incongruity in entering upon the books of a corporation as the capital value of property acquired for permanent employment in its business and still retained for that purpose, a sum corresponding not to its cost but to what probably might be realized by sale in *394 the market. It is not merely that *the market value has not been realized or tested by sale made, but that sale cannot be made without abandoning the very purpose for which the property is held, involving a withdrawal from business so far as that particular property is concerned. Whether in a given case property should be carried in the capital account at market value rather than at cost may be a matter of judgment, depending upon special circumstances and the local law. But certainly Congress, in seeking a general rule, reasonably might adopt the cost basis, resting upon experience rather than anticipation.

In organizing corporations, it is not unusual to issue different classes of securities, with various priorities as between themselves, to represent different kinds of contribution to capital. In exchange for cash, bonds may be issued; for fixed properties, like plant and equipment, preferred stock may be given; while more speculative values, like good will or patent rights, may be represented by common stock. In the present case, for instance, when appellant took the estimated increase in value of its ore lands as a basis for increased capitalization, issued preferred stock to the amount of the former total, carrying those lands at cost, and issued a like amount of common stock to represent the appreciation in their market value. It does not appear that in form the new issues were thus allocated; but at least there was a recognition of a higher claim in favor of one part of the book capital than of the other. Upon like grounds, it was not unreasonable for Congress, in adjusting the "excess profits tax," to accord preferential treatment to capital representing actual investments, as compared with capital representing higher valuations based upon estimates, however confident and reliable, of what probably could be realized were the property sold instead of retained.

From every point of view, the tax in question must be sustained. We intimate no *395 opinion upon the effect of *the act with respect to deductions from cost values of capital assets because of depreciation or the like; no question of that kind being here involved.

Judgment affirmed.

Mr. Justice McREYNOLDS concurs in the result.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

(256 U. S. 681)

No. 194. J. L. HUDSON, plaintiff in error, v. O. L. HOPKINS, as County Treasurer, etc.; and

No. 195. William E. McGUIRE, as Administrator, etc., plaintiff in error, v. E. J. McCURDY, as County Treasurer, etc. April 18, 1921. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 75 Okl. 260, 183 Pac. 507. Mr. Elmer E. Grinstead, of Hominy, Okl., for plaintiff in error. Mr. S. P. Freeling, of Oklahoma City, Okl., for defendant in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(256 U. S. 682)

No. 245. N. W. PALMER et al., plaintiffs in error, v. Racheal KING et al. April 18, 1921. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 75 Okl. 276, 183 Pac. 411. Mr. C. S. Arnold, of Enid, Okl., for plaintiffs in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

No. 348. SOUTHERN PACIFIC RAILROAD COMPANY, appellant, v. John Barton PAYNE, Secretary of the Interior, et. al. April 18, 1921. See, also, 40 Sup. Ct. 584. Mr. A. A. Hoehling, Jr., of Washington, D. C., for appellant. The Attorney General for respondent. Resignation of John Barton Payne, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, suggested by Mr. A. A. Hoehling for the appellant, and ordered that Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, be made the parties appellees herein.

(256 U. S. 682)

No. 716. Herbert DARLINGTON, plaintiff in error, v. Harry W. MAGER, Collector of Internal Revenue for the First District of Illinois. April 18, 1921. In error to the District Court of the United States for the Northern District of Illinois. Messrs. Herbert Pope, Rush C. Butler, and James J. Forstall, all of Chicago, Ill., and E. B. Prettyman, of Washington, D. C., for plaintiff in error. Mr. William L. Frierson, Solicitor General, for defendant in error.

PER CURIAM. Affirmed with costs, upon authority of the act of February 24, 1919, c. 18, § 213a, 40 Stat. 1057, 1065 (Comp. St. Ann. Supp. 1919, § 6336⅛ff); act of September 8, 1916, c. 463, § 2 (a), 39 Stat. 756, 757 (Comp. St. § 6336b); Merchants' Loan & Trust Co. v. Smietanka, No. 608, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. 751; Eldorado Coal & Mining Co. v. Mager, No. 609, 255 U. S. 522, 41 Sup. Ct. 390, 65 L. Ed. 757; Goodrich v. Edwards, No. 663, 255 U. S. 527, 41 Sup. Ct. 390, 65 L. Ed. 758; and Walsh v. Brewster, No. 742, 255 U. S. 536, 41 Sup. Ct. 392, 65 L. Ed. 762, decided March 28, 1921.

(256 U. S. 691)

No. 753. The FILER & STOWELL COMPANY, petitioner, v. DIAMOND IRON WORKS. April 18, 1921. For opinion below, see 270 Fed. 489. Mr. Louis A. Lecher, of Milwaukee, Wis. (Messrs. Wm. G. Henderson, of Washington, D. C., and F. E. Dennett, of Milwaukee, Wis., of counsel), for petitioner. Mr. Frank A. Whiteley, of Minneapolis, Minn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 691)

No. 765. Panayiotis PANOUALIAS, petitioner, v. NATIONAL EQUIPMENT COMPANY. April 18, 1921. For opinion below, see 269 Fed. 630. Mr. Frank C. Briggs, of New York City, for petitioner. Messrs. William Quinby, of Boston, Mass., and Livingston Gifford, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 686)

No. 783. Charles W. ANDERSON, Collector of Internal Revenue, etc., petitioner, v. NEW YORK LIFE INSURANCE COMPANY. April 18, 1921. For opinion below, see 269 Fed. 1021. See, also, 256 U. S. 696, 41 Sup. Ct. 536, 65 L. Ed. —. Mr. William L. Frierson, Solicitor General, and Miss Annette Abbott Adams, Asst. Atty. Gen., for petitioner. Mr. James H. McIntosh, of New York City, for respondent. Order granting writ of certiorari (255 U. S. 568, 41 Sup. Ct. 449, 65 L. Ed. —) herein set aside to enable a resubmission of the petition after due notice to counsel for the respondent.

(256 U. S. 692)

No. 794. John R. BAILEY, petitioner, v. MISSISSIPPI HOME TELEPHONE COMPANY. April 18, 1921. For opinion below, see 269 Fed. 125. Mr. Thomas M. B. Hicks, of Williamsport, Pa., for petitioner. Mr. J. Fred Schaffer, of Sunbury, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(256 U. S. 692)

No. 800. Ulrica Dahlgren PIERCE, as Trustee, etc., appellant, v. John V. DAHLGREN. April 18, 1921. For opinion below, see Dahlgren v. Pierce, 270 Fed. 507. Messrs. Keifer & Keifer, of Springfield, Ohio (Mr. J. Warren Keifer, of Springfield, Ohio, of counsel), for petitioner. Messrs. Lawrence Maxwell, of Cincinnati, Ohio, and Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(256 U. S. 682)

No. 800. Ulrica Dahlgren PIERCE, as Trustee and Individually, appellant, v. John V. Dahlgren. April 18, 1921. Appeal from the United States Circuit Court of Appeals for the Sixth District. For opinion below, see Dahlgren v. Pierce, 270 Fed. 507. Messrs. Keifer & Keifer, of Springfield, Ohio (Mr. J. Warren Keifer, of Springfield, Ohio, of counsel), for petitioner. Messrs. Lawrence Maxwell, of Cincinnati, Ohio, and Frederic R. Coudert, and Howard Thayer Kingsbury, both of New York City, for respondent.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Hull v. Burr, 234 U. S. 712, 720, 35 Sup. Ct. 729, 59 L. Ed. 1119; Roman Catholic Church of St. Anthony v. Pennsylvania R. Co., 237 U. S. 575, 577, 34 Sup. Ct. 892, 58 L. Ed. 1557; Louisville & Nashville R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 302, 35 Sup. Ct. 598, 59 L. Ed. 965; Delaware, Lackawanna & Western R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(256 U. S. 692)

No. 815. SAMUEL VERNON ESTATE (Inc.), petitioner, v. John J. LYTTLE, as receiver and trustee, etc. April 18, 1921. For opinion below, see In re Prudential Lithograph Co., 270 Fed. 469. Mr. Frederick Seymour, of New York City, for petitioner. Mr. E. J. Myers, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 692)

No. 833. SEABOARD TRANSPORTATION COMPANY, petitioner, v. BOSTON, CAPE COD & NEW YORK CANAL COMPANY. April 18, 1921. For opinion below, see Boston, C. C. & N. Y. Canal Co. v. Seaboard Transp. Co., 270 Fed. 525. Mr. Edward E. Blodgett, of Boston, Mass., for petitioner. Messrs. Guy W. Currier, Samuel H. Pillsbury, and Thomas H. Mahony, all of Boston, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(256 U. S. 693)

No. 834. John W. YATES, petitioner, v. Charles R. SMITH, Executor, etc., et al. April 18, 1921. For opinion below, see 271 Fed. 33. Mr. Samuel E. Darby, of New York City, for petitioner. Mr. Stephen J. Cox, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(256 U. S. 693)

No. 836. STANDARD PORTLAND CEMENT COMPANY, petitioner, v. J. R. FOLEY. April 18, 1921. For opinion below, see 270 Fed. 203. Mr. Augustus Benners, of Birmingham, Ala., for petitioners. Mr. Erle Pettus, of Birmingham, Ala., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(256 U. S. 687)

No. 840. GASTON, WILLIAMS & WIGMORE, OF CANADA (Limited), petitioner, v. Philip A. WARNER. April 18, 1921. For opinion below, see 272 Fed. 56. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(256 U. S. 693)
No. 841. William BARBER, petitioner, v. OTIS MOTOR SALES COMPANY. April 18, 1921. For opinion below, see 271 Fed. 171. Mr. Fred Francis Weiss, of Brooklyn, N. Y., for petitioner. Messrs. Jeffery, Kimball & Eggleston, of New York City (Messrs. Robert D. Eggleston and Oscar W. Jeffery, both of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 693)
No. 842. The CITY OF NEW YORK, petitioner, v. Lyndon R. CONNETT et al., etc. April 18, 1921. For opinion below, see Connett v. City of New York, 270 Fed. 197. Mr. Vincent Victory, of New York City, for petitioner. Mr. Samuel Seabury, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 687)
No. 846. James S. McKEE et al., petitioners, v. Benjamin GRATZ. April 18, 1921. For opinion below, see Gratz v. McKee, 270 Fed. 713. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(256 U. S. 693)
No. 861. STANDARD OIL COMPANY, as Owner of THE Steamship JOHN D. ROCKEFELLER, petitioner, v. THE Steamship FALLS CITY, etc. April 18, 1921. For opinion below, see 272 Fed. 67. Messrs. J. Parker Kirlin and John M. Woolsey, both of New York City, Edward R. Baird, Jr., of Norfolk, Va., and Robert S. Erskine, of New York City, for petitioner. Messrs. Hughes, Little & Seawell, of Norfolk, Va. (Mr. Leon T. Seawell, of Norfolk, Va., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(256 U. S. 705)
No. 287. Herman WESSELS, appellant, v. John D. McDONALD, commandant of the United States Navy Yard, Brooklyn, New York. April 21, 1921. For opinion below, see U. S. v. McDonald, 265 Fed. 754. Messrs. Thomas J. O'Neill and William H. Daly, both of New York City, for appellant. The Attorney General, for respondent. Appeal from the District Court of the United States for the Eastern District of New York. Dismissed, per stipulation.

(256 U. S. 705)
No. 532. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, appellant, v. RAILROAD COMMISSION OF WISCONSIN et al. April 21, 1921. For opinion below, see 267 Fed. 711. Appeal from the District Court of the United States for the Western District of Wisconsin. Dismissed, per stipulation.

(256 U. S. 683)
No. —, original. Ex parte In the matter of Thomas G. MORAN, petitioner; and

(256 U. S. 683)
No. —, original. Ex parte In the matter of Henry O. HOLLANDER, petitioner. April 25, 1921. Motions for leave to file petitions for writs of certiorari, prohibition, and mandamus in these cases severally denied.

No. 870. The STATE OF TEXAS, appellant, v. EASTERN TEXAS RAILROAD COMPANY et al. April 25, 1921. Motion for restraining order in this case granted, and ordered that the case be advanced and assigned for argument on Monday, October 10 next, after the cases heretofore assigned for that day.

(256 U. S. 694)
No. 782. George N. BAXTER, petitioner, v. William M. SAFFORD et al. April 25, 1921. For opinion below, see Petition of Baxter, 269 Fed. 344. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(256 U. S. 694)
No. 790. Carl A. MARTIN et al., etc., petitioners, v. PRESIDIO MINING COMPANY et al. April 25, 1921. For opinions below, see Presidio Mining Co. v. Overton, 261 Fed. 933, 270 Fed. 388. Mr. William Denman, of San Francisco, Cal. (Wm. F. Rose, of San Francisco, Cal., of counsel), for petitioners. Messrs. R. T. Harding and Henry E. Monroe, both of San Francisco, Cal. (J. J. Dunne, of San Francisco, Cal., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(256 U. S. 694)
No. 780. J. C. DYSART, petitioner, v. The UNITED STATES of America. April 25, 1921. For opinion below, see 270 Fed. 77. Messrs. Head, Dillard, Smith, Maxey & Head, of Sherman, Tex., and William Hawley Atwell, of Dallas, Tex., for petitioner. Mr. R. P. Stewart, Asst. Atty. Gen., and W. C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(256 U. S. 694)
No. 781. BOSTON & MAINE RAILROAD, petitioner, v. Timothy J. DESMOND. April 25, 1921. For opinion below, see Desmond v. Boston & M. R. Co., 129 N. E. 596. Mr. Frederick N. Wier, of Lowell, Mass., for petitioner. Messrs. James H. Vahey and Philip Mansfield, both of Boston, Mass., for respondent. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

(256 U. S. 695)
No. 797. Joseph OPLE, petitioner, v. George P. WEINBRENNER, Sheriff, etc.;

No. 798. Earl MILLER, petitioner, v. SAME; and

No. 799. Leo CLYNE, petitioner, v. SAME. April 25, 1921. For opinion below, see 226 S. W. 256. Messrs. Mat J. Holland and Charles A. Houts, both of St. Louis, Mo., for petitioner. Mr. Alphonso Howe, of St. Louis, Mo., for respondent. Petition for writs of certiorari to the Supreme Court of the State of Missouri denied.

(256 U. S. 695)

No. 801. McKITTRICK OIL COMPANY, plaintiff in error, v. SOUTHERN PACIFIC RAILROAD COMPANY. April 25, 1921. For opinion below, see 194 Pac. 80. See, also, 256 U. S. 685, 41 Sup. Ct. 624, 65 L. Ed. —. Petition for a writ of certiorari herein denied.

(256 U. S. 695)

No. 843. Louis KARASIK et al., as Trustees, etc., petitioners, v. Henry DOSCHER et al., as Executors, etc. April 25, 1921. For opinion below, see In re Franklin Brewing Co., 272 Fed. 828. Mr. Samuel Evans Maires, of Brooklyn, New York, for petitioners. Mr. Henry F. Cochrane, of Brooklyn, New York, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 695, 696)

No. 873. Joseph ROSENBLATT, petitioner, v. The UNITED STAES of America; and No. 874. Samuel DAVIDSON, petitioner, v. The UNITED STATES of America. April 25, 1921. For opinion below, see 271 Fed. 435. Mr. Charles Hershenstein, of Jersey City, N. J. (Mr. Samuel Hershenstein, of New York City, of counsel), for petitioner Rosenblatt. Messrs. Allan R. Campbell and Mark Hyman, both of New York City, for petitioner Davidson. Mr. Robert P. Stewart, Asst. Atty. Gen., and William C. Herron, of Washington, D. C., for the United States. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

No. 869. Walker D. HINES, Director General of Railroads, etc., plaintiff in error, v. Cena I. BAECHTEL et al. April 25, 1921. See, also, Davis v. Baechtel, 256 U. S. 698, 41 Sup. Ct. 537, 65 L. Ed. —. Messrs. Frederic D. McKenney and John Spalding Flannery, both of Washington, D. C., for plaintiff in error. Resignation of Walker D. Hines, as Director General of Railroads, suggested, and James C. Davis, his successor in office, made the party plaintiff in error herein, on motion of Mr. Frederic D. McKenney for the plaintiff in error.

(256 U. S. 706)

No. 308. Henry ALBERS, petitioner, v. The UNITED STATES. April 27, 1921. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 263 Fed. 27. See, also, 253 U. S. 481, 40 Sup. Ct. 584, 64 L. Ed. 1024. Messrs. James B. Kerr and Charles H. Carey, both of Portland, Ore., for petitioner. Mr. Solicitor General Frierson, for the United States. Judgment reversed on confession of error on motion of Mr. Solicitor General Frierson for the respondent.

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS. May 2, 1921. See, also, 256 U. S. 70, 41 Sup. Ct. 420, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. Motion of John M. Taylor et al. for leave to intervene denied.

(256 U. S. 687)

No. 880. SNAKE CREEK MINING & TUNNEL COMPANY, petitioner, v. MIDWAY IRRIGATION COMPANY et al. May 2, 1921. For opinion below, see Midway Irrigation Co. v. Snake Creek Mining & Tunnel Co., 271 Fed. 157. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(256 U. S. 696)

No. 783. Charles W. ANDERSON, Collector of Internal Revenue, etc., petitioner, v. NEW YORK LIFE INSURANCE COMPANY. May 2, 1921. For opinion below, see 269 Fed. 1021. Messrs. William L. Frierson, Solicitor General, and Miss Annette Abbott Adams, Asst. Atty. Gen., for petitioner. Mr. James H. McIntosh, of New York City, for respondent. Writ of certiorari heretofore issued (255 U. S. 568, 41 Sup. Ct. 449, 65 L. Ed. —) recalled and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 696)

No. 818. ERIE RAILROAD COMPANY, petitioner, v. Fred D. WARD. May 2, 1921. For opinion below, see Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, which reverses judgment, 185 App. Div. 841, 172 N. Y. Supp. 691. Mr. Halsey Sayles, of Elmira, New York, for petitioner. Mr. Thomas A. Sullivan, of Buffalo, New York, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(256 U. S. 696)

No. 821. Arthur A. JONES et al., petitioners, v. Gregory PAGE, Receiver, etc., et al. May 2, 1921. For opinion below, see 194 Pac. 883. Petition for a writ of certiorari to the Supreme Court of the State of New Mexico denied.

(256 U. S. 696)

No. 824. Al WEATHERS, petitioner, v. The UNITED STATES of America. May 2, 1921. For opinion below, see 269 Fed. 254. Messrs. John I. O'Phelan, of Raymond, Wash., and Charles J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for petitioner. (Messrs. O. P. Hubbard and Henry Roden, both of Juneau, Alaska, of counsel.) Mr. Chapin Brown, of Washington, D. C., for petitioner. Mr. Robert P. Stewart, Asst. Atty. Gen., and William C. Herron, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(256 U. S. 697)

No. 826. BULLOCK TRACTOR COMPANY, petitioner, v. J. Herbert KNAPP and Parker N. Black, partners as Knapp & Black. May 2, 1921. For opinion below, see 270 Fed. 379.

Messrs. John S. Miller, Merritt Starr, and Edward Osgood Brown, all of Chicago, Ill. (Thomas E. Haven, of San Francisco, Cal., James C. McMath, of Chicago, Ill., and Frank Davis, Jr., of Columbus, Ohio, of counsel), for petitioner. Mr. Phil. D. Swing, of El Centro, Cal. (Ray W. Bruce, of Los Angeles, Cal., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(256 U. S. 697)

No. 850. Louis SABLOWSKI et al., petitioners, v. The UNITED STATES. May 2, 1921. For opinion below, see 271 Fed. 294. Messrs. William J. Fallon, of White Plains, N. Y., and Eugene F. McGee, of New York City, for petitioners. Mr. William L. Frierson, Solicitor General, and Robert P. Frierson, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 697)

No. 851. ASSOCIATED OIL COMPANY, petitioner, v. Walter L. MILLER and his wife, Mattie E. Miller, et al. May 2, 1921. For opinion below, see 269 Fed. 16. Mr. James A. Baker, of Houston, Tex. (Messrs. Baker, Botts, Parker & Garwood, Conrad J. Landram, and C. L. Carter, all of Houston, Tex., of counsel), for petitioner. Mr. Luther Nickels, of Dallas, Tex. (Messrs. R. E. Hardwicke, of Fort Worth, Tex., and O. C. Funderburk, of Eastland, Tex., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(256 U. S. 697)

No. 863. Clifford E. TREAT, petitioner, v. REDTOP ELECTRIC COMPANY, Inc. May 2, 1921. For opinion below, see 271 Fed. 307. Mr. Frederick S. Lyon, of Los Angeles, Cal., for petitioner. Messrs. Henry J. Lucke and Robert Watson, both of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 698)

No. 869. James C. DAVIS, Director General of Railroads, etc., plaintiff in error, v. Cena I. BAECHTEL et al. May 2, 1921. For opinion below, see Hines v. Baechtel (Md.) 113 Atl. 126. See, also, 41 Sup. Ct. 536. Petition for a writ of certiorari herein denied

(256 U. S. 698)

No. 872. CHICAGO RAILWAY EQUIPMENT COMPANY et al., petitioners, v. Henry D. LAUGHLIN. May 2, 1921. For opinion below, see 272 Fed. 678. Messrs. Harrison Musgrave and Henry Russell Platt, both of Chicago, Ill., for petitioners. Mr. Louis E. Hart, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 698)

No. 881. FORD MOTOR COMPANY, petitioner, v. HOTEL WOODWARD COMPANY. May 2, 1921. For opinion below, see 271 Fed. 625. Messrs. John W. Davis, of Clarksburg, W. Va., Alfred Lucking, of Detroit, Mich., and James M. Beck, of New York City, for petitioner. Messrs. Stephen C. Baldwin, of Brooklyn, N. Y., and Charles H. Tuttle and Victor E. Whitlock, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 684)

No. —, original. Ex parte In the matter of D. H. RIDDLE, petitioner. May 16, 1921. See, also, 255 U. S. 450, 41 Sup. Ct. 370, 65 L. Ed. 725. Motion for leave to file petition for a writ of mandamus herein denied.

(256 U. S. 684)

No. —, original. Ex parte In the matter of C. C. HARTWELL COMPANY, Limited, et al., petitioners. May 16, 1921. Motion for leave to file petition for writ of mandamus herein denied.

(256 U. S. 684)

No. —, original. Ex parte In the matter of EXPORTERS OF MANUFACTURERS' PRODUCTS, Inc., petitioner. May 16, 1921. Motion for leave to file petition for writs of mandamus and/or prohibition herein denied.

(256 U. S. 683)

No. 311. The CITY OF NEW YORK, appellant, v. The BROOKLYN UNION GAS COMPANY. May 16, 1921. Mr. Vincent Victory, of New York City, for appellant. Mr. William N. Dykman, of Brooklyn, N. Y., for respondent. Appeal from the District Court of the United States for the Southern District of New York. Per Curiam. Dismissed for the want of jurisdiction upon the authority of the City of New York v. Consolidated Gas Company of New York et al., 253 U. S. 219, 40 Sup. Ct. 511, 64 L. Ed. 870.

(256 U. S. 706)

No. 470. Charles F. HUNT, Executor, etc., appellant, v. The UNITED STATES. May 16, 1921. For opinion below, see 55 Ct. Cl. 77. Mr. Burt E. Barlow, of Washington, D. C., for appellant. The Attorney General, for the United States. Appeal from the Court of Claims. Stricken from the docket, on motion of counsel for the appellant.

(256 U. S. 699)

No. 823. John W. KEOGH, plaintiff in error, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY et al. May 16, 1921. For opinion below, see 271 Fed. 444. Petition for a writ of certiorari herein denied.

(256 U. S. 69

No. 844. Clark T. HENDERSON, petitioner, v. The COMMISSIONER OF PATENTS. May 16, 1921. For opinion below, see In re

Henderson, 269 Fed. 707. Messrs. Melville Church, of Washington, D. C., and Wylie C. Margeson and Edwin B. H. Tower, Jr., both of New York City, for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(256 U. S. 699)

No. 847. The MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS et al., petitioners, v. UNITED STATES MORTGAGE & TRUST COMPANY et al., Trustees, etc. May 16, 1921. For opinions below, see United States Mortgage & Trust Co. v. Missouri, K. & T. R. Co., 269 Fed. 497, 272 Fed. 458. Mr. A. H. McKnight, of Dallas, Tex. (Mr. Alexander S. Coke, of Dallas, Tex., of counsel), for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(256 U. S. 699)

No. 848. James D. HARDIN, petitioner, v. UNION TRUST COMPANY OF PHILADELPHIA. May 16, 1921. For opinion below, see McCutchen v. Union Trust Co., 271 Fed. 586. Messrs. R. P. Stewart, of Deadwood, S. D., and Frank McNulty, of Aberdeen, S. D., for petitioner. Mr. Chambers Kellar, of Lead, S. D. (Mr. R. N. Ogden, of Deadwood, S. D., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(256 U. S. 700)

No. 860. Fred B. GRANT et al., petitioners, v. The UNITED STATES of America. May 16, 1921. For opinion below, see 268 Fed. 443. Messrs. Fallon & McGee, of New York City, T. Morris Wampler, of Washington, D. C., Maurice L. Galvin and John L. Rich, both of Cincinnati, Ohio, for petitioners. Mr. William L. Frierson, Solicitor General, and Robert P. Frierson, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(256 U. S. 700)

No. 865. DIRECTOR GENERAL OF RAILROADS, petitioner, v. Sarah A. WILSON, administratrix, etc. May 16, 1921 For opinion below, see Wilson v. Director General of Railroads, 112 Atl. 732. Messrs. Geo. A. Bourgeois and Harry R. Coulomb, both of Atlantic City, N. J., for petitioner. Messrs. James Mercer Davis, of Camden, N. J., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New Jersey denied.

(256 U. S. 700)

No. 877. Charles VINCENTI et al., petitioners, v. The UNITED STATES of America. May 16, 1921. For opinion below, see 272 Fed. 114. Messrs. Ogle Marbury, Philip B. Perlman, Lloyd L. Jackson, Jr., and William Curran, all of Baltimore, Md., for petitioners. Miss Annette Abbott Adams, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(256 U. S. 700)

No. 882. Nettie L. SCOTT, petitioner, v. Elizabeth K. DeFRIES, née Pilipo. May 16, 1921. For opinion below, see DeFries v. Scott, 268 Fed. 952. Mr. Frederick Milverton, of San Francisco, Cal., for petitioner. Messrs. Daniel W. O'Donoghue and Arthur A. Alexander, both of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(256 U. S. 698)

No. 886. MICHIGAN CENTRAL RAILROAD COMPANY, petitioner, v. C. A. GUSTAFSON et al., copartners, etc. May 16, 1921. For opinion below, see Gustafson v. Michigan Cent. R. Co., 296 Ill. 41, 129 N. E. 516. Mr. Ralph M. Shaw, of Chicago, Ill. (Messrs. Frank E. Robson, of Detroit, Mich., and Frank H. Towner, of Chicago, Ill., of counsel), for petitioner. Mr. Hobart P. Young, of Chicago, Ill. (Charles Martin, of Chicago, Ill., of counsel), for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied.

(256 U. S. 602)

STATE OF OKLAHOMA v. STATE OF TEXAS (UNITED STATES et al., Interveners).

(Decided June 1, 1921.)

No. 23.

Original suit by the State of Oklahoma against the State of Texas, in which the United States and various other parties intervened.

See, also, 256 U. S. 70, 41 Sup. Ct. 420, 65 L. Ed. ——.

Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma.

Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas.

The following orders were made by the court:

Application of Pearson et al.

Upon application of A. E. Pearson, R. R. Bell, Susie Shaw, Georgia Darby, Mrs. John Mounts, Henry G. Beard and the Silver Moon Oil Company, claimants of certain tracts or parcels of land purchased by Fred Capshaw from the United States of America under patent dated February 17, 1920.

It is ordered that the receiver be and he is hereby authorized and directed to sink a well for oil and gas upon the land described in said patent at such place as the receiver shall select, provided said applicants shall pay in advance from time to time as required the cost and expense of sinking the same and bringing it into production. The said well shall be operated by the receiver as he operates wells on other lands in the river bed area, and he shall conserve and dispose of the proceeeds of the oil and gas as in the case of wells on other lands in the river bed area, and shall reimburse the said Pearson et al. out of the net proceeds for the moneys so advanced and paid by them for drilling the well and bringing it into production; the remainder of such proceeds to be retained by him subject to the order of the court.

Claim of Eoff.

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*Upon motion of Luther Eoff, claiming to be owner of an oil and gas lease upon a certain tract of 500 acres of land described in his motion, situate on the flood plain on the south side of Red river, in range 15 west,

It is ordered that the receiver be and he is hereby authorized and directed to sink a well for oil and gas upon the land described in said motion at such place as the receiver shall select, provided said applicant shall pay in advance from time to time as required the cost and expense of sinking the same and bringing it into production. The said well shall be operated by the receiver as he operates wells on lands in the river bed area, and he shall conserve and dispose of the proceeds of the oil and gas as in the case of wells on lands in the river bed area, and shall reimburse the said Eoff out of the net proceeds for the moneys so advanced and paid by him for drilling the well and bringing it into production; the remainder of such proceeds to be retained by the receiver subject to the order of the court.

Claim of Armstrong et al.

Upon motion of J. R. Armstrong et al., and upon the assent of the receiver, it appearing that the receiver has in his hands a fund of approximately $50,000, being part of the proceeds derived by him from the production of receiver's wells Nos. 157, 162, and 170, operated by him for said Armstrong and for one C. J. Benson, under whom he claims by assignment,

It is ordered that Frederick S. Tyler, Esq., be and he is hereby appointed a special master to hear and report to this court for determination the claim of said J. R. Arm*strong to have said fund turned over to him as purchaser of said wells, and said master shall hear and report on said claim and on all other claims that may be presented against said fund.

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Said master shall have authority to issue process of subpœna to compel the attendance of witnesses, and it shall be his duty to give notice to all parties concerned, to fix the time and place of hearing, and adjourn the same from time to time if necessary, and he shall report all the evidence taken, together with his findings of fact, conclusions of law, and recommendation in the premises, for the ultimate consideration and action of this court.

If for any reason the said Frederick S. Tyler, Esq., shall be unable to act as such special master, or to complete his duties as such, a special master to act in his place shall be named by the Chief Justice or the senior Associate Justice of this court.

Instructions to Receiver.

Upon considering the fifth report of the receiver, filed herein May 26, 1921, it is ordered:

(1) That until further order all development work by the receiver (except as prescribed in certain other orders made this day) shall be confined to the completion of the wells in the river bed area, about 12 in number, work upon which already has been begun.

(2) That the receiver be and he is hereby authorized and directed to collect, withhold, and impound three-sixteenths of the gross proceeds of gas produced by wells within the receivership area from and after June 1, 1921.

(3) That the receiver be and he is hereby authorized to publish a notice in four daily newspapers, two circulating in Texas and *605 two circulating in Oklahoma, to be *selected by him, requesting all persons having claims against the receiver or against the property or funds in his custody to present the same to the receiver within 60 days from the date of publication of such notice, accompanying their statements of claim with supporting affidavits and certified or sworn copies of any documentary evidence upon which they may rely, and the receiver is directed to examine and investigate said claims and supporting evidence, and he is hereby authorized to settle and discharge the same if he can do so upon a fair and equitable basis, and as to any not so adjusted and settled he shall make a full report to this court at its next term for such further action as the court may deem proper.

Order Setting Intervening Petitions for Hearing.

It appearing that special issues have been joined in this cause (1) upon the intervening petition of E. Everitt Rowell, claimant of riparian land on the north bank of Red river, and the answer thereto of the United States embodied in paragraph II of its amended petition of intervention; (2) upon the intervening petition of A. E. Pearson, R. R. Bell, Susie Shaw, Georgia Darby, Mrs. John Mounts, Henry G. Beard, and the Silver Moon Oil Company, claimants of riparian lands on north bank of Red river, and the answer thereto of the United States embodied in paragraph II of its amended petition of intervention; (3) upon the amended petition of intervention of the Burk Divide Oil Company (Consolidated) and others, placer mining claim- *606 ants, and the answer of the *United States thereto embodied in paragraph III of its amended petition of intervention; (4) upon the petition of intervention of the Mellish Consolidated Placer Oil Mining Association, a placer mining claimant, and the answer thereto of the United States embodied in paragraph III of its amended petition of intervention; (5) and as between the state of Oklahoma and the United States as to the school sections abutting on Red river owned by said state, in respect to which it claims by riparian right the entire bed of Red river to the south bank, as said claim is set up in the original bill of said state and answered by the United States in paragraph II, subparagraph 10, of its amended petition of intervention:

It is ordered that this cause be and it is hereby set down for hearing as to said special issues, and as to the claims of any and all other interveners herein who may claim riparian lands on the north bank of Red river or placer mining locations under the mining laws of the United States, on the 17th day of October, A. D. 1921.

Frederick S. Tyler, Esq., of Washington, D. C., is hereby appointed as commissioner to take the evidence of the said respective parties with respect to said issues and claims, and report the same to the court, but without findings or conclusions. Said evidence shall be taken and closed on or before July 30, 1921. The evidence as to all said issues and claims shall be embodied in one record, but the evidence as to each issue or claim shall be set forth separately so far as practicable. Subject to the time fixed for closing said evidence, the time and place for commencing and proceeding with the taking of testimony, and the order in which the different matters shall be taken up, may be fixed by agreement of the parties, or in case of disagreement shall be fixed by the commissioner.

If for any reason the said Frederick S. Tyler shall be unable to act as such com- *607 missioner, or to complete his *duties as such, a commissioner to act in his place shall be named by the Chief Justice or the senior Associate Justice of this court.

Order to Show Cause.

It appearing from the fifth report made by Frederick A. Delano, the receiver heretofore appointed by this court in the above-stated cause, that an action recently was commenced against him in the United States District Court for the Northern District of Texas by the Casa Oil Company to recover damages for the alleged conversion of certain personal property claimed by said Casa Oil Company and alleged to have been seized and appropriated by said receiver; and that a citation has been issued by said court commanding said receiver to appear in said cause and make answer to the petition therein at the next regular term of said court, to be held on the 21st day of November, A. D. 1921,

It is ordered that the Honorable James C. Wilson, Judge of the said United States District Court for the Northern District of Texas, do show cause before this court, at the Capitol in Washington, in the District of Columbia, on the 17th day of October, A. D. 1921, why a writ of prohibition should not be issued commanding him to desist from further entertaining jurisdiction of said cause.

Reimbursement of Operators and Drillers.

It is ordered that Frederick A. Delano, receiver, be and he is hereby authorized, in his discretion, out of thirteen-sixteenths of the net proceeds of any well or wells in the river bed area (other than the well known as the Burk Senator) paid to him since April 1, 1920, to reimburse to those operators or *608 drillers who had drilled and brought *into production such well or wells, their actual cost of such work, including a reasonable allowance for field supervision, but excluding any allowance for general or office supervision, and after deducting a proper allowance for the yield derived by them from such well or wells prior to the taking possession of the same by the receiver.

Order Setting Cause for Further Hearing.

This court having on the 7th day of June, 1920, set this cause down for hearing upon specified questions of law, the hearing having been had, and the court having considered of the matter, and having announced its opinion and conclusion on April 11, 1921:

It is ordered, adjudged, and decreed that according to the treaty of 1819 between the United States and Spain, as heretofore examined and construed by this court in the case of United States v. Texas, 162 U. S. 1, 16 Sup. Ct. 725, 40 L. Ed. 867, the decree in which is conclusive upon the parties to this cause, the true boundary between the state of Oklahoma and the state of Texas where it follows the course of the Red river from the 100th degree of west longitude to the eastern boundary of the state of Oklahoma is along the south bank of Red river. And as it still needs to be determined between the state of Oklahoma, complainant, and the United States of America, intervener, on the one hand, and the state of Texas, on the other hand, as to what constitutes the south bank of Red river, as to where along that bank the true boundary line is, and as to the proper mode of locating the same upon the ground,

It is, on motion of the state of Oklahoma, concurred in by the state of Texas and the United States of America, ordered that this *609 cause be set down for hearing upon *those questions on the 9th day of January, A. D. 1922.

And it is ordered that upon said hearing the parties shall be at liberty to refer to and use the evidence heretofore taken and returned in this cause so far as applicable to said question, without the necessity of republication or reprinting, and they shall proceed to take such further evidence as they may desire relating, among other things, to the characteristics and regimen of Red river, the physical conditions along the same, any substantial changes that may have occurred since the treaty by avulsions, relictions, erosions, accretions, or other natural causes, and the practical construction and application of the treaty of 1819 by the governments and states concerned and their inhabitants.

Frederick S. Tyler, Esq., of Washington, D. C., is hereby appointed as commissioner to take said further evidence and report the same to the court, but without findings or conclusions, and if for any reason said Frederick S. Tyler shall be unable to act as such commissioner, or to complete his duties as such, a commissioner to act in his place shall be named by the Chief Justice or the senior Associate Justice of this court.

Subject to the limitations hereinafter imposed, the times and places of taking such testimony, and the order of taking the same, may be fixed by stipulation of the parties, and, if they shall fail to stipulate, shall be fixed by the commissioner. The taking of testimony shall commence not later than the 15th day of August, 1921, and shall be concluded on or before the 29th day of October following. Unless the parties otherwise stipulate, the evidence in chief on the part of the United States shall be presented first, that on the part of the state of Oklahoma next, and that on the part of the state of Texas next, and the rebuttal evidence of the respective parties shall be presented in the same order.

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*The hearing on the counterclaim of the state of Texas, and the taking of testimony thereon, is reserved for further order.

Order as to Filing of Petitions in Intervention.

It is ordered that no petition in intervention may hereafter be filed herein under the order of June 7, 1920, except upon special leave given by the court.

(256 U. S. 524)

UNITED STATES v. HUTTO et al.

(Argued April 11, 1921. Decided June 1, 1921.)

No. 691.

1. Indians 🔑4 — Prohibition against officer's interest in trade not limited to property in which government has an interest.

The provision in Rev. St. § 2078 (Comp. St. § 4026), that no person employed in the Indian Department shall have any interest in any trade with the Indians except on account of the United States, is not, when construed with the history of similar legislation and the context of the original act, confined to transactions involving lands or other property of Indians in respect to which the government has an interest or control.

2. Conspiracy 🔑3 — Object of "conspiracy" may be unlawful act, not crime.

Even if Rev. St. § 2078 (Comp. St. § 4026), prohibiting an employee in Indian affairs from having any interest in trade with the Indians, does not create a criminal offense, but merely subjects the offender to an action for a penalty, a conspiracy to engage in such trade is a conspiracy to commit an offense against the United States within Criminal Code, § 37 (Comp. St. § 10201), since a combination to accomplish a purpose, either criminal or otherwise unlawful, is within the accepted definition of conspiracy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

In Error to the District Court of the United States for the Western District of Oklahoma.

A. Z. Hutto and others were indicted for conspiracy. The district court sustained demurrer to the indictment, and the United States brings error. Reversed and remanded.

Mr. Assistant Attorney General Garnett, for the United States.

Mr. Sam K. Sullivan, of Newkirk, Okl., for defendants in error.

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*Mr. Justice PITNEY delivered the opinion of the Court.

This writ of error was brought under the Criminal Appeals Act of March 2, 1907 (chapter 2564, 34 Stat. 1246 [Comp. St. § 1704]), to review a judgment of the District Court sustaining demurrers to an indictment under section 37, Criminal Code (Comp, St. § 10201), charging a conspiracy to violate section 2078, Rev. Stat. U. S. (Comp. St. § 4026), and overt acts done to effect the object of the conspiracy.

Section 37 prescribes:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined," etc.

Section 2078, Rev. Stat., reads thus:

> "No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office."

The indictment alleges that A. Z. Hutto was a duly appointed and qualified Indian farmer for the Tonkawa Tribe of Indians, Ponca Reservation, Oklahoma, acting as such, and that under an act of Congress and the rules and regulations promulgated by the Secretary of the Interior, it was his duty to superintend and direct farming and stock raising among said Tonkawa Tribe, to supervise the leasing of Indian lands, and to appraise their value for sale; that Hutto, J. R.

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White, Ray See, and J. R. *Ricks feloniously conspired together that Hutto, while so employed in Indian affairs, should have an interest and concern in certain trades with the Indians not for or on account of the United States, in violation of section 2078, Rev. Stat. U. S., that is to say, that Hutto, while so employed, should have an interest and concern in sales of land by Indians of said tribe, and in the purchase of automobiles and other commodities by said Indians, and that the alleged conspirators would and should persuade, induce, procure, and cause certain Indians named, members of said Tonkawa Tribe, to sell their lands, purchase automobiles and other commodities, borrow money and lend money, and that said Hutto should have an interest and profit in said sales, purchases, and loans. The alleged overt acts need not be recited.

Defendants having filed separate demurrers, the District Court at first sustained them upon the ground that the acts prohibited in section 2078, Rev. Stat., are not a crime against the United States, but acts for which a penalty is provided, to be collected only by a civil action, and hence cannot form the basis of a criminal conspiracy in violation of section 37, Criminal Code.

Upon a rehearing, the demurrers again were sustained, but upon the ground that section 2078 is inapplicable to transactions involving lands or other property with respect to which the Government has no interest or control, and that no such interest or control was alleged in the indictment.

[1] Taking up the second point first: It seems to us the plain terms of section 2078 leave little room for discussion over the proposition that the prohibition is not confined to transactions involving lands or other property in respect to which the government has an interest or control.

In early days, under the power conferred upon Congress by the Constitution (article 1, § 8, cl. 3) to regulate commerce with the In-

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dian Tribes, some traffic was carried *on with the Indians upon the government account. As early as the year 1796 (chapter 13, 1 Stat. 452) the President was authorized to establish Indian trading posts on the frontiers and in the Indian country; and the agent appointed for each trading house was required to swear or affirm in his oath of office that he would not directly or indirectly be concerned or interested in any trade, commerce, or barter with any Indian or Indians but on the public account. This was a temporary measure, to continue for two years and to the end of the next session of Congress thereafter. Another act, to continue for three years, was approved April 21, 1806 (chapter 48, 2 Stat. 402), which required of the superintendent of Indian trade an oath or affirmation faithfully to execute the trust committed to him, and that he would not directly or indirectly be concerned or interested in any trade, commerce, or barter but on the public account. A like oath was required of the agent appointed for each trading house. Still a third act for establishing trading houses with Indian tribes, approved March 2, 1811 (chapter 30, 2 Stat. 652), required a similar form of oath from the superintendent of Indian trade, and from each agent and assistant agent. This act, like the others, was limited to a brief duration.

Section 2078, Rev. Stat., was taken, with but slight change, from section 14 of an act of June 30, 1834 (chapter 162, 4 Stat. 735, 738 [Comp. St. § 4026]), entitled "An act to provide for the organization of the department of Indian affairs," and designed not for the carrying on of trade or barter with the Indians on government account, but to carry out treaty obligations, pay annuities and distribute merchandise to the Indians as stipulated, furnish them with domestic animals, implements of husbandry, and rations as the President might think proper, provide interpreters, blacksmiths, farmers, mechanics, and teachers, as required by treaty, and generally to promote friendly relations with

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*the Indians and advance their welfare. In this connection the provision of section 14, "that no person employed in the Indian department shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States," manifestly had a significance extending quite beyond any pecuniary interest of the United States in government trade or barter with the Indians. In its original setting, and more emphatically when grouped in the Revised Statutes with other provisions having to do with the supervision and management of the affairs of the Indians, it manifestly was and is designed to insure integrity of conduct on the part of all persons employed in Indian affairs, and an impartial attitude towards the Indians, by excluding from persons so employed all motives of personal gain, so that the duty of the United States as trustee for these dependent peoples, recognized wards of the government, might be performed with a single regard for their interests appropriate to the fiduciary relation. The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus to maintain the honor and credit of the United States, rather than to subserve its pecuniary interest.

The District Court erred in its construction of section 2078.

[2] Nor can we sustain the other ground upon which it is contended the demurrers were well taken. Section 37, Criminal Code, is violated by a conspiracy "to commit any offense against the United States," accompanied or followed by an overt act done to effect the object of the conspiracy. It does not in terms require that the contemplated offense shall of itself be a criminal offense; nor does the nature of the subject-matter require this construction. A combination of two or more persons by concerted action to ac-

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complish a purpose either criminal *or otherwise unlawful comes within the accepted definition of conspiracy. Pettibone v. United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419. The distinction between a conspiracy and the contemplated offense that forms its object has often been pointed out. United States v. Rabinowich, 238 U. S. 78, 85, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211, and cases cited. And we deem it clear that a conspiracy to commit any offense which by act of Congress is prohibited in the interest of the public policy of the United States, although not of itself made punishable by criminal prosecution, but only by suit for penalty, is a conspiracy to commit an "offense against the United States" within the meaning of section 37, Criminal Code, and, provided there be the necessary overt act or acts, is punishable under the terms of that section.

We have assumed, for the sake of the argument, that under section 2078, Rev. Stat., the United States is confined to the suit for penalty specifically mentioned; but we do not so decide, and in our view the present case does not require an expression of opinion upon that subject. See United States v. Stevenson, 215 U. S. 190, 197, et seq., 30 Sup. Ct. 35, 54 L. Ed. 153.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

(256 U. S. 530)

UNITED STATES v. HUTTO.

(Argued April 11, 1921. Decided June 1, 1921.)

No. 692.

In Error to the District Court of the United States for the Western District of Oklahoma.

A. Z. Hutto was indicted for conspiracy. The District Court sustained demurrer to the indictment, and the United States brings error. Reversed and remanded.

Mr. Assistant Attorney General Garnett, for the United States.

Mr. Sam K. Sullivan, of Newkirk, Okl., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

This is a writ of error under the Criminal Appeals Act of March 2, 1907 (chapter 2564, 34 Stat. 1246 [Comp. St. § 1704]), to review a judgment sustaining a demurrer to an indictment, which, in essential respects, is precisely like that passed upon in United States v. Hutto et al. (No. 691, just decided) 256 U. S. 524, 41 Sup. Ct. 541, 65 L. Ed. —. In this case the demurrer was sustained upon the ground that section 2078, Rev. Stat. U. S. (Comp. St. § 4026), was inapplicable to transactions involving property with respect to which the government had no interest or control. For the reasons stated in the opinion in No. 691, the judgment herein is reversed, and the cause remanded for further proceedings in conformity with this opinion.

(256 U. S. 519)

ANCHOR OIL CO. v. GRAY et al.

(Argued and Submitted Jan. 27, 1921. Decided June 1, 1921.)

No. 188.

1. **Indians 🔑16(3) — Lease by Creek Indian may be approved by Secretary of Interior after Indian's death.**

Under Act May 27, 1908, c. 199, § 2, authorizing leases of restricted lands of members of the Five Civilized Tribes for oil and gas and other mining purposes with the approval of the Secretary of the Interior, the Secretary's approval of an oil and gas lease made by a Creek Indian might be given either before or after her death, so far as the rights of her heirs and those claiming under them with notice are concerned, and the approval, when given, related back and took effect as of the execution of the lease, notwithstanding section 9, providing that the death of any allottee shall remove all restrictions on alienation.

2. **Indians 🔑16(½)—Lodging of lease with Indian agent for transmission to Secretary of Interior held notice to persons claiming under Indian or her heirs.**

Under Act March 1, 1907, c. 2285, providing that the filing of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice, the lodging with such agent of a Creek Indian's oil and gas lease, for transmission to the Secretary of the Interior for approval, constituted notice to all parties thereafter claiming under her or her heirs.

3. **Indians 🔑16(2)—Statute as to notice of leases not repealed by Oklahoma Enabling Act or Constitution.**

Act March 1, 1907, c. 2285, providing that the filing of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice, was not repealed or superseded by the admission of Oklahoma into the Union, or by the provisions of the Enabling Act or the Constitution of Oklahoma, in view of section 1 of the Enabling Act, providing that nothing in such Constitution shall limit rights of person or property pertaining to Indians, or affect the authority of the United States government to make any law or regulation respecting Indians, though section 21 of such act and section 2 of the Schedule to the Constitution continues in force territorial laws not repugnant to the Constitution and not locally inapplicable.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Anchor Oil Company against W. H. Gray and others. A decree of dismissal was affirmed by the Circuit Court of Appeals (257 Fed. 277, 168 C. C. A. 361), and plaintiff appeals. Affirmed.

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*Mr. John Devereux, of Tulsa, Okl., for appellant.

Mr. Preston C. West, of Tulsa, Okl., for appellees.

Mr. Justice PITNEY delivered the opinion of the Court.

This is a suit in equity instituted by appellant against appellees in a state court of Oklahoma, involving the ownership of a leasehold estate for oil and gas mining purposes in a Creek Indian allotment containing 80 acres, situate in Tulsa county, Okl. Upon petition of appellees it was removed to the United States District Court upon the ground that it arose under the Constitution and laws of the United States; a motion to dismiss the suit was granted by that court, the decree of dismissal was affirmed by the Circuit Court of Appeals for the Eighth Circuit (257 Fed. 277, 168 C. C. A. 361), and an appeal brings the case here.

From appellant's amended petition it appears that the 80 acres were allotted to Jennie Samuels, a full-blood Creek Indian, as her distributive share of the lands of the tribe, and patented to her in the year 1903. December 5, 1914, pursuant to the Act of Congress of May 27, 1908, c. 199, § 2 (35 Stat. *521 312), and the rules and regu*lations of the Secretary of the Interior, she made an oil and gas mining lease to McDonnell and Egan covering the lands in controversy, and this was filed in the office of the United States Indian agent (now designated as Superintendent of the Five Civilized Tribes), Union Agency, at Muskogee, on January 5, 1915. It was forwarded by the agent to the Commissioner of Indian Affairs with a favorable recommendation October 14, 1915; submitted by the Commissioner to the Secretary of the Interior for approval, and by him approved October 21, 1915. It was first filed for record in the county clerk's office of Tulsa county on August 10, 1916. Appellees are the owners of this lease, and are in possession of the lands.

Jennie Samuels died intestate October 11, 1915 (10 days before the Secretary's approval of the above lease), leaving as her heirs a daughter, Feney Rogers, and a granddaughter, Lina White, both full-blood Creek Indians, and to them the lands descended, subject to the lease. In the following December they made oil and gas leases to one Williams covering the same 80 acres, which were approved by the county court having jurisdiction of the estate of Jennie Samuels, and were recorded in the county records prior to August 10, 1916. These leases are held by appellant, whose interest was acquired, according to the averments of the petition, without knowledge or notice of the lease made by Jennie Samuels.

Appellees, having entered into possession, commenced drilling and discovered and produced petroleum and natural gas in paying quantities. This suit was commenced in January, 1917, appellant praying that their lease be canceled and they enjoined from interfering with appellant in the possession of the premises, and required to account.

[1] Like the courts below, we find it unnecessary to consider the inherent validity or *522 invalidity of appellant's *title, because we conclude that that of appellees is good and has priority over it. The authority of the Secretary of the Interior to approve and thereby confirm oil and gas mining leases made by full-blood Creek allottees upon their allotments—derived from section 2 of the Act of May 27, 1908—did not cease at the death of the allottee by reason of the provision of section 9 of the same act (35 Stat. 315):

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The validity of the lease made by Jennie Samuels having been conditioned upon the approval of the Secretary, such approval might be given at any time either before or after her death, so far as the rights of her heirs and those claiming under them with notice were concerned, and the approval when given related back and took effect as of the execution of the lease by the parties named therein. Pickering v. Lomax, 145 U. S. 310, 314, 316, 12 Sup. Ct. 860, 36 L. Ed. 716; Lomax v. Pickering, 173 U. S. 26, 27, 32, 19 Sup. Ct. 416, 43 L. Ed. 601; Lykins v. McGrath, 184 U. S. 169, 171, 172, 22 Sup. Ct. 450, 46 L. Ed. 485.

[2, 3] The lease received the approval which gave it complete validity, some time before the first of the leases made by the heirs to Williams. And Williams was charged with notice of the prior grant, because, under the provision of the Act of March 1, 1907, c. 2285 (34 Stat. 1015, 1026), "The filing heretofore or hereafter of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice," the lodging of the prior lease with that officer in January, 1915, for transmission to the Secretary of the Interior, constituted notice to all parties thereafter claiming under her or her heirs. We agree that this provision was neither repealed nor superseded by the *523 admis*sion of the state of Oklahoma into the Union, or by the provisions of the Enabling Act, or the Constitution of the state which became effective November 16, 1907. As the Circuit Court of Appeals pointed out (257 Fed. 282, 168 C. C. 361), section 1 of the Enabling Act (Act June 16, 1906, c. 3335, 34 Stat. 267) contained a proviso:

> "That nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians * * * or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

While section 21 of the same act (34 Stat. 277), and section 2 of the Schedule to the Constitution of Oklahoma (Rev. Laws Oklahoma 1910, p. cxcix), contained provisions to the effect that laws in force in the territory of Oklahoma at the time of the admission of the state not repugnant to its Constitution and not locally inapplicable should be extended to and remain in force throughout the state, there was nothing to show an intent to repeal or supersede the provision of the Act of Congress of March 1, 1907, above quoted, or to establish the local recordation statutes in its place so far as related to Indian leases, such as we have here. See Exparte Webb, 225 U. S. 663, 682, 683, 32 Sup. Ct. 769, 56 L. Ed. 1248.

The satisfactory reasoning of the courts below, which we have followed in outline, has the support of a well-considered decision by the Supreme Court of Oklahoma in Scioto Oil Co. v. O'Hern, 169 Pac. 483.

Appellant lays some stress upon particular provisions in the Jennie Samuels lease, but we find nothing in them to affect the result. They are sufficiently dealt with in the opinion of the Circuit Court of Appeals. 257 Fed. 280, 281, 168 C. C. A. 361.

Decree affirmed.

(256 U. S. 582)

DISTRICT OF COLUMBIA v. R. P. ANDREWS PAPER CO. SAME v. SAKS & CO. SAME v. LISNER.

(Argued April 22 and 25, 1921. Decided June 1, 1921.)

Nos. 282, 283, 284.

1. District of Columbia ⚷22 — Permits for vaults under sidewalks held revocable at will, and not to create vested rights.

Permits from the District of Columbia to abutting owners for the construction of vaults under sidewalks, subject to the provisions of the building regulations of the District; provisions of the building regulations that no charge would be made for the occupancy of public space by vaults, except the usual permit fee, that all permits were subject to revocation at any time when the vault space was needed for public use or improvement, that the permit was accepted with the understanding that no right, title, or interest of the public was waived or abridged, except as expressed in the permit, and that the applicant for a permit must contract to relinquish such space and remove all fixtures when ordered by the commissioners or needed for public use; and acceptances of permits providing that the Dis-

trict should have the right to construct sewers, etc. through the vaults, that clear and sufficient space would be made therefor, and that no right, title, or interest of the public was in any way abridged—did not give the abutting owners any vested right to use the vault space until needed for public use, but created only licenses subject to revocation at any time.

2. District of Columbia 🔑22—From application to contruct vault under sidewalks and construction thereof only license revocable at will can be inferred.

Where, in 1884, an application was made by an abutting owner for a permit to erect a building with adjacent vaults under the sidewalk, and the vault was constructed and used ever since, but no formal permit appears in the record, a license to construct and use the vaults, revocable at will, is all that can be inferred against the public.

3. District of Columbia 🔑22—Act providing for collection of rent for vaults under sidewalks not limited to those subsequently constructed.

As abutting owners, constructing vaults under sidewalks under permits from the District of Columbia prior to Act Sept. 1, 1916, § 7, were mere licensees, that section, providing that the commissioners of the District shall collect rent from all users of space under the streets and sidewalks, is not limited to constructions after the date of such act.

On Writs of Certiorari to the Court of Appeals of the District of Columbia.

Three actions by the District of Columbia against the R. P. Andrews Paper Company, against Saks & Co., and against Abraham Lisner. Judgments for plaintiff were reversed by the Court of Appeals of the District of Columbia (49 App. D. C. 273, 276, 263 Fed. 1017, 1020), and plaintiff brings certiorari. Reversed, and judgments of the Supreme Court of the District of Columbia affirmed.

See, also, 253 U. S. 479, 40 Sup. Ct. 481, 482, 64 L. Ed. 1022, 1023.

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*Mr. F. H. Stephens, of Washington, D. C., for petitioner.

Messrs. M. D. Rosenberg and Charles L. Frailey, both of Washington, D. C., for respondents.

MR. JUSTICE CLARKE delivered the opinion of the Court.

These three cases, tried on agreed statements of fact, were argued and will be disposed of together.

The respondents were assessed a rental upon vaults under sidewalks which were used in connection with business conducted in adjacent buildings. They refused to pay the assessments, and in these suits to collect them, judgments were rendered by the Supreme Court in favor of the District, which were reversed by the Court of Appeals on the ground that the act of Congress authorizing the assessments was applicable only to constructions permitted after its date.

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*The essential facts are as follows:

The appropriation act for the District of Columbia, approved September 1, 1916 (39 Stat. 676, 716, § 7), provided:

> "That hereafter the commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Pursuant to this authority, the commissioners caused the space occupied by vaults of each of the three respondents to be valued and then assessed against each of them a rental which it is stipulated is "fair and reasonable" in amount, "if it be a legal charge."

The permits involved in the Paper Company and Lisner Cases were issued before the act complained of was passed, and these two cases will be first considered.

The essential provisions of each of these permits are:

> "This is to certify that * * * has permission to build vault * * * as per plan * * * in accordance with application * * * on file in this office, and subject to the provisions of the Building Regulations of the District of Columbia."

There is nothing in either permit in the nature of a grant or which enlarges the permission beyond the terms quoted.

When these permits were issued, the Building Regulations provided (paragraph 9):

> "No charge will be made for the occupancy of public space by vault or areas except the usual permit fee, but all permits for such occupancy are subject to revocation by the commissioners at any time without compensation when the vault space is needed for public use or improvement. * * * And this permit is accepted with the understanding that the occupation of the vault space is permitted merely *585 as an accommodation to the owner of *the abutting premises and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid."

Then follows an agreement by the licensee to use the vault only for the purposes authorized by the commissioners.

And paragraph 3 provided:

> "The application for a vault must be accompanied by the written agreement, upon an official blank, signed by the owner of the abutting property * * * contracting to release and relinquish the vault space and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when

so ordered by the commissioners, or needed for public use."

The only charge made by the District was $1 for the permit to construct.

Pursuant to paragraph 3, supra, the applicants each signed an agreement in precisely the same form, accepting the permit on condition (1) that the District shall have the right to construct under, over or through the vault public sewers or other underground construction which it may deem necessary, without compensation; and (2) that upon notice from the District of a desire to place any such construction in the area occupied by the vault, space clear and sufficient for it shall forthwith be made therein (by the acceptor) "without cost to the District." The acceptance concludes:

> "This permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest in the public is in any way abridged thereby, except as expressed in said permit and the conditions aforesaid."

[1] The respondents the R. P. Andrews Paper Company and Abraham Lisner defended against the collection of the assessments, claiming that their permits to construct *586 *were in such form as to create in each by contract a vested right of property in the vault in the street, of which they would be deprived without due process of law if they were required to pay the rental.

To sustain this position, the respondents select from paragraph 3 of the Building Regulations, supra, the provision that "no charge shall be made for occupancy of public space by a vault," and that all permits are subject to revocation "when the vault space is needed for any public use and improvement." From paragraph 3, supra, they select the stipulation that the vault space shall be vacated when ordered by the commissioners "or needed for public use," and from the terms of the acceptances of the permits the provision that the commissioners may place in the vaults any construction they may "deem necessary." Grouping these unrelated excerpts together, it is contended that they constitute a contract on the part of the District to leave the respondents in the undisturbed possession of the vaults, free of charge, until such time as the space may be demanded because needed for some public use and improvement, and that since the act of Congress under which the disputed rental is imposed is purely a revenue measure which does not require the surrender of the space for any public use, but contemplates the continued private use of it, it is an invalid attempt to deprive the respondents of their property without due process of law.

This statement of the contention of the respondents is it own sufficient refutation.

In form the permit is a mere naked permission to build. Two of the three clauses relied upon to create rights of property in the streets are derived from the Building Regulations, which, as their name implies, are designed to regulate the materials of buildings and the manner of their construction and use; they are not looked to, on such a mere reference as we have here, for a grant *587 of rights *in streets; and the third clause is from the acceptances of the permits, which are signed only by the applicants. When to this we add that, the applications culminated and ended in acceptances of the permits "with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title and interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions [in the acceptances] aforesaid," and that the settled rule of law is that the grants of rights and privileges in streets are strictly construed so that whatever is not unequivocally granted therein is withheld, and that nothing passes in such case by implication. (Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; Blair v. City of Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801; Piedmont Power & Light Co. v. Town of Graham, 253 U. S. 193, 194, 40 Sup. Ct. 453, 64 L. Ed. 855), we cannot doubt that the permits to the respondents were mere licenses, subject to revocation at any time in the discretion of the government of the District.

[2] The Saks & Co. Case, No. 283, is, if possible, even less substantial than the other two. Whatever rights in the streets this respondent has must be derived from the application made in 1884 for a permit to erect a building with adjacent vaults, and from the presumption of a permit, arising from the fact that a vault was constructed and has been in use ever since. No formal permit appears in the record.

A license to Saks & Co. to construct and use the vaults, revocable at will, would be sufficient to render them unlawful constructions in the street until the privilege should be revoked, and this is all that can fairly be inferred against the public from the facts stated. Without a permit presumed the vault would be a public nuisance, but no grant of a permanent right in the street can be inferred from a mere application and use.

The Court of Appeals gives much greater *588 significance *to the concluding words of the acceptances in the permits in Nos. 282 and 284, "except as expressed in said permit and the condition aforesaid," than we can find in them. There are certainly no limitations upon the rights of the public in the permit itself, and the conditions of acceptance here referred to were special agreements, in the acceptances, on the part of the applicants to surrender the vault space upon demand of the commissioners for special purposes and to an extent designated, which we think not inconsistent with the larger declaration with which the permit was accepted, that the occupation of the vault was a mere accomodation to the receiver of the permit and did not constitute any waiver of any right, title or interest of the public in the streets.

[3] Concluding, as we do, that the respondents were mere licensees, we see no reason for limiting the act of Congress, as the Court of Appeals limited it, to constructions after the date of the act. Such an interpretation of the act would so obviously result in unjust inequality that it should be adopted only under stress of imperative language which we do not find in it.

It results that the judgment of the Court of Appeals of the District will be reversed and that of the Supreme Court affirmed in each of the cases.

Reversed.

(256 U. S. 446)

UNITED STATES v. AMERICAN CHICLE CO.

(Argued Jan. 24, 1921. Decided June 1, 1921.)

No. 175.

1. Internal revenue 🔑38 — Petition for recovery of stamp taxes should show facts essential to recovery.

In an action to recover back an amount paid for revenue stamps for chewing gum, which the petition alleged had been transported from the place of manufacture to one of the manufacturer's other factories or warehouses, if the greater part were sent to other factories, the petition should have so stated.

2. Internal revenue 🔑11—Stamp tax due on chewing gum when sent to another state, where there was a more promising market.

Under Act Oct. 22, 1914, § 5, and Schedule B, imposing a stamp tax on certain articles, including chewing gum, manufactured, sold, or removed for sale, assuming that the tax is levied in respect of the sale, rather than of the manufacture, chewing gum was removed for sale and subject to the tax when sent by the manufacturer to its warehouses in other states, where there was a more promising market, and the stamps attached to the packages could not be redeemed under section 24 of the act of 1914 and Act Sept. 8, 1916, § 411 (Comp. St. § 6346a).

3. Internal revenue 🔑11 — Statute imposing stamp tax on chewing gum contemplated payment by manufacturer.

Act Oct. 22, 1914, § 5, and Schedule B, imposing a stamp tax on chewing gum manufactured, sold or removed for sale, contemplated payment by the manufacturer, even though the tax was levied in respect of sale rather than of manufacture, in view of sections 17–19, imposing a punishment for violations, and section 20, requiring manufacturers to file a monthly declaration that no article has been removed from its premises, other than such as have been duly taken account of and charged with the tax.

In Error to the District Court of the United States for the Southern District of New York.

Suit by the American Chicle Company against the United States. Judgment for plaintiff, and the United States brings error. Reversed.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for the United States.

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*Mr. Charles P. Spooner, of New York City, for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

The defendant in error, the petitioner below, made a claim against the United States for $6,318.56 paid by it for revenue stamps under the Act of October 22, 1914, c. 331, § 5, and Schedule B, 38 Stat. 745, 754, 763, (extended by Resolution of December 17, 1915, c. 4, 39 Stat. 2, through December 31, 1916), which it alleges were unused after January 1, 1916, and therefore were to be redeemed under section 24 of the Act of October 22, 38 Stat. 764, and the Act of September 8, 1916, c. 463, § 411, 39 Stat. 756, 793 (Comp. St. § 6346a), the stamps having been purchased within two years of the application for redemption as required by the latter act. The United States demurred to the petition and the petitioner recovered in the District Court. The question is whether the petition discloses facts upon which it can be said that the goods were not "removed for sale" within the meaning of section 5, which levies the tax upon the things mentioned in Schedule B "manufactured, sold, or removed for sale."

[1] The petitioner manufactures chewing gum, one of the articles mentioned in Schedule B, and when the product is prepared transports it from the place of preparation, in the language of the petitioner "to one of its other factories or warehouses, as the state of the stock therein, or the condition of the trade, may demand." The goods concerned "had been removed from the factory at which they were manufactured and prepared for sale, to other factories or warehouses of petitioner in other parts of the United States, as hereinbefore set forth." They had upon them uncancelled revenue stamps, but belonged to the petitioner and were subject to no contract of sale on September 9, 1916, when the above mentioned Act of September 8, 1916, went into effect,

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*providing for the redemption of stamps, as we have said. The petitioner sells only to wholesale dealers, never at retail. By its own statement it must be taken to have removed the goods for the purposes of sale to such places as seemed most likely to offer a market, although no sale had taken place. It is said that upon the language of the petition the greater part of the goods may have been sent to other factories. But it is for the petitioner to state a case and so far as appears, and probably in fact, all the removals had the same end in view.

[2] We may assume without deciding that the tax is levied in respect of the sale rather than of the manufacture of goods, but that throws little light upon the question of the precise moment when it falls due. The words "sold or removed for sale" clearly mean that it falls due in some cases before a sale is complete. No one we presume would doubt that if the goods were removed for the purpose of satisfying an outstanding contract for a certain amount of chewing gum, the tax would be due at the moment of the removal although the goods were not yet appropriated to the contract in any binding way. It seems to us hardly more doubful that the same would be true if goods were removed by a manufacturer to put into the window of a retail shop kept by it on the other side of the street. If we are right these examples show that removal for the purpose of forwarding a sale is a removal for sale within the meaning of the Act. But on the face of the petition that was the object of the transfer of these goods to other parts of the United States.

[3] Notwithstanding the assumption that the tax is levied in respect of sale rather than of manufacture we agree with the Government that the statute contemplates a payment by the manufacturer. This is shown by sections 17–19. By section 20 every manufacturer of any article provided for in Schedule B is required to file a monthly declaration that no such article has been "re-

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moved * * * from *the premises of such manufacturer * * * other than such as have been duly taken account of and charged with the stamp tax," under a penalty for neglect. This seems to us to confirm the conclusion that we already have indicated. If the petitioner should send a mass of chewing gum from its factory in New Jersey or New York to a more promising market in another State it does not appear to us that it could escape the obligation of section 20 by showing that although the gum unquestionably had left the premises of the manufacturer it was destined to another warehouse that the petitioner also owned. That does not seem to us the natural or the rational meaning of the words used. It is said that the construction of a similar Act of June 13, 1898, c. 448, 30 Stat. 448–463, was the same while that was in force, and that presumably the later Act adopted the construction. The argument is another confirmation of the view that we adopt.

The tax is four cents upon packages of not more than $1 of actual retail value, with 4 cents for each additional dollar, but this rough reference to retail price is far from implying that the package must have been sold in order to fix the tax. It appears to us entirely natural that Congress should look to the original place of manufacture as the place for the identification of the taxable goods and to the moment of leaving it, except in exceptional cases, as the time for the attaching of the tax. It seems to us to have done so in sufficiently unmistakable terms.

Judgment reversed.

(256 U. S. 540)

YAZOO & M. V. R. CO. et al. v. NICHOLS & CO.

(Argued April 22, 1921. Decided June 1, 1921.)

No. 216.

Carriers 🔑113—Provision of uniform bill of lading as to when property shall be at owner's risk held inapplicable to certain sidings at station where there is an agent.

The uniform bill of lading approved by the Interstate Commerce Commission, providing that property destined to, or taken from, a station at which there is no regularly appointed agent shall be at the owner's risk after unloaded or until loaded, and when received or delivered on private or other sidings shall be at owner's risk until the cars are attached to and after they are detached from trains, does not apply to loaded cars on a public or semipublic siding, or one privately used, but owned by the railroad, at a station at which there is an agent, and they are not at the risk of the shipper where a bill of lading has been issued.

On Writ of Certiorari to the Supreme Court of the State of Mississippi.

Action by Nichols & Co. against the Yazoo & Mississippi Valley Railroad Company. A judgment for plaintiff was affirmed by the Supreme Court of Mississippi (120 Miss. 690, 83 South. 5), and defendant and the United States Fidelity & Guaranty Company bring certiorari. Affirmed.

Mr. Charles N. Burch, of Memphis, Tenn., for petitioners.

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*Messrs. J. W. Cutrer, of Clarksdale, Miss., and Frederick S. Tyler, of Washington, D. C., for respondent.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

In November, 1917 the Yazoo & Mississippi Railroad Company issued to Nichols & Co. a bill of lading for 31 bales of cotton which had been loaded into a box car at Alligator, Miss., for shipment to Memphis, Tenn. Before the loaded car had been attached to any train or engine it was destroyed by fire. The shipper sued in a state court of Mississippi to recover the value of the cotton. The carrier contended that by the terms of the bill of lading it was relieved from liability. The provision relied upon was the second clause of the last paragraph of section 5 of the Uniform Bill of Lading, approved by the Interstate Commerce Commission June 27, 1908, and duly filed and published as part of the railroad's tariff. The paragraph referred to is this:

> "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels and when received or delivered on private or other sidings, wharves or landings shall be at owners' risk until the cars are attached to and after they are detached from trains."

The shippers insisted that the provision did not apply, because at Alligator there was a regularly appointed agent, and that the second clause of the paragraph, like the first, was applicable only to stations where there was none. The shippers also contended, on *544 the following facts which *were undisputed, that the place where the car was received was, in effect, a part of the carrier's terminal, and not a "private or other" siding within the meaning of the above provision.

The cotton had been loaded from the platform of a gin located at the blind end of a spur which leads from the main line at a point near the depot. The spur, which is 1,000 feet long, had been built by the railroad many years before at its own expense. About half of it is on the railroad right of way, and runs parallel to the main line; the rest is on private land. Under the contract for building the spur the landowner furnished free the right of way over his own land; but the railroad was to have full control over the spur, and reserved the right to abandon it at any time and remove the track material. The spur was used generally by the public for loading and unloading carload freight. The only track scale at Alligator was on it—as was also another gin.

Each party requested a directed verdict. A verdict was directed for the shippers. The judgment entered thereon was affirmed by the Supreme Court of Mississippi on the ground that the clause in question applies only to stations at which there is no regularly appointed agent. 120 Miss. 690, 83 South. 5. In the appellate courts of the states in which the question had arisen the decisions were conflicting.[1] For this reason a writ of certiorari was granted. 251 U. S. 550, 40 Sup. Ct. 219, 64 L. Ed. 409. The only question requiring decision *545 here *is whether the court below gave the correct construction to the clause. In our opinion it did.

Whether goods destroyed, lost or damaged while at a railroad station were then in the possession of the carrier as such, so as to subject it to liability in the absence of negligence, had, before the adoption of the Uniform Bill of Lading, been the subject of much litigation. At stations where there is a regularly appointed agent the field for controversy could be narrowed by letting the execution of a bill of lading or receipt evidence delivery to and acceptance by the carrier; and by letting delivery of goods to the consignee be evidenced by surrender of the bill or execution of a consignee's receipt. But at nonagency stations this course is often not feasible. There the field for controversy as to the facts was particularly inviting and the reasons persuasive for limiting the carrier's liability. Local freight trains are often late. Shippers or consignees cannot be expected to attend on their arrival. Less than carload freight awaiting shipment must ordinarily be left on the station platform to be picked up by the passing train and lots arriving must be dropped on the platform to be called for by the consignee. At such stations the situation in respect to carload freight is not materially different. And this is true whether the car be loaded for shipment on the public siding or on a neighboring private siding, and whether the arriving loaded car be shunted onto a public siding or a private siding. There carload, as well as less than carload, freight, whether outgoing or incoming, must ordinarily be left unguarded for an appreciable time. It is not unreasonable that shippers at such stations should bear the risks naturally attendant upon the use. The reason why an agent is not appointed is that the traffic to and from the station would not justify the expense. The station is established for the convenience of shippers customarily using it. *546 And the paragraph here in question *was apparently designed to shift the risk from the carrier to shipper or consignee of both classes of freight. It does so in the case of less than carload freight by having the carrier's liability begin when the goods are put on board cars and end when they are taken off. It does so in the case of carload freight by limiting liability to the time when the car is attached to or detached from the train. But, at a station where there is a regularly appointed agent it would be obviously unreasonable to place upon the shipper, after a bill of lading has issued, the risks attendant upon the loaded car remaining on the public siding because it has not yet been convenient for the carrier to start it on its journey. It would likewise be unreasonable to place upon the consignee at such a station the risk attendant upon the arriving car's remaining on the siding before there has been notice to the consignee of arrival and an opportunity to accept delivery. The situation there would be practically the same whether the loaded cars were left standing on a public siding or on a siding to a private industry on the railroad's right of way, as in Swift & Co. v. Hocking Valley Railway Co., 243 U. S. 281, 37 Sup. Ct. 287, 61 L. Ed. 722, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, or on a siding, partly on the railroad's right of way and partly on private lands as in Chicago & North Western Railway v. Ochs, 249 U. S. 416, 39 Sup. Ct. 343, 63 L. Ed. 679, and Lake Erie & Western Railroad Co. v. Public Utilities Commission, 249 U. S. 422, 39 Sup. Ct. 345, 63 L. Ed. 684, when the siding is, either by state law or by agreement and in fact, a part of the carrier's terminal system.

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[1] The clause was held not applicable in McClure v. Norfolk & Western Ry. Co., 83 W. Va. 473, 98 S. E. 514; Jolly v. Atchison, etc., R. R. Co., 21 Cal. App. 368, 131 Pac. 1057. It was applied under different facts in Chickasaw Cooperage Co. v. Yazoo & Mississippi Valley R. R. Co., 141 Ark. 71, 215 S. W. 897; Standard Combed Thread Co. v. Pennsylvania R. R. Co., 88 N. J. Law, 257, 95 Atl. 1002, L. R. A. 1916C, 606; Bers v. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456; Id., 176 App. Div. 241, 163 N. Y. Supp. 114; Siebert v. Erie R. R. Co. (Sup.) 163 N. Y. Supp. 111. See, also, Bianchi & Sons v. Montpelier & Wells River R. R. Co., 92 Vt. 319, 104 Atl. 144; Bainbridge Grocery Co. v. Atlantic Coast Line Ry. Co., 8 Ga. App. 677, 70 S. E. 154.

If we approach the construction of the second clause of the last paragraph of section 5 of the Uniform Bill of Lading in the light of this practical situation all doubt as to its meaning must vanish. It could not have been intended that at stations where there are regularly appointed agents outgoing loaded cars for which bills of lading have issued and which are left standing on a siding solely to await the carrier's convenience are to be at the risk of the shipper.

*547

And this is true whether the siding *be a strictly public one, or a semipublic one as in the Ochs and Lake Erie and Western Cases, supra, and the case at bar; or whether it be a siding privately used but owned by the railroad as in the Swift Case, supra; and in such cases the fact that the spur extends over land not part of the carrier's right of way is immaterial. The construction contended for by the railroad, even if not applied to team tracks in the freight yards of a great city, would place all loaded cars arriving elsewhere at the owner's risk from the moment they were detached from a train, although the consignee had not even been notified of their arrival.

It is clear that the immunity conferred by the last paragraph of section 5 does not apply to loaded cars on the spur here involved. Whether the same rule should apply to cars on strictly private industry tracks effectively separated from the terminal and exclusively under private control, like the industry tracks involved in Bers v. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456, we have no occasion to determine.

Affirmed.

(256 U. S. 450)

UNITED STATES v. YUGINOVICH et al.

(Argued March 10, 1921. Decided June 1, 1921.)

No. 523.

1. Courts 🔑385(1½) — Construction or sufficiency of indictment not considered on writ of error under Criminal Appeals Act.

On writ of error by the United States under the Criminal Appeals Act (Comp. St. § 1704), the construction or sufficiency of the indictment, which was quashed, will not be considered; but the meaning placed on the indictment by the court below will be adopted for the purpose of construing the statute.

2. Statutes 🔑159—Later statute repeals earlier, with which it is clearly inconsistent.

Though repeals by implication are not favored, a later statute repeals a former one, when clearly inconsistent with the earlier enactment.

3. Statutes 🔑165 — Penal statute is repealed by later statute fixing less penalty for same act.

A later penal statute repeals former ones, where it practically covers the same acts and fixes a less penalty.

4. Intoxicating liquors 🔑132—Repealing section of Prohibition Act must be construed with prohibition amendment and purpose of act.

Under National Prohibition Act, § 35, repealing prior acts only to the extent of their inconsistency with that act, the last clause, that the act shall not relieve any person from any liability incurred under existing laws, must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and the provisions of the Volstead Act intended to make that amendment effective.

5. Internal revenue 🔑2—National Prohibition Act repeals statute punishing distiller for defrauding government of revenue.

National Prohibition Act, which was intended to prevent the distilling of spirits for beverage purposes, and which impose on any person violating the act a penalty of fine and imprisonment, and also double the tax theretofore imposed by existing laws with an additional specific penalty, manifests an intention to prescribe the full penalty for unlawful distilling, and repealed Rev. St. § 3257 (Comp. St. § 5993), making it an offense to defraud the United States of a tax on spirits by one carrying on the business of a distillery, in so far as it relates to distilling for beverage purposes, notwithstanding the provision of section 35 of the Prohibition Act that the act does not relieve any person from liability, civil or criminal, incurred under existing laws.

6. Internal revenue 🔑2—National Prohibition Act repeals revenue statute relating to distilleries.

The National Prohibition Act impliedly repeals Rev. St. § 3279 (Comp. St. § 6019), requiring a sign to be posted on a registered distillery, section 3281 (Comp. St. § 6021), requiring a distiller to give bond, and section 3282 (Comp. St. § 6022), making it penal to make a mash in any building other than an authorized distillery, in so far as those sections applied to the distilling of spirits for beverage purposes.

In Error to the District Court of the United States for the District of Oregon.

Boze Yuginovich and another were indicted for unlawfully engaging in the business of distillers within the intent and meaning of the internal revenue laws. From an order sustaining motion to quash the indictment and demurrer thereto (266 Fed. 746) the United States brings error. Affirmed.

*451

*Assistant Attorney General Adams for the United States.

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*Mr. Ransom H. Gillett, of Albany, N. Y., for defendants in error.

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*Mr. Justice DAY delivered the opinion of the Court.

This case is here under the Criminal Appeals Act. 34 Stat. 1246 (Comp. St. § 1704). The indictment is in four counts.

*458

*The first count, based on section 3257 of the U. S. Rev. Stats. (Comp. Stats. § 5993), charges the defendants with unlawfully engaging in the business of distillers within the intent and meaning of the internal revenue laws of the United States, and that in fact they did distill spirits subject to the internal revenue tax imposed by the laws of the United States, and did defraud and attempt to defraud the United States of the tax on said spirits. The second count, based on section 3279 of the U. S. Rev. Stats. (Comp. Stat. § 6019), charges that the defendants failed to keep on the distillery, conducted by them, any sign exhibiting the name or firm of the distiller, with the words "Registered Distillery," as required by statute. The third count, based on section 3281 of the U. S. Rev. Stats. (Comp. Stats. § 6021), charges the defendants with carrying on the business of distilling within the intent and meaning of the revenue laws of the United States without giving the bond required by law. The fourth count, based on section 3282 of the U. S. Rev. Stats. (section 6022, Comp. Stats.), charges the defendants with unlawfully making a mash, fit for distillation, in a building not a distillery duly authorized by law.

The defendants interposed a motion to quash the indictment upon the grounds that the acts of Congress under which the same was found were repealed before the finding of the indictment, and that the acts charged to have been committed by them were after the date upon which the Eighteenth Amendment to the federal Constitution and the Volstead Act (41 Stat. 305) became effective. Defendants also filed a demurrer to the indictment on practically the same grounds. The motion to quash and the demurrer were sustained by the District Court. 266 Fed. 746.

The sections of the Revised Statutes may be summarized as follows: Section 3257 makes it an offense to defraud or attempt *459 to defraud the United States of a tax *upon spirits distilled by one carrying on the business of a distillery, provides for forfeiting the distillery and the distilling-apparatus and all spirits found in the distillery or on the distillery premises, and subjects the offender to a fine of not less than $500 or more than $5,000, and imprisonment of not less than six months or more than three years. Section 3279 requires distillers to exhibit on the outside of their place of business a sign with the words "Registered Distillery." A violation of this section subjects the offender to a fine of $500. Section 3281 makes it an offense to carry on the business of a distiller without having given bond. For such offense the penalty is a fine from $1,000 to $5,000 and imprisonment not less than six months or more than three years. Section 3282 makes it penal to make or permit mash to be made in any building other than a distillery authorized by law. A violation of this section subjects the offender to a fine of not less than $500 or more than $5,000, and imprisonment of not less than six months or more than two years.

These statutes have long been part of the federal internal revenue legislation, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the federal government was concerned, to manufacture and sell ardent spirits for beverage purposes. The government derived large revenue from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the Eighteenth Amendment to the federal Constitution, and the enactment of legislation to make the amendment effective. The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States *460 for *beverage purposes, and confers upon Congress the power to enforce the amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act. 41 Stat. 305. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes.

Before taking up the sections of the Revised Statutes, some provisions of the Volstead Act may be appropriately referred to. Section 3 provides that after the Eighteenth Amendment to the Constitution of the United States goes into effect it shall be illegal to manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in the act. Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed but only as in the act provided, and the Commissioner of Internal Revenue may issue permits therefor. The act contains many provisions to make effective the purposes declared in section 3. Section 25, tit. 2, makes it unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violation of the act or which has been so used, and provides that no property rights shall exist in any such liquor or property. The same section provides for the issue of search warrants, and if it is found that any liquor or property be unlawfully held or possessed, or had been unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor shall be destroyed, unless the court otherwise orders. Section 29 provides that any person who manufactures or sells liquor in violation of title 2 of the act shall for a first offense be fined not less than $1,000, or be imprisoned not exceeding six months, and for a second *461 or subsequent offense shall be fined *not less than $200 or more than $2,000 and be imprisoned for not less than one month nor more than five years.

In title 3 elaborate provision is made for the production of alcohol in industrial alcohol plants. It provides for the taxation of such alcohol, and excepts industrial alcohol plants and bonded warehouses for the storage and distribution of industrial alcohol from certain sections of the Revised Statutes.

[1] It is well settled that in cases of this character the construction or sufficiency of the indictment is not brought before us. United States v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; United States v. Stevenson, 215 U. S. 190, 30 Sup. Ct. 35, 54 L. Ed. 153. For the purpose of interpreting the statute we adopt the meaning placed upon the indictment by the court below. United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443. As that court evidently construed the statutes upon the assumption that the charges had relation to intoxicating liquors intended for beverage purposes, we shall follow that view of the indictment in determining whether the former statutes are still in force.

Section 35 (in the margin)[1] in its first sentence *462 repeals *all prior acts to the extent of their inconsistency with the National Prohibition Act, to that extent and no more, and provides that no revenue stamps, or tax receipts, shall be issued in advance for the illegal manufacture or sale of intoxicating liquors, and that upon evidence of such illegal manufacture or sale the tax shall be assessed in double the amount now provided by law, with an additional penalty of $500 as to retail dealers and $1,000 as to manufacturers, and that the payment of such tax or penalty shall not give the right to engage in the manufacture or sale of such liquors, or relieve any one from criminal liability.

That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment. License Tax Cases, 5 Wall. 462, 471, 18 L. Ed. 497; In re Kollock, 165 U. S. 526, 536, 17 Sup. Ct. 444, 41 L. Ed. 813; United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 283, 63 L. Ed. 613. The question remains concerning the applicability of section 3257, involving the right to punish for attempting to defraud the United States of a tax, did Congress intend to punish such violation of law by imposing the *463 old penalty denounced *in section 3257 or as provided in the new and special provision enacted in the Volstead Act?

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[1] Section 35: "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws. The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

This section has given rise to different constructions in the federal courts, in some it has been held that the National Prohibition Act has repealed the old revenue laws. United States v. Windam (D. C.) 264 Fed. 376; United States v. Puhac (D. C. Pa.) 268 Fed. 392; United States v. Stafoff (D. C. Mo.) 268 Fed. 417; Reed v. Thurmond (C. C. A. S. C.) C. C. A. 4th Circuit, 269 Fed. 252. Contra United States v. Sohm (D. C.) 265 Fed. 910; United States v. Turner (D. C.) 266 Fed. 249; United States v. Sacein Rouhana Farhat (D. C. Ohio) 269 Fed. 33.

It is the contention of the government that section 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes:

> "* * * Nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

[2-4] It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty. The concluding phrase of section 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and in view of the provisions of the Volstead Act intended to make that amendment effective.

[5] Having in mind these principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the general language used at the close of section 35 evidences the intention of Congress to inflict for such an offense the punishment provided in section 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under section 35 enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. Moreover, the concluding words of the first paragraph of section 35, as to all the offenses charged, *464 must *be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquors for beverage purposes, or property designed for the manufacture of such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision for punishment made in the Volstead Act.

[6] We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words "Registered Distillery" in a place intended for the production of liquor for beverage purposes which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law.

The questions before us solely concern the construction of the statutes involved, under an indictment pertaining to the production of liquor for beverage purposes, and we think they were correctly answered in the opinion of the court below. It follows that its judgment is

Affirmed.

(256 U. S. 427)

MICHIGAN CENT. R. CO. v. MARK OWEN & CO.

(Argued April 28, 1921. Decided June 1, 1921.)

No. 299.

1. Carriers 🔑53—Bill of lading is contract, and legal when not contrary to law.

A bill of lading is a contract between the transportation company and him who is interested in the shipment, and legal when within the policy and edicts of the law regulating the relation.

2. Carriers 🔑140—Liability as carrier continues for 48 hours after notice, unless goods removed within that time.

Under the provision of the uniform bill of lading that property not removed within 48 hours after notice of its arrival may be kept in car, depot, or place of delivery, subject to the carrier's responsibility as warehouseman, etc., the carrier's liability as carrier continues during the 48 hours, unless the property is removed within that time, though the car is accepted by the consignee, the seals broken, and unloading commenced.

3. Carriers 🔑88—Property not delivered by giving notice, followed by acceptance and breaking of seals.

Where a car, on arrival at destination, was placed on a public delivery track and notice given a consignee, who accepted the car, broke the seals, and started to unload, there was no delivery of property still in the car, but only a right of access given to it, in order that it might be removed.

Mr. Justice McReynolds dissenting.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

Action by Mark Owen & Co. against the Michigan Central Railroad Company. A judgment of the Appellate Court of Illinois, reversing a judgment for defendant and awarding judgment for plaintiff, was affirmed by the Supreme Court of Illinois (Mark Owen & Co. v. Michigan Cent. R. Co., 291 Ill. 149, 125 N. E. 767), and defendant brings certiorari. Affirmed.

See, also, 253 U. S. 481, 40 Sup. Ct. 483, 64 L. Ed. 1023.

*428

*Messrs. Ralph M. Shaw and Frank H. Towner, both of Chicago, Ill., for petitioner.

Messrs. William B. Moulton and Joseph A. Bates, both of Chicago, Ill., for respondent.

Mr. Justice McKENNA delivered the opinion of the Court.

Action in the municipal court of Chicago for damages for loss on several shipments of grapes, four car lots, shipped in sound and merchantable condition.

On receipt of the shipments bills of lading were issued. The total loss is alleged to have been 126 baskets of grapes of the value of $23.30. The municipal court found against plaintiff (respondent here, and it will be so referred to). The judgment was reversed by the Appellate Court, First District, of the state, and judgment awarded respondent which was affirmed by the Supreme Court *429 of *the state, to which an appeal was granted because the court of appeals considered that the case involved questions of importance "on account of principal and collateral interests" which should be passed upon by the Supreme Court.

Our review is concerned with questions of law; the facts are undisputed. It is stipulated that the cars were transported by the railroad company from their respective points of origin to Chicago, arriving there at different days and times of the days. Upon the arrival of each car it was placed on a public delivery track of the railroad company and notice thereof given. Respondent accepted each car, breaking the seals thereof; and it is stipulated that at the time respondent started to unload, each of the cars contained the number of baskets and pounds of grapes received for transportation. The loss, whatever there was, occurred after the acceptance of the cars and their unloading had commenced, and whether the railroad company is liable therefor, and in what capacity liable—whether as carrier, or warehouseman, or at all—is the question in the case.

The answer depends upon the construction to be given to the first paragraph of section 5 of the bill of lading. It is as follows:

> "Property not removed by the party entitled to receive it, within 48 hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

*430

*Regarding the words of the section merely, they are clear enough, and present no "double sense." But controversies have arisen and judicial judgments have divided upon them. The point of the controversies has been, and is, as to the relation of the carrier to a shipment within 48 hours after notice of its arrival has been duly sent or given, and the contentions upon the point are in sharp antagonism. That of respondent is that the railroad company during the 48 hours is responsible as a carrier, this relation not terminating until the expiration of that time. The contention of the railroad company is contra, and that it, the company, is neither liable as a carrier or warehouseman. Not as carrier because the shipment had been delivered and accepted—not as warehouseman because no negligence has been proved against it. The Supreme Court decided against the contentions of the railroad company and held it liable for loss on all of the shipments. As to three of them we may say immediately, in disposition of them, respondent withdraws any claim on account of them, and confines the issue to one car which was undoubtedly unloaded within 48 hours of the notice of its arrival. There is question of the other cars.

The importance of the issue, however, still remains, although it is concerned with only 31 baskets of grapes, of the value of $8.68, and the difficulty of its determination is indicated by the fact of the diversity of judicial reasoning upon a like issue in other cases. And counsel have been at pains to set the cases in opposition with approving or disapproving comment of their own.

[1] The differences of the cases cannot be reconciled and a review of them for the purpose of selection would manifestly extend this opinion to a great length. Their outside principle is simple enough; the bill of lading is a contract between the transportation company and him who is interested in the *431 shipment, and legal when *within the policy and edicts of the law regulating that relation.[1]

[2] By recurring to section 5 of the bill of lading, it will be seen that it supposes a contingency and provides for its occurrence. It supposes that property may not be removed when it has reached destination, and is available for delivery, and two periods of time are provided for. One of 48 hours after notice of the arrival of the property has been sent or given. During this time there is no

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[1] Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. Ed. 358; Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; G., F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; St. L., I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; M., K. & T. Ry. Co. v. Ward, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213; Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Erie Railroad Co. v. Shuart & Sons, 250 U. S. 465, 39 Sup. Ct. 519, 63 L. Ed. 1088.

declaration of the relation of the railroad company to the property. The other period commences at the expiration of the first or 48-hour period, during which the provision is that the property is subject "to carrier's responsibility as warehouseman only." The comparison has its significance and must be accounted for. Realizing this, the railroad company makes a distinction. Its contention is that where delivery has been made of the property as, it insists was true, in the case at bar, the responsibility of the railroad company as carrier immediately ceases. If, however, it is neither delivered nor removed within 48 hours after notice of its arrival, the responsibility of the railroad company thereafter is that of "warehouseman only."

To the distinction and the contention based upon it, the Supreme Court of the state answered that the bill of lading provides for property "not removed"—not to property "delivered" or "not delivered," and it must be taken at its word.

[3] The answer puts too much emphasis upon the distinction between property re-

moved and property delivered. *The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation.

The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the company shall be that of warehouseman, and by necessary implication, therefore, until that responsibility attaches, that of carrier exists.

All the elements of the case considered and assigned their persuasive force, we think the judgment of the Supreme Court should be and it is

Affirmed.

Mr. Justice McREYNOLDS dissenting.

This cause is important because of what had been said concerning section 5 of the uniform bill of lading approved and recommended by the Interstate Commerce Commission after much consideration and repeated conferences between carriers and shippers, extending through four years.

In their report, 14 Interst. Com. Com'n R. (1908) 346, 348, 349, 350, the Commission said:

> "This proposed bill of lading—for the two forms may be considered as one in what we have further to say—is submitted for adoption by the carriers and use by the shipping public with considerable confidence. It is not claimed to be perfect, and experience may develop the need of further modifications, but it represents the most intelligent and exhaustive efforts of those who undertook its preparation to agree upon a bill of lading which should be reasonably satisfactory to the railroads and the public. It is, of course, more or less a compromise

> between oppos*ing interests, because on the one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object, and perhaps not without substantial reason. As we are advised, it is in some respects less favorable to the shipper than the local laws or regulations of one or more states, but is more favorable to the shipper than the local laws or regulations of most of the states. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country. * * * The circumstances under which the work of the joint committee has been conducted and the substantial agreement on most points by the different interests concerned, to say nothing of direct assurances from representatives of the carriers, warrant us in expecting that the assenting roads will adopt the bill upon our recommendation. We therefore assume that the railroads in Official Classification territory, whose proposed action was the subject of the original investigation, will adopt and use this bill, to the extent above indicated, from and after the date named for that purpose. We shall also expect that railroad carriers subject to the act outside of Official Classification territory will adopt and use this bill of lading to the same extent and from and after the same date. There may be peculiar conditions in Western and Southern territory which require some modifications of or additions to this standard bill, but the desirability of uniform usage is so great and the reasons for it so obvious as to justify the expectation that carriers in Western and Southern territory will adopt the bill in question to the fullest extent practicable without abridging any just privileges which their shippers now enjoy."

The language in controversy was not selected by the carriers alone; they reluctantly ac-

cepted the whole in*strument rather than dictated it to others. Texas & Pacific Ry. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 253, 46 L. Ed. 358, holding that doubtful provisions should be resolved in the shipper's favor, is not applicable. The agreement ought to be construed and applied as one arrived at through deliberate negotiation by intelligent parties seeking to make some definite statement or modification of common law rules concerning their rights and liabilities.

The carrier acknowledges receipt of—

> "The property described * * * marked, consigned and destined as indicated below, which said carrier (which word is to be understood throughout this bill of lading as meaning any person or corporation in possession of the property under the bill of lading) agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination."

Among other things, section 1 provides:

> "The carrier or party in possession of any of the property herein described shall be liable for

> any loss thereof or damage thereto, except as hereinafter provided. * * * When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

Section 5 follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility *435 as warehouseman only, or *may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The uniform bill does not purport to specify all rights and obligations of the parties as between themselves, but leaves these as established by law, except when and as otherwise provided. Particularly, it does not undertake to define what shall constitute delivery to the consignee.

"In order to simplify the issues the respondent" confines its claim here to losses from car No. 22049—$8.68. The parties stipulated that this car—

> "arrived in Chicago on October 8, 1914, was placed on a public delivery team track on October 9, 1914, at 8 a. m. o'clock; that notice of arrival and placement of said car was given to the plaintiff herein on October 9, 1914, at 9 a. m. o'clock; that plaintiff accepted said car, broke the seals thereon, and started to unload it on October 9, 1914, at 9:30 a. m. o'clock; and that the unloading of said car was completed by the plaintiff on October 9, 1914, at 6 p. m. o'clock. * * * That at the time the plaintiff accepted and started to unload each of said cars, every car contained the same number of baskets and pounds of grapes as were received by the defendant in said car for transportation at the point of origin thereof, named herein, and that at said time the doors of each of said cars were sealed with the same seals intact as were placed on them by the defendant when it received said grapes for transportation."

The circumstances accompanying acceptance and unloading are not revealed except as above stated. Whether these suffice clearly to establish final and complete delivery of possession of the freight to the consignee may be questioned, but mere consideration of the *436 bill cannot *solve the difficulty. If, as matter of fact, the consignee was put into actual possession of the property within 48 hours, it must be clear that the carrier's liability as insurer ceased when he accepted control.

What constitutes delivery by a railroad carrier sufficient to change its responsibility from insurer to warehouseman has given occasion for much difference of opinion.

The so-called New York rule, the strictest against the carrier,

> "is stated to be that if the consignee is present, upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer." Hutchinson on Carriers (3d Ed.) § 708.

The Massachusetts rule has been thus stated:

> "All that could be required of railways was a safe deposit of the goods upon the platform or in the warehouse of the road at the end of the transit, to await delivery to the consignee, when he should call for them, and that from the time of such deposit, even without notice by the carrier to the consignee, the liability of the former was changed from that of common carrier to warehouseman." Hutchinson on Carriers (3d Ed.) § 702.

The New Hampshire rule continues the carrier's liability as insurer until the consignee has had a reasonable time to receive the goods after their arrival at destination. During that period—

> "the servants of the carrier still continue in charge of them. They are equally shut off from observation and the oversight of others as when in transit; and if they are lost, damaged, or *437 purloined, he *has no greater opportunity of ascertaining or proving by whose fault or negligence it was done, than if such loss had occurred during the transportation. Consequently, the same reasons for holding the carrier to extraordinary responsibility during the transportation of the goods exist after their arrival, at least, until the owner or consignee shall have had an opportunity to take them in charge." Hutchinson on Carriers (3d Ed.) § 704.

Undoubtedly, the uniform bill was prepared with the above rules in mind. It did not adopt any of them, but left the matter to which they relate for determination by the courts.

It should be noted that the bill acknowledged receipt of property "which said carrier * * * agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination," and further, that "the carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided."

The special purpose of section 5 was to protect the carrier by placing an extreme limit upon the time during which freight might remain with it without charge for storage; and also to define the carrier's right and obligation thereafter. The unnecessary delay incident to unloading and the undue utilization of railroad cars and warehouses by consignees for storage purposes had seriously hindered prompt movement of freight, and proper employment of equipment. This section does not purport to establish any rule of liability during the 48 hours, but leaves that to be determined by application of the common law to the circumstances. To say that a carrier insures for 48 hours although the consignee has taken actual custody of the goods would seem an absurd conclusion. And the practical impossibility of stationing an *438 agent at every car within *a great terminal while freight is being removed by thousands of consignees and their agents—a necessary precaution of thefts or mistakes by any one of them must be prevented—makes it manifest that the Interstate Commerce Commission would not have sanctioned the responsibility now claimed and that the carriers would not have acquiesced. I cannot think there was purpose to burden carriers beyond the most stringent of the rules above referred to.

The fair inference from the facts stipulated is that the consignee received possession and control of his goods before the loss occurred. A carrier's responsibility as insurer depends upon exclusive possession and control and must cease when these end. The modified one prescribed by the uniform bill for goods shipped in open cars where such possession and control is difficult or impossible to maintain gives practical recognition to the real basis upon which liability rests. Here the car was opened, examined, accepted and apparently thereafter remained in charge of the consignee. Yet, it is said the delivery was not sufficient to terminate liability as insurer but that this continued because of section 5, which in plain terms refers only to removal. It must not be forgotten that we are not dealing here with a question of due care but with the absolute liability of an insurer.

It is not good reasoning to conclude that because an extreme limit is placed upon the time during which freight may remain in a car without charge, therefore the carrier's liability as an insurer continues during such time.

The uniform bill is in common use and the opinion of the court will be far-reaching. The subject therefore seems sufficiently important to demand an indication of the reasons which lead me to dissent.

(256 U. S. 512)

Ex parte LINCOLN GAS & ELECTRIC LIGHT CO.†

(Argued March 15 and 16, 1921. Decided June 1, 1921.)

No. 29.

1. Appeal and error 🔑1208(2)—Mandate on affirmance held to authorize retention of jurisdiction and secure refund to consumers under supersedeas bond.

Where a gas and electric light company, on appeal from a decree sustaining an ordinance fixing rates and dismissing the bill, gave a supersedeas bond to keep the temporary injunction against enforcement of the rate in effect, which bond required the company, if its appeal was not sustained, to refund all overcharges collected from the consumers and to pay such overcharges to the clerk of the District Court or his successor in office for the consumers, when the amount due to each consumer had been ascertained in such manner as the court should direct, a mandate from the Supreme Court on affirmance of the decree, commanding the District Court that such proceedings be had in said cause as ought to be had, authorizes the District Court to retain jurisdiction for the purpose of determining the amount of refund due to the consumers.

2. Appeal and error 🔑1208(2)—Supersedeas bond held to authorize proceedings for refund of overcharges to consumers who were not parties to the suit.

Under a supersedeas bond, given by a gas and electric light company to continue in force a temporary injunction against the enforcement of a rate ordinance pending appeal from the decree dismissing the bill, which bond provided that if the appeal was not sustained the company should pay its consumers all overcharges above the ordinance rates collected by it, and should pay the amount of such overcharges to the clerk of the district court for the benefit of the consumers when the amount thereof had been determined, the District Court can require the repayment of the overcharges to the consumers, though they were not parties to the action, since the city authorities against whom the action was brought enacted the ordinance and defended it in the courts for the benefit of the consumers.

3. Appeal and error 🔑1208(2)—On failure of attack on rate ordinance, refund overcharges collected since final decree can be ordered without new hearing as to reasonableness.

Where an attack by a gas and electric light company upon an ordinance fixing the rates to be charged by it was unsuccessful, the court can require the company to refund to the consumers the amount collected from them in excess of the ordinance rates after the date of the final decree in the court below without a new hearing as to the reasonableness of such rates after that date, especially where the supersedeas bond on appeal from the decree expressly requires such refund, since the rates fixed by the ordinance are prima facie reasonable, and the burden is on the company to show a change of conditions which renders them unreasonable.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

† Rehearing denied 257 U. S. —, 42 Sup. Ct. 2, 66 L. Ed. —.

On Petition for Writ of Mandamus.

Petition by the Lincoln Gas & Electric Light Company for a writ of mandamus to command the judge of the district court to nullify and revoke certain orders and refrain from assuming jurisdiction over the cause after receiving mandate from the Supreme Court. Rule discharged.

See, also, 41 Sup. Ct. 321.

Mr. Robert A. Brown, of St. Joseph, Mo., for petitioner.

Mr. C. Petrus Peterson, of Lincoln, Neb., for respondent.

*513

*Mr. Justice PITNEY delivered the opinion of the Court.

Following our decision in Lincoln Gas & Electric Light Co. v. City of Lincoln et al. (June 2, 1919) 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968, our mandate went down to the District Court of the United States for the District of Nebraska, reciting our determination that its decree of September 23, 1915, should be modified as indicated in the opinion, and as so modified should be affirmed with costs, and proceeding as follows:

> "You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Upon the filing of this mandate, the District Court, on January 6, 1920, entered an order modifying its decree of September 23, 1915, as particularly required, and, at the same time, made an order retaining jurisdiction for the purpose of requiring the company to make refund and restitution to consumers of gas for all amounts collected over and above the legal rate pending the litigation, with interest, in accordance with the terms of a bond that the company had filed in the cause in order to obtain a supersedeas, with a continuance of injunction, pending its appeal from the decree of September 23, 1915. An appeal from the order retaining jurisdiction, taken by the company to this court, was dismissed because the order lacked finality. 253 U. S. 477, 40 Sup. Ct. 585, 64 L. Ed. 1022. The mandate upon the dismissal again commanded the District Court:

> "That such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

This having gone down, the court appointed a master, with direction to examine the books and accounts of the company and prepare an account of the amounts paid by consumers in excess of the ordinance rates during the pendency of any restraining order or *514 injunction in the *cause, with other provisions not necessary to be mentioned.

The company applied to this court, obtained leave for the purpose, and filed a petition for a writ of mandamus to command the judge of the District Court to nullify and revoke the above-mentioned orders and refrain from assuming jurisdiction over the cause as aforesaid. An order to show cause was issued, proper return thereto made by the judge, and the matter has been argued.

From the petition and return the following additional particulars appear: The original suit was commenced December 27, 1906, in the United States Circuit (now District) Court, by the company against the city and its officials as defendants seeking (among other things) to enjoin the enforcement of an ordinance regulating the price to be charged for gas. At the outset a restraining order was obtained, and this was followed by a temporary injunction, continued in force until final decree, and afterwards, pending an appeal to this court (223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466), under a bond conditioned to account for overcharges if the rate ordinance should be sustained. After this first appeal, the litigation was continued until September 23, 1915, when the District Court made a final decree sustaining the rate ordinance and dismissing the bill. An application for allowance of an appeal to this court, with a supersedeas to keep the injunction in effect, was granted November 22, 1915, upon approval of a supersedeas bond tendered by the company for the purpose, in the penal sum of $575,000, to be paid to the clerk of the District Court for the benefit of all gas consumers who had purchased gas from the company during the pendency of the action from its commencement, and all consumers who should purchase gas thereafter until the final determination of the suit, with a condition reciting the decree of September 23, 1915, and the temporary injunction theretofore *515 granted to restrain the putting into effect *of the rate ordinance, and providing that if the company should prosecute its appeal to effect, or failing to make its appeal good should answer all costs and damages and refund all overcharges collected from gas consumers above the price fixed by said ordinance, and should pay to the clerk of the District Court or his successor in office, for the benefit of all whom it might concern and in particular for the benefit of all consumers entitled to refunds, all overcharges collected since the granting of the original injunction, together with interest thereon, when the several parties lawfully entitled and the amount of refund due to each should have been ascertained in the action in such manner as the court should direct, the determination to be binding upon all parties to the bond, then the obligation should be void, otherwise to remain in force.

This appeal resulted in our decision of June 2, 1919, affirming the decree, with two modifications, one of which related to an occupation tax that was under attack in the same suit, but is not now material; the other was, to cause the dismissal of the suit as to the rate ordinance to be without prejudice to the commencement of a new action thereafter to restrain enforcement of the ordinance if it could be shown to be confiscatory in its effect under the new conditions.

Thus it appears that, during the entire course of this protracted litigation (except for a period when the company put the prescribed rate into effect as a test), the operation of the ordinance was suspended at the instance of the company, upon terms obliging it and its surety to refund all overcharges should it fail to make good its attack upon the established rate, and binding it to abide by the determination of the court in the same cause as to the amounts due, and pay the entire amount thus ascertained, with interest, to the clerk of the court, for the benefit of the consumers. According to the com- *516 *pany's own statement, its books showing the accounts between it and its customers during the period from 1906 to 1920 contain more than 25,000 accounts, which are involved and complicated by other charges, so that an examination of them would involve much time and expense.

[1] The principal contention upon which the petition for mandamus is rested is that, under our mandate following the decision of June 2, 1919, and the more recent one on dismissal of the subsequent appeal, no jurisdiction was conferred upon the District Court to take any action except to affirm its decree of September 23, 1915, dismissing the bill of complaint, after modifying the decree in the two particulars specified. It is said that, after an appeal, the court below has jurisdiction to proceed only in conformity with the direction of the mandate of the appellate court. This may be conceded. But here our mandate expressly commanded "that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." Of course, whatever proceedings were taken thereafter in the same cause would be further proceedings; and the absence of the particular word "further" from the mandate is of no consequence. Emphatically the command called for proceedings in the nature of execution according to right and justice and the laws of the United States. The necessary meaning is that the court below should proceed to carry our decision into full effect according to right and justice; and, manifestly, this could not be done without proceeding to enforce the supersedeas bond according to its terms. The bond recognized that the city and its officials, who were the nominal parties defendant, were in a broad sense the representatives of the consumers, the parties actually concerned. It recognized that they were required to pay a rate for *517 gas higher than the city *ordinance had determined to be just and reasonable; that these excess charges were being exacted pending the suit, in order that the company might be secure in the event that it should prevail, and, per contra, that they ought to be refunded with interest in the event that it should fail. It recognized that the consumers were so many in number, and the difficulty of sustaining their individual claims through separate suits would be so great, that to remit them to such suits would be a virtual denial of justice. And it recognized that to ascertain what should be due to them, to see to its collection from the company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause. To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate.

The case is within the principle of Arkadelphia Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 143–147, 39 Sup. Ct. 237, 63 L. Ed. 517.

[2] The contention that the jurisdiction fails because the consumers were not parties to the record, nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas *518 *bond recognized all this, and was particularly designed for their protection.

[3] Nor is there substance in the contention that the jurisdiction does not extend to overcharges subsequent to September 23, 1915. The thought suggested is, that the adjudication of the validity of the ordinance did not extend beyond the date of the final decree; that thereafter changed conditions, increased costs, and other circumstances referred to by us in 250 U. S. 268, 39 Sup. Ct. 454, 63 L. Ed. 968, may have rendered the limited rate noncompensatory, and the ordinance therefore confiscatory; and that at least the company, before being called upon to make restitution, ought to have a hearing upon this question as to the period subsequent to September 23, 1915. The contention overlooks the effect of the ordinance, which is presumptively valid, and has continuing force unless and until set aside by judicial decree

as the result of an investigation, in which the burden of proof is upon the company; that the decree of September 23, 1915, is conclusive evidence that the company has made such an attempt, and has failed, and that the ordinance rate not only is lawful and binding, but will so continue unless and until the company, under the "without prejudice" clause, shall begin a new suit and maintain its contention that the rate through changed conditions has become noncompensatory. See Missouri v. Chicago, Burlington & Quincy R. R., 241 U. S. 533, 539, 36 Sup. Ct. 715, 60 L. Ed. 1148. The contention also overlooks the fact that the bond itself was given subsequent to the decree appealed from, in terms for the benefit not only of gas consumers who theretofore had purchased gas from the company, but of those who should purchase thereafter at any time before the final determination of the suit. The specific obligation thus assumed requires it to refund all overcharges collected in excess of the ordinance rate, so long as it had the benefit of the injunction pending the appeal; and the jurisdiction of the District Court to see *519 *that the excess charges are refunded has corresponding extent.

We have said enough to demonstrate the existence of the jurisdiction of the District Court and its scope. Other points are raised, but they relate not to the question of jurisdiction, but to the mode in which the jurisdiction ought to be exercised. If they have substance—as to which we make no intimation—they will be subject to review in the appropriate method, after the conclusion of the proceeding.

Rule discharged.

(256 U. S. 484)

UNITED STATES v. BOWLING et al.

(Argued April 27, 1921. Decided June 1, 1921.)

No. 295.

1. Indians 🔑15(1), 18—United States has equal supervisory control over "trust allotments" and "restricted allotments," and Secretary of the Interior may be required to determine heirship.

As respects both "trust allotments" to Indians, which are those in which a certificate or trust patent declaring that the United States will hold the land for a designated period in trust for the allottee, and "restricted allotments," which are those in which a patent issues at once conveying the land to the allottee and imposing a restriction upon its alienation for a designated period, the United States exercises a supervisory control, and as an incident thereof may authorize and require the Secretary of the Interior to determine the legal heirs of a deceased allottee, and may make that determination final and conclusive.

2. Indians 🔑18—Secretary of the Interior has authority to determine heirs of restricted allottee.

Though Act June 25, 1910, § 1 (Comp. St. § 4226), authorizing the Secretary of the Interior to determine finally the legal heirs of an Indian allottee, in terms is confined to trust allotments, an intention to authorize such determination in the case of restricted allotments is manifested by the context, and is established by subsequent acts making appropriations to meet the cost of determining the heirs of allottees having either trust or restricted allotments, which were enacted when the Congress had before it reports of the Secretary of the Interior showing determination of heirship for both classes of allotments.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by the United States against George E. Bowling and others, to recover possession of a tract of land in Oklahoma, with damages for its detention and use. Judgment for defendants was affirmed by the Circuit Court of Appeals (261 Fed. 657), and the United States brings error. Reversed and remanded.

Mr. Leslie C. Garnett, of Washington, D. C., for the United States.

*485 *Mr. Halbert H. McCluer, of Kansas City, Mo., for defendants in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action by the United States to recover the possession of a tract of land in Oklahoma, with damages for its detention and use by the defendants for several years. The trial resulted in a judgment for the defendants, which the Circuit Court of Appeals affirmed. 261 Fed. 657.

The land was allotted and patented under the Act of March 2, 1889, c. 422, 25 Stat. 1013, to Pe-te-lon-o-zah, or William Wea, a member of the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, as his distributive share of the tribal lands. The patent was dated April 8, 1890, conveyed a fee-simple title and imposed a restriction upon alienation for a period of 25 years from its date. Wea died intestate and seized of the land January 23, 1894. Shortly after his death persons claiming to be his heirs executed a conveyance of the land, and on May 4, 1914, this court affirmed a decree against two of the present defendants, canceling that conveyance as made in violation of the restriction. Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080.

This action was commenced January 20, 1915, during the period of restriction, and, according to the petition, was brought in the interest of designated Indians who were alleged to be the heirs at law of Wea, to be entitled to the possession, and to be members of the confederated tribes and still under the supervision and guardianship of the United States. The defendants, by their answer, admitted that the land had been allotted and patented to Wea and that they were in possession; denied all the other allegations in *486 the petition, including the heirship *of those in whose interest the action was brought; and alleged that at the time of answering the defendants were rightfully in possession under conveyances executed by the real heirs after the restriction upon alienation expired.

At the trial the United States, to establish the heirship of those in whose interest the action was brought, offered in evidence an exemplified copy of a decision by the Secretary of the Interior, dated October 21, 1914, during the period of restriction, finding and holding that they were the heirs, and the sole heirs, of Wea, and stating their respective shares. To this the defendants objected upon the ground that the law of Congress under which the decision was given applied only where the deceased allottee held under a trust patent. The court sustained the objection and no other evidence on the subject was presented by either side. Whether the court erred in excluding the Secretary's determination is the only question reserved at the trial and now presented for decision. It was not claimed that the Secretary proceeded without notice or without according all who were interested a full hearing, but only that he had not been empowered to determine who were the heirs where the deceased allottee held, as did Wea, under a patent in fee, even though the land was subject to a restriction upon alienation.

[1] Before coming to the acts under which the Secretary of the Interior proceeded, it will be helpful to refer to the modes, long in use, by which Indians are prevented from improvidently disposing of allotted lands. One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring that the United States will hold the land for a designated period, usually 25 years, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period *487 will convey the same to him, or *his heirs, in fee, discharged of the trust and free of all charge or incumbrance. The other is to issue at once to the allottee a patent conveying to him the land in fee and imposing a restriction upon its alienation for 25 years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments and those under the second as restricted allotments. As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.[1] As an incident to this power Congress may authorize and require the Secretary of the Interior to determine the legal heirs of a deceased allottee and may make that determination final and conclusive.[2] It rests with Congress to say which of the two modes shall be followed in respect of the lands of a particular tribe, and this usually is done in the act directing that the lands be allotted. The act of 1889, under which the lands of the confederated tribes were allotted, required that the second mode be following—that of issuing a patent in fee imposing a restriction upon alienation for a fixed period.

[2] By section 1 of the Act of June 25, 1910, c. 431, 36 Stat. 855 (Comp. St. § 4226), Congress provided:

> "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple *488 patent, without having *made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

The courts below concluded from the words of this provision that it was confined to trust allotments—those held under trust patents. Separately considered, it hardly admits of any other view; and yet other provisions in the same section suggest that its words may not have been happily chosen and that it may have been intended to be more comprehensive. To illustrate, a closely following proviso declares:

> "That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent."

But we need not dwell upon the internal proof of what was intended, for by a series of appropriation acts, beginning August 1, 1914, and extending to the present time, Congress has treated and construed the provision as including both trust and restricted allotments.[3] Each of the appropriation acts contains a paragraph appropriating $100,000 to meet the cost of "determining the heirs of deceased Indian allottees having any right, title, or interest, in any trust or restricted allotment, under regulations prescribed by the Secretary of the Interior," and they show affirmatively that they refer to a determination *489 under section 1 of the act of *1910. Not only so, but they all contain a proviso that "this paragraph shall not apply to the Osage Indians, nor to the Five Civilized Tribes," which would be a needless provision, if Congress had not intended that the power to determine heirships should extend to restricted as well as trust allotments; for the allotments to the Osages and to members of the Five Civilized Tribes were not trust, but restricted, allotments. The annual reports of the Indian Bureau[4] show that the officers of that bureau, including the Secretary of the Interior, have uniformly regarded section 1 of the act of 1910, in connection with these appropriation acts, as enabling them to determine the heirs of both classes of deceased allottees, and they further show that in each year since these appropriations began these officers have determined the heirs of hundreds of deceased allottees who held under restricted as distinguished from trust allotments. In one year alone the number was 566 and of course the aggregate of the values involved was great. These reports were regularly laid before Congress and, with the knowledge thus obtained, it repeated the appropriation each year. Of course, this can be accounted for only upon the theory that in the opinion of Congress the officers were but exercising the power which it intended they should have and exercise. It was after the original provision had been so construed and supplemented by the first of the appropriation acts that Wea's heirs were determined by the Secretary. Apparently the appropriation acts and the reports of the Indian Bureau were not brought to the attention of the courts below.

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[1] United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600; La Motte v. United States, 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. —.

[2] Hallowell v. Commons, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409. And see Lane v. Mickadiet, 241 U. S. 201, 36 Sup. Ct. 599, 60 L. Ed. 956; Egan v. McDonald, 246 U. S. 227, 38 Sup. Ct. 223, 62 L. Ed. 680.

We conclude that the District Court erred *490 in sustain*ing the defendants' objection to the introduction in evidence of the Secretary's determination, and therefore that the judgment must be reversed and the case remanded for a new trial.

Judgment reversed.

(256 U. S. 575)

SUTTON v. UNITED STATES.

(Argued April 29, 1921. Decided June 1, 1921.)

No. 307.

1. United States 🔑62—Secretary of War held not authorized to make contract for harbor improvement in excess of the appropriation.

Act June 25, 1910, Act Feb. 27, 1911, and Act July 25, 1912, making appropriations for improving a harbor channel and for completing the improvement, did not authorize the Secretary of War to contract for the completion of the improvement at a cost exceeding the amount appropriated, especially in view of Rev. St. §§ 3732, 3733, 5503 (Comp. St. §§ 6884, 6886, 10266), and Act June 30, 1906, § 9 (Comp. St. § 6763), denying authority to make contracts on behalf of the United States in excess of appropriations therefor.

2. United States 🔑85, 88—Appropriation for continuance of work is not payable for work theretofore done, and may be deducted from amount due for other work.

The appropriation made by Act Oct. 2, 1914, for the further prosecution of river and harbor improvements, did not authorize the application of the amount so appropriated to work theretofore done by a contractor, and where a portion had been paid from such appropriation to a contractor for previous work, the United States could deduct a similar amount for work done by the same contractor on another improvement.

3. United States 🔑69—Limitation of authority to contract for government applies to implied contract.

The limitation on power of government officers, who make contracts for the government not to exceed the amounts appropriated therefor, applies to implied contracts as well as express contracts, so that no contract can be implied from the acts or omissions of a government officer, if an express contract by him would have been unauthorized.

4. United States 🔑69 — Subsequent use of unauthorized improvement does not require payment therefor.

The fact that the government subsequently made use of an unauthorized improvement in a harbor channel does not imply a contract to pay for it, since the improvement became the government's property by being annexed to the soil, and had been done without the consent or request of the government.

5. United States 🔑93—Not liable to contractor on theory of unjust enrichment through mistake of fact.

Even if the equitable rule allowing recovery for unjust enrichment through work done on the land of another under a mistake of fact could ever apply to the government, it cannot authorize a claim by a contractor against the government, since the right to sue the United States in the Court of Claims must rest on the existence of a contract express or implied.

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[3] Act Aug. 1, 1914, c. 222, 38 Stat. 582, 586; Act May 18, 1916, c. 125, 39 Stat. 123, 127; Act March 2, 1917, c. 146, 39 Stat. 969, 972; Act May 25, 1918, c. 86, 40 Stat. 561, 567; Act June 30, 1919, c. 4, 41 Stat. 3, 8; Act Feb. 14, 1920, c. 75, 41 Stat. 408, 413.

[4] House Doc. No. 90, p. 38, 64th Cong. 1st Sess.; House Doc. No. 1899, p. 51, 64th Cong. 2d Sess.; House Doc. No. 915, p. 53, 65th Cong. 2d Sess.; House Doc. No. 1455, p. 53, 65th Cong. 3d Sess.; House Doc. No. 409, p. 51, 66th Cong. 2d Sess.; House Doc. No. 849, p. 45, 66th Cong. 2d Sess.

6. United States 🔑75 — Cost of superintendence of work after exhaustion of appropriation cannot be deducted from amount due contractor.

Though the government may properly charge against an appropriation for harbor improvement the reasonable cost of superintendence thereof, it cannot deduct from the amount of such appropriation the cost of superintendence incurred after the appropriation had been exhausted through a mistake of its inspector, which resulted in the contractor's doing work for which he could recover no compensation.

Appeal from Court of Claims.

Claim by John B. Sutton, trustee of the estate of the Hillsboro Dredging Company, bankrupts, against the United States. From a judgment of the Court of Claims denying the claim (55 Ct. Cl. 193), the claimant appeals. Modified and affirmed.

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*Messrs. John B. Sutton, of Tampa, Fla., and M. Walton Hendry, of Washington, D. C., for appellant.

Mr. Frank Davis, Jr., of Columbus, Ohio, for the United States.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

The River and Harbor Act of July 25, 1912, c. 253, 37 Stat. 201, 209, made this appropriation:

> "Improving channel from Clearwater Harbor through Boca Ceiga Bay to Tampa Bay, Florida. Completing improvement and for maintenance, twenty thousand dollars."

Sealed proposals were solicited, and on January 21, 1913, a contract was made by the War Department with the Hillsboro Dredging Company to do work at unit rates for dredging soft material and for excavating rock. The appropriation was ample to defray the cost at these rates, assuming that the quantities of material to be removed did not greatly exceed the estimates presented by the specifications. It was provided by the contract that United States "inspectors will keep a record of the work done" and also that, "within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work, * * * be it more or less than the quantities above estimated. * * *"

Work was begun under the contract in June, 1913, and payments were made monthly on estimates of the government inspector. Upon these estimates both the government and the contractor relied. About May 15, 1914, it was discovered that through a mistake of the inspector so much work had already been done that, if paid for at the unit rates, it would call for an amount far in excess of the appropriation available. The government engineer in charge ordered operations discontinued immediately, and this contractor had no further connection with the work. The work already done amounted at the unit price to $25,032.31. The aggregate appropriation available for the improvement—including an additional $3,000 made by Act of March 4, 1913, c. 144, 37 Stat. 801, 809—was $23,000.

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Against this appropriation the gov*ernment charged $1,732.90 for superintendence and office expenses. The balance—$21,267.10—it paid to the contractor, leaving unsatisfied a claim, at the unit rates, of $3,042.74, for material dredged or excavated, and a further claim of $1,551 for the cost of blasting rock which was not removed because of the order to cease work. To recover these sums the assignee in bankruptcy of the Hillsboro Company brought this suit in the Court of Claims. That court entered judgment for the government, 55 Ct. Cl. 193; and the case is here on appeal.

[1] First. It is urged that the Secretary of War was authorized by Congress to make, and that he did make, a contract with the Hillsboro Company not only to proceed with the work, but for its completion, and that the United States is, therefore, liable, even though the appropriation proved to be insufficient. Two appropriations had been made for this project before the Act of 1912 above referred to; one by Act of June 25, 1910, c. 382, 36 Stat. 630, 644, of $29,500, for "improving channel from Clearwater Harbor"; the other by Act of February 27, 1911, c. 166, 36 Stat. 933, 941, of a like amount for "completing improvement." The Act of 1912 provided by section 8 (37 Stat. 233; Comp. St. § 9888) that—

> "Whenever the appropriations made, or authorized to be made, for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of such work."

But by none of these acts was any authority conferred upon the Secretary of War to complete the improvement or to contract to expend more than the amount then appropriated. On the other hand, section 3733 of the Revised Statutes (Comp. St. § 6836) provides that no contract "for any public improvement shall bind the government to pay a larger sum than the amount in the treasury appropriated

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for the specific purpose." See *also sections 3732 and 5503 (Comp. St. §§ 6884, 10266). And the Act of June 30, 1906, c. 3914, provides by section 9 (34 Stat. 697, 764; Comp. St. § 6763) that—

> "No act of Congress hereafter passed shall be construed * * * to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

The Secretary of War was, therefore, without power to make a contract binding the government to pay more than the amount appropriated. See Bradley v. United States, 98 U. S. 104, 113, 114, 25 L. Ed. 105. Those dealing with him must be held to have had notice of the limitations upon his authority. But there is nothing in the contract indicating a purpose to bind the government for any amount in excess of the appropriation. On the contrary, it limits to the amount of the appropriation the work which may be done.

[2] By Act of October 2, 1914, c. 313, 38 Stat. 725, Congress appropriated the sum of $20,000,000—

> "to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the preservation and maintenance of existing river and harbor works, and for the prosecution of such projects heretofore authorized as may be most desirable in the interests of commerce and navigation, and most economical and advantageous in the execution of the work."

Out of the sum so appropriated $12,000 was allotted by the Secretary for completing the Clearwater Harbor improvement; and out of this sum there was paid to the contractor in November, 1914, $3,046.44, being the unpaid balance at unit prices for the material removed prior to May 15, 1914. This payment was later disallowed by the auditor for the War Department and the Comptroller of the Treasury, and was deducted from payments made to the contractor under a wholly different contract for work in North and South Carolina. It is clear that the Act of 1914 did *580 not *authorize the application of any part of the appropriation to work theretofore done. The payment therefrom having been unauthorized, did not bind the government; and if it was entitled to recover the money, the method pursued in doing so was proper. Wisconsin Central Railroad Co. v. United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399; Grand Trunk Western Railway Co. v. United States, 252 U. S. 112, 40 Sup. Ct. 309, 64 L. Ed. 484.

[3, 4] Second. It is contended that since the contract provided that the government "inspectors will keep a record of the work done," since their estimates were relied upon by the contractor, and since by reason of the inspector's mistake the contractor was led to do work in excess of the appropriation, the United States is liable as upon an implied contract for the fair value of the work performed. But the short answer to this contention is that since no official of the government could have rendered it liable for this work by an express contract, none can by his acts or omissions create a valid contract implied in fact. The limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made. Nor did the subsequent use of the excavation by the government imply a promise to pay for it if at any time thereafter Congress should appropriate money to be applied in completing the improvement.

> "Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it." United States v. Pacific Railroad, 120 U. S. 227, 240, 7 Sup. Ct. 490, 496 (30 L. Ed. 634).

And the work here in question was not done with the consent or at the request of the United States; for neither the government *581 inspectors *nor the Secretary of War had authority either to obligate the government or accept voluntary services. See Rev. Stat. § 3679, as amended by Act March 3, 1905, c. 1484, § 4, 33 Stat. 1257, and Act February 27, 1906, c. 510, § 3, 34 Stat. 48 (Comp. St. § 6778).

[5] There is no necessity to consider what may be the equitable rule where there is a claim of unjust enrichment through work done upon the land of another under a mistake of fact. See Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875; Id., 2 Story, 608, Fed. Cas. No. 1,876; Williams v. Gibbes, 20 How. 535, 538, 15 L. Ed. 1013; Canal Bank v. Hudson, 111 U. S. 66, 82–83, 4 Sup. Ct. 303, 28 L. Ed. 354; Armstrong v. Ashley, 204 U. S. 272, 285, 27 Sup. Ct. 270, 51 L. Ed. 482. Nor need we consider whether the doctrine is ever applicable to transactions with the government. For the right to sue the United States in the Court of Claims here invoked must rest upon the existence of a contract express or implied in fact. United States v. North American Co., 253 U. S. 330, 335, 40 Sup. Ct. 518, 64 L. Ed. 935.

[6] Third. While the contractor cannot recover for work done in excess of the appropriation he is entitled to payment to the extent of the available appropriation. The amount appropriated was $23,000. The contractor received only $21,267.10. It appears that the balance, $1,732.90, was applied to superintendence and office expenses; and the findings of fact state that the contractor "was charged with expenses of inspection during an extension of time beyond the contract period amounting to $722.47." The appropriate expense of superintendence is clearly chargeable against the appropriation. But if, through mistake of the government's representatives more work is done, and work is continued for a longer period, than was contracted for or authorized, the expenses of superintendence incident to the mistake should be borne by the government, and the contractor should not be made to suffer b

the depletion of the appropriation. The fund otherwise available for work actually performed should be applied to that purpose.

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*The findings of fact leave us in doubt whether there has been charged against this appropriation any sum for superintendence in excess of amounts properly chargeable; and counsel were unable to remove these doubts, to which attention was called at the argument. Unless the parties can agree as to the facts, the case should be remanded to the Court of Claims to determine what, if any, amount was erroneously charged against the appropriations aggregating $23,000; and for the amount of such improper charges, if any, judgment should be entered for the petitioner. Except as stated the judgment is

Affirmed.

(256 U. S. 589)

DANE v. JACKSON, Treasurer, etc.

(Argued April 15, 1921. Decided June 1, 1921.)

No. 720.

1. Constitutional law ⚷229(1), 283—Taxation ⚷37—Only palpable inequality makes state tax a violation of due process or equal protection of the laws.

Since no system of taxation has yet been devised which will return to each taxpayer or class of taxpayers benefits in proportion to the payments made, the United States Supreme Court will not attempt to revise a necessarily complicated system of taxation to produce what might be thought to be a more just distribution of the burdens, and where no conflict with federal power is involved, a state law will be held contrary to the Fourteenth Amendment, as denying due process of law or equal protection of the laws, only where it proposes or clearly results in such palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation.

2. Constitutional law ⚷229(1), 283—Taxation ⚷54—Massachusetts statute for distribution of income tax among subdivisions held not contrary to federal Constitution.

St. Mass. 1919, c. 314, providing for the distribution of the income tax collected by the state among the local subdivisions thereof in increasing percentages, and after a few years entirely, in proportion to the amount of the state tax imposed upon each, regardless of the amount of the income tax collected from each, does not deny a taxpayer due process of law or equal protection of law, guaranteed by Const. Amend. 14, though he resided in a town which will receive a smaller proportion of the income tax collected therein than will other towns.

3. Mandamus ⚷165—Presumption that local subdivisions will properly apply tax money prevails over admission by demurrer to allegations that it might devote it to purpose not benefiting taxpayers.

The presumption that local subdivisions of a state will apply legally the portion of the income tax received from the state prevails over the admission by demurrer of an allegation of the petition for mandamus that such subdivisions might, if they so elected, apply the money to purposes which did not confer any benefit on petitioner.

In Error to the Supreme Judicial Court of the State of Massachusetts.

Mandamus proceedings by Ernest B. Dane against James Jackson, Treasurer and Receiver General of Massachusetts. There was a judgment of the Supreme Judicial Court of Massachusetts dismissing the petition upon demurrer (129 N. E. 606), and petitioner brings error. Affirmed.

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*Mr. Philip Nichols, of Boston, Mass., for plaintiff in error.

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*Mr. William Harold Hitchcock, of Boston, Mass., for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

In this proceeding we are asked to review and reverse a judgment of the Supreme Judicial Court of Massachusetts, holding valid an act of the General Court (General Acts 1919, c. 314), providing for the distribution of the proceeds of an income tax among the towns, cities and taxing districts of that state, against the contention that it violates the due process and equal protection of the law

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*clauses of the Fourteenth Amendment to the Constitution of the United States.

By amendment to the Constitution of Massachusetts, approved by the people in 1915 (xliv), the General Court was given power to impose a tax at different rates upon income derived from different classes of property but at a rate uniform throughout the commonwealth on incomes derived from the same class of property and to exempt the property producing such income from other taxes.

Pursuant to this authority, a law was enacted in 1916 (General Acts 1916, c. 269), which it is sufficient to describe as taxing, with exceptions negligible here: Income received from bonds, notes, money at interest and debts due the person paying the tax; dividends on shares of any corporations not organized under the laws of Massachusetts; dividends on shares in partnerships, associations or trusts, the interest in which is represented by transferable shares; and income derived from professions, employments, trade or business. Intangible property, the income from which is taxed by the act, is practically exempted from local taxation.

The validity of this act is not assailed.

Prior to the enactment of this law, the taxing subdivisions of the state had taxed the real estate and tangible and intangible personal property, within their respective jurisdictions, for both state and local purposes, and the exemption from local taxation of intangible property, provided for in the act, necessarily resulted in an important reduction in their revenues.

The proceeds of the income tax thus provided for were distributed by temporary acts applicable only to the years 1917 and 1918, but in the year 1919 the act was passed, the validity of which is assailed in this proceeding, which provides, in substance: That the state treasurer shall pay to each city, *596 town and district, from the income tax *collected for the year 1919, an amount equal to 90 per cent. of the difference between the average amount of the tax levied on tangible and intangible personal property therein in the years 1915 and 1916 and the average that would be produced by a tax upon the personal property actually assessed therein for the years 1917 and 1918 at the average of the rates of taxation prevailing therein in 1915 and 1916. In each succeeding year, until and including the year 1927, the amount payable was reduced to an amount 10 per cent. less than it was for the next preceding year. Any amount collected in any year prior to 1928, in excess of the required payments must be distributed to the cities, towns and districts of the state in proportion to the amount of the state tax imposed upon each for such year, and in 1928 and thereafter the whole of the amount of the income tax must be so distributed each year.

It is obvious that it was the purpose of this act to reimburse the various taxing subdivisions until the year 1928 to the extent thought necessary to supply the loss which each would sustain by the withdrawal from its taxing power of the intangible property the income of which was taxed by the state, and that prior to 1928 any excess of the income tax fund over such requirements, and beginning with that year and continuing thereafter, the whole of that fund, should be distributed to such subdivisions in proportion to the amount of the state tax paid by each.

The petition in the case is one for mandamus and the essential allegations of it are: That the petitioner, an inhabitant of the town of Brookline, in the years 1919 and 1920 derived income from intangible personal property and otherwise which rendered him subject to the provisions of the Income Tax Act of 1916; that the state tax in Massachusetts is imposed upon towns and cities in proportion to the value of the real estate and tangible personal property and polls taxable *597 therein, without regard *to intangible property or incomes taxed; that a sum in excess of $1,000,000 was raised in the year 1920 by the taxation of the inhabitants of Brookline upon incomes derived during the year 1919 from intangible property located in that town and on other income earned therein, and that as great an amount will be in like manner raised in 1921; that under the distribution statute of 1919 there will be returned to the town of Brookline not more than $500,000 in the year 1920, and in each year thereafter a less amount, until in the year 1928 not more than $250,000 will be returned to it, while other towns, having greater real estate and tangible personal property valuation for taxation, will receive much more than their inhabitants will have contributed to the income tax fund; and that such payments may be used by the cities and towns receiving them, if they so elect, for the exclusive use and benefit of their own inhabitants for local and "proprietary" purposes, which would not in any degree contribute to the benefit of the petitioner, or of the inhabitants of Brookline or of the citizens generally of the commonwealth. Upon these allegations a writ of mandamus, commanding the respondent not to distribute any of the income tax collected in the years 1920 or 1921, was prayed for.

Upon demurrer the petition was dismissed.

This statement of the case shows that it is admitted: That the Income Tax Act of 1916 is a valid law; that the contention is, only, that the act of 1919, providing for distribution of the tax, is unconstitutional; and that this contention rests wholly upon the allegation of the petition that such amount of the income tax collected by the state from the plaintiff in error and from other inhabitants of Brookline as may be returned to any other subdivision thereof, may, if the subdivision so elects, be used for local or "proprietary" purposes such that no benefit whatever will accrue from the expenditure of the *598 tax to the plaintiff *in error or to other inhabitants of the town of Brookline or to the inhabitants of the state in general.

It is argued that from these conditions it must follow that the plaintiff in error and other inhabitants of Brookline are taxed for the exclusive benefit of the inhabitants of other subdivisions of the state, and that this violates the due process of law clause, or, if not that, the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, and that therefore the proposed distribution of the tax should be restrained.

The relation of the power of the federal courts to the taxing systems of the states has been the subject of much discussion in the opinions of this court, notably in the following cases: McCullough v. Maryland, 4 Wheat. 316, 428–432, 4 L. Ed. 579; Providence Bank v. Billings and Pittman, 4 Pet. 514, 563, 7 L. Ed. 939; State Tax on Foreign Held Bonds, 15 Wall. 300, 319, 21 L. Ed. 179; Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. Ed. 616; Kirtland v. Hotchkiss, 100 U. S. 491, 497, 25 L. Ed. 558; Memphis Gas Light Co. v. Taxing District of Shelby County, 109 U. S. 398, 400, 3 Sup. Ct. 205, 27 L.

Ed. 976; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237, 238, 10 Sup. Ct. 533, 33 L. Ed. 892; Merchants' & Manufacturers' Bank v. Pennsylvania, 167 U. S. 461, 463, 464, 17 Sup. Ct. 829, 42 L. Ed. 236; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 615, 616, 19 Sup. Ct. 553, 43 L. Ed. 823; Travelers' Insurance Co. v. Connecticut, 185 U. S. 364, 371, 22 Sup. Ct. 673, 46 L. Ed. 949; Wagner v. Baltimore, 239 U. S. 207, 220, 36 Sup. Ct. 66, 60 L. Ed. 230.

[1] While the nature of the subject does not permit of much finality of general statement, it may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more *599 just distribution of the *burdens of taxation than that arrived at by the state Legislatures (4 Pet. 517, 7 L. Ed. 939; 15 Wall. 319, 21 L. Ed. 179; 109 U. S. 400, 3 Sup. Ct. 205, 27 L. Ed. 976; 185 U. S. 371, 22 Sup. Ct. 673, 46 L. Ed. 949, supra); and that where, as here, conflict with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—"to spoliation under the guise of exerting the power of taxing." 134 U. S. 237, 10 Sup. Ct. 533, 33 L. Ed. 892; 173 U. S. 615, 19 Sup. Ct. 553, 43 L. Ed. 823; 239 U. S. 220, 36 Sup. Ct. 66, 60 L. Ed. 230, supra. For other inequalities of burden or other abuses of the state power of taxation, the only security of the citizen must be found in the structure of our government itself. So early as 4 Pet. 563, 7 L. Ed. 939, supra, it was said by Chief Justice Marshall:

> "This vital power [of taxation] may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally."

The application of this summary of the law renders our conclusion not doubtful.

[2] The income tax involved is uniform in its application to all income within the description of the act of all inhabitants of the state without regard to the taxing subdivision in which they may reside. It is collected by the state and the capital value producing the tax is practically exempted from other taxation. The tax was authorized by the people of the state and the act was given form by the Legislature, for the purpose of correcting flagrant inequalities of taxation, resulting from what the Supreme Judicial Court, in the opinion in this case, called the "colonization" of wealthy owners of intangible securities *600 in *towns and cities which had exceptionally low rates of taxation "brought about by avoidance and evasion, legal and illegal, of the tax laws prevailing before the enactment of the income tax law." Report to the Senate and House of Representatives of Massachusetts by "the Joint Special Committee on Taxation," January 31, 1919. The report just referred to was made after an elaborate study of the subject of the distribution of this income tax, in the progress of which largely attended public hearings were held in many cities of the state, and it recommended the law assailed, in substantially the form in which it was enacted. The plan of returning the tax to the various taxing districts, in which those who paid it resided, which is so strongly urged in argument, was carefully considered and was rejected, as expensive and difficult, if not impracticable, of application, and as calculated to ignore the considerations which led to the enactment of the law and to restore the evils and inequalities of taxation which it was devised to correct. It is also apparent that this distribution law should not be considered as an isolated provision but as an important part, which it clearly is, of an elaborate and involved system of state taxation, which would be seriously affected by the granting of such a writ of mandamus as is prayed for.

[3] Accepting as true, as we must, the allegation of the petition, admitted by the demurrer, that the local subdivisions of the state may, "if they so elect," devote the money derived from the income tax through the distribution provided for in the act assailed, to purposes which might not confer any certain benefit upon the plaintiff in error or persons in like situations, yet, it must be accepted on the other hand that it is entirely clear that there are many purposes to which these subdivisions may devote the money, "if they so elect," which would be of such statewide influence that the plaintiff in error and those similarly situated would very certainly *601 be benefited *by the expenditure of it. It must be said also in this case, as was said by the Supreme Judicial Court of Massachusetts, in the decision of a similar case, Duffy v. Treasurer and Receiver General, 234 Mass. 42, 125 N. E. 135:

> "There is nothing on the record to justify the assumption that the several municipalities design to devote to other than public use any

portion of the income tax thus distributed to them. Every presumption is in favor of legality in the absence of evidence to the contrary."

This presumption of legality is a sound and strong one, and is amply sufficient to prevail over the effect of the admitted allegation of the petition.

The case presented is clearly not one of that extreme inequality in taxation of which the federal courts should lay hold, but involves rather a question of state policy, of a character which the people have been satisfied to leave to the judgment, patriotism and sense of justice of representatives in their state Legislature.

The judgment of the Supreme Judicial Court of Massachusetts is

Affirmed.

(256 U. S. 547)

UNITED STATES v. PFITSCH.

(Argued March 22, 1921. Restored to Docket for Reargument on Question of Jurisdiction April 11, 1921. Reargued and Submitted April 25, 1921. Decided June 1, 1921.)

No. 246.

Courts ⚷385(1)—District Court, determining claims for requisition of supplies, does not sit as Court of Claims, and Supreme Court does not have jurisdiction of a direct writ of error thereto.

Under Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), giving the District Court jurisdiction to determine claims for the balance of the value of supplies requisitioned for the army, in which section the provision that the suit should be brought in the manner provided by Judicial Code, § 24, par. 20 (Comp. St. § 991), and section 145 (section 1136), added by amendment in the Senate, was omitted on objection by the House, though such provision was left in Lever Act Aug. 10, 1917, §§ 12, 16, 25 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛jj, 3115⅛*ll*, 3115⅛q), relating to requisitions of other classes of property, the District Court, in a suit under section 10, does not sit as a Court of Claims, but is exercising its ordinary jurisdiction in which a trial by jury may be demanded so that the Supreme Court has no jurisdiction of a direct writ of error to review a judgment in such a suit, but the writ should go in first instance to Circuit Court of Appeals, under Judicial Code, § 128 (Comp. St. § 1120).

In Error to the District Court of the United States for the Southern District of New York.

Suit by Charles G. A. Pfitsch against the United States to recover a balance alleged to be due him for property requisitioned for the army under the Lever Act. Judgment for plaintiff, and the United States brings error. Writ of error dismissed for want of jurisdiction.

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*The Attorney General, for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Pursuant to section 10 of the Lever Act (Act Aug. 10, 1917, c. 53, 40 Stat. 276, 279 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii]) the President requisitioned for the army on April 18, 1918, a radial drill belonging to Pfitsch. The Board of Appraisers of the War Department found its then value to be $3,979.50, and awarded him that amount as compensation. Pfitsch declared this amount was unsatisfactory, and insisted that the value was greater, and that he was entitled also to interest from the date of the taking. On February 5, 1919, the government paid him an amount equal to 75 per

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centum of the award. *Thereupon this suit was brought by him in the District Court of the United States for Southern New York to recover the balance alleged to be due. The case was tried, by agreement, without a jury. The court found the value to be $4,550, and entered judgment for the part then unpaid, together with interest from the date of taking, at the rate of 6 per cent. on the amounts from time to time unpaid. The government brought the case here by direct writ of error and assigned as the only error that interest should not have been allowed.

The preliminary question arises whether this court has jurisdiction on direct writ of error. The answer to be given to it depends upon the nature of the jurisdiction conferred upon the District Court by section 10 of the Lever Act. If the jurisdiction is to be exercised in the manner provided by section 24, paragraph 20, of the Judicial Code (Comp. St. § 991), which confers upon the District Court jurisdiction concurrent with the court of Claims a direct writ of error lies from this court. J. Homer Fritch, Inc., v. U. S., 248 U. S. 458, 39 Sup. Ct. 158, 63 L. Ed. 359. If however, the jurisdiction is the ordinary jurisdiction of the District Court, the writ of error should have gone, in the first instance, from the Circuit Court of Appeals under section 128 of the Judicial Code (Comp. St. § 1120). The nature of the jurisdiction of the District Court is of importance, not only because of the question directly involved, but because the answer given to it will determine incidentally whether plaintiffs who proceed under section 10 are entitled to a trial by jury; for section 24, paragraph 20, of the Judicial Code declares that "all suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury." See United States v. McGrane (C. C. A.) 270 Fed. 761; Filbin Corporation v. United States (D. C.) 266 Fed. 911.

Section 10 provides that the President may requisition foods, feeds, fuels, and other war supplies with the necessary storage facilities, and that he shall ascertain and pay *550 *just compensation for them. But if any person is not satisfied with the President's award he is to receive 75 per cent. of the award and for the balance claimed "shall be entitled to sue the United States * * * and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." Three later sections of the act which provide for requisitioning other classes of property—section 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛jj), relating to factories, mines, and pipe lines; section 16 (section 3115⅛*ll*), to distilled spirits; and section 25 (section 3115⅛q), to coal or coke plants or businesses—make provision for suits against the United States to recover just compensation in terms materially different from that in section 10. Each of those three sections provides in identical terms that a person dissatisfied with the President's award "shall be entitled to sue the United States * * * in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code." The latter of these sections of the Judicial Code confers jurisdiction upon the Court of Claims to adjudicate claims against the United States, and the former confers upon the District Courts jurisdiction concurrent with the Court of Claims in cases which do not involve more than $10,000. Thus, while sections 12, 16, and 25 of the Lever Act, in terms, confers jurisdiction concurrently upon the Court of Claims and the District Courts sitting as a Court of Claims, section 10, in terms, confers jurisdiction to hear all cases arising under it upon the District Courts alone. The question presented to us is whether this exclusive jurisdiction granted the District Courts by section 10 is to be exercised in accordance with the law governing the usual procedure of a District Court in actions at law for money compensation or by the provisions of the law governing the exceptional jurisdiction concurrent with the Court of Claims where it sits without a jury.

The legislative history of the Lever Act *551 establishes that *the difference of the jurisdictional provision in section 10 from those of sections 12, 16, and 25 was the result, not of inadvertence, but of deliberate action in the face of opposition. The jurisdictional provision of section 10, as introduced into the House of Representatives and as originally passed by it, was in the precise form in which it was enacted into law. 65th Cong. 1st Sess. House Rept. 75; 55 Cong. Rec. 4113. When the bill reached the Senate from the House, the Senate committee reported an amendment striking out the House provision and substituting a provision which made section 10 in this respect identical with sections 12, 16, and 25; that is, the senate committee's amendment provided that suits under section 10 should be brought against the United States "in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code." 55 Cong. Rec. 4626. This would have conferred concurrent jurisdiction upon the Court of Claims and the District Court sitting as a Court of Claims. As so amended, section 10 was passed by the Senate; but the House refused to concur in this amendment. And this disagreement, with eight others relating to section 10, was sent to the conference committee. 55 Cong. Rec. 5473. The House conferees recommended receding from objections to the eight other Senate amendments of this section, but they insisted upon the objection to the change of the jurisdictional provision. 55 Cong. Rec. 5733–5737. The Senate conferees recommended receding from its amendment to the jurisdictional provision and that the original House provision be restored. 55 Cong. Rec. 5709. In reporting for the House conferees, Mr. Lever said of this amendment:

> "Amendment 30. This amendment gives jurisdiction, in suits to recover just compensation under section 10 of the House Bill, to the Court of Claims in addition to the United States District Courts. The Senate recedes." 65th Congress, 1st Sess. House Report No. 117, p. 14; 55 Cong. Rec. 5737.

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*It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn between granting for the adjudication of cases arising under this section concurrent jurisdiction in the Court of Claims and the District Courts without a trial by jury, or of establishing an exclusive jurisdiction in the District Courts of which the right to a jury trial is an incident. The first alternative was rejected, and the reason given for this rejection in the statement of the House conferees is that the proposed amendment would confer jurisdiction upon the Court of Claims. It is difficult to conceive of any rational ground for rejecting the clear and explicit amendment made by the Senate, except to accord a trial by jury. All difficulties of construction vanish if we are willing to give to the words of section 10, deliberately adopted, their natural meaning.

Furthermore, it is significant that this is not the only occasion upon which Congress has provided for suits against the United States exclusively in the District Courts. Section 1 of the War Risk Insurance Act of May 20, 1918, c. 77, 40 Stat. 555, provides that suits upon insurance policies "may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides." The Act of March 4, 1919, c. 125, § 3, 40 Stat. 1348 (Comp. St. Ann. Supp. 1919, § 3115⅛kk [3]), which authorizes the President to requisition storage facilities for wheat, provides, in the words of section 10 of the Lever Act, that "jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." And section 2 of the Act of July 11, 1918, c. 145, 40 Stat. 898 (Comp. St. Ann. Supp, 1919, § 514e), permits suits against the United States on marine insurance "in the District Court of the United States, sitting in admiralty."

A survey of the war legislation permitting the seizure of property discloses that congress has established three distinct jurisdictions *553 for the purpose of suit against the *United States for compensation. In 17 instances[1] it definitely provided by reference to the appropriate sections of the Judicial Code for concurrent jurisdiction in the Court of Claims and the District Courts sitting as a court of claims. In the four instances above set forth it conferred jurisdiction only on the District Courts. In four instances it conferred jurisdiction only on the Court of Claims.[2] The established rule of statutory construction should lead us to give effect in every practicable manner to the distinctions which Congress has seen fit to make. Compare Penn Mutual Life Insurance Co. v. Lederer, 252 U. S. 523, 533, 40 Sup. Ct. 397, *554 64 L. Ed. 698. And where it designates a *jurisdiction in which the trial will be with a jury instead of one where the trial will be by the court alone, it is our duty to give effect to its designation.

The writ of error is dismissed for want of jurisdiction in this court.

Dismissed.

(256 U. S. 421)

BETHLEHEM MOTORS CORPORATION et al. v. FLYNT, Sheriff et al.

(Submitted March 22, 1921. Decided June 1, 1921.)

No. 254.

1. Corporations 🔑662—Doing business in a state and having agent therein within jurisdiction for purpose of suit against them.

Foreign corporations, doing business in a state and having an agent therein, are within the jurisdiction of the state for the purpose of suit against them.

2. Constitutional law 🔑240(1)—Increased license fee from corporations not having specified investments within state held to discriminate against foreign corporations.

Laws N. C. 1917, c. 231, § 72, imposing a license on automobile manufacturers, which provides that the license on such manufacturers who have invested three-fourths of their assets in state securities or in personal property within the state shall be only one-fifth of the amount imposed on others, unjustly discriminates between foreign corporations manufacturing outside of the state, but doing business therein by selling their products, since a foreign corporation could not comply with the condition for the reduced license, while a domestic corporation could and therefore the act denies the equal protection of the laws guaranteed by Const. Amend. 14.

3. Commerce 🔑72—License on sale of product of corporation not within the state is taxed on interstate commerce.

Laws N. C. 1917, c. 231, § 72, imposing a license tax on all manufacturers of automobiles engaged in selling them within the state, when applied to a foreign manufacturer not doing business within the state, but sending its products there for sale, is a direct burden on interstate commerce, contrary to the commerce clause of the United States Constitution.

Mr. Justice Pitney and Mr. Justice Brandeis, dissenting.

In Error to the Supreme Court of the State of North Carolina.

Suit by the Bethlehem Motors Corporation and others against George W. Flynt, as Sheriff, and another, to restrain a sale of a truck and motor car for nonpayment of license tax. An order dissolving a preliminary restraining order was affirmed by the Supreme Court of North Carolina (178 N. C. 399, 100 S. E. 693), and plaintiffs bring error. Reversed and remanded.

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[1] Statutes which provide for suits for compensation against the United States in both the District Courts and the Court of Claims in the manner provided by section 24, par. 20, and section 145 of the Judicial Code (Comp. St. §§ 991, 1136): Act March 4, 1917, c. 180, 39 Stat. 1193; the Naval Emergency Fund Act; Act June 15, 1917, c. 29, 40 Stat. 183 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § $3115^{1}/_{16}$d), Emergency Shipping Fund Act; Act Aug. 10, 1917, c. 53, §§ 12, 16, 25, 40 Stat. 279, 282, 284 (sections 3115⅛jj, 3115⅛*ll*, 3115⅛q); Act Oct. 6, 1917, c. 79, 40 Stat. 353, 371, 372 (section 2804bbbb), land for ordnance proving ground and for naval construction; Act March 1, 1918, c. 19, 40 Stat. 438, 439 (section 8146t), Shipping Board Housing; Act April 22, 1918, c. 62, 40 Stat. 535 (sections $3115^{1}/_{16}$d, $3115^{1}/_{16}$dd), Shipping Board trolleys or interurban railways; Act April 26, 1918, c. 64, 40 Stat. 537, 538 (section 2804bbbbb), land for ordnance proving ground; Act May 16, 1918, c. 74, § 2, 40 Stat. 551 (Comp. St. Ann. Supp. 1919, § 3115⅝b), land for war housing; Act July 1, 1918, c. 114, § 5, par. "d," 40 Stat. 720 (section $3115^{1}/_{16}$c), contracts for ships, war materials, factories, etc.; Act July 8, 1918, c. 139, § 1, 40 Stat. 826 (section 6933c), Buildings for War Dept. in District of Columbia; Joint Res. July 16, 1918, c. 154, 40 Stat. 904, telegraph systems; Act July 18, 1918, c. 157, § 14, 40 Stat. 916 (section $3115^{1}/_{16}$jj), dry docks, wharves, warehouses, terminals; Act of Oct. 5, 1918, c. 181, § 3, 40 Stat. 1010 (section 3115⅛sss), minerals, ores, mines, smelters, etc.; Act Nov. 21, 1918, c. 212, § 1, 40 Stat. 1048 (section 839c), buildings for Department of Agriculture in District of Columbia.

[2] Statutes which provide for suits for compensation against the United States only in the Court of Claims; Act Oct. 6, 1917, c. 106, § 10, 40 Stat. 422 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ee), patents; Act July 1, 1918, c. 114, 40 Stat. 705 (Comp. St. Ann. Supp. 1919, § 9465), patents used by United States; Act March 21, 1918, c. 25, § 3, 40 Stat. 454 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾c), railroads; Act March 2, 1919, c. 94, § 2, 40 Stat. 1273 (Comp. St. Ann. Supp. 1919, § $3115^{14}/_{15}$b), war contracts, etc.

Mr. J. E. Alexander, of Winston-Salem, N. C., for plaintiffs in error.

Messrs. James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., both of Raleigh, N. C., for defendant in error.

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*Mr. Justice McKENNA delivered the opinion of the Court.

The defendants in error are, respectively, sheriffs of Forsyth and Guilford counties, N. C. Under the laws of the state, for the nonpayment of a license tax, the former levied on a motor truck belonging to the Bethlehem Corporation (referred to as the Pennsylvania corporation); the latter levied on a car belonging to the National Motor Car & Vehicle Corporation (referred to as the Indiana corporation). The trucks are manufactured in Pennsylvania, the cars in Indiana, and they are distributed in North Carolina and other states through W. Irving Young & Co. (referred to as the Delaware corporation), a corporation of the state of Delaware, which conducts its business in North Carolina by the Liberty Motors Corporation and the National Motors Company, these companies being corporations of North Carolina. And it is the finding or conclusion of the trial court that "both corporations thereupon were and became the agents" of the three other corporations "for the purpose of selling and delivering said trucks and automobiles." They were consigned to the two latter companies and were sold direct by them from their storage warehouse, being consigned to them for that purpose and not to be used exclusively as samples or for demonstration purposes, nor used or intended to be used, simply for the purpose of soliciting orders to be filled by shipment from the place of their manufacture.

Plaintiffs in error brought this suit in the superior court of Forsyth county to restrain the defendants in error from selling the truck and car. A preliminary restraining order was granted. It was subsequently dissolved. The order of dissolution was affirmed by the Supreme Court, thereby sustaining the license tax and the levy upon the automobiles made to enforce it.

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*A summary of the act by which a license is required is necessary. It provides in section 72 of Laws 1917, c. 231, that every manufacturer of automobiles "engaged in the business of selling the same in this state, or every person or persons or corporation engaged in selling automobiles in this state, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the state treasurer a tax of $500 and obtain a license for conducting such business." The name of the machine must accompany the application for a license, which must be in writing. A licensee may employ an unlimited number of agents, but each county of the state may levy a tax on each agent. Besides some other provisions, there is one (and it is of special pertinence in the case) "that if any officer, agent, or representative of such manufacturer shall file with the state treasurer a sworn statement showing that at least three-fourths of the entire assets of the said manufacturer of automobiles are invested" in the bonds of the state or any of its counties, cities or towns, or in property situated therein, and returned for taxation, the taxes named in the section shall be one-fifth of those named. Upon the renewal of a license that shall have been in force less than six months, a rebate of $250 is allowed on the new license.

Two contentions are made by the plaintiffs in error:

(1) That the act imposing the tax offends the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States.

(2) That the act attempts to regulate interstate commerce in contravention of the commerce clause of the Constitution (Const. art. 1, § 8).

The contentions depend upon different considerations. The basis of the first is that they, the corporations, are discriminated against; the basis of the second is that their products are. The contentions, therefore, should not be *confused. They fall under two heads: (1) If the Pennsylvania corporation and the Indiana corporation and the Delaware corporation are doing business in the state, and therefore within its jurisdiction, they undoubtedly can complain of a discrimination against them that is offensive to the Fourteenth Amendment. Southern Railway Co. v. Greene, 216 U. S. 400, 415, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. (2) If, however, they are not in the state and subject to its jurisdiction, and seek to enter, the tax may be considered a condition which the statute may impose. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, and a number of subsequent cases, including Southern Railway Co. v. Greene, supra. Unless, as plaintiffs in error contend, the tax is a discrimination against their products.

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These contentions we will consider in their order, keeping them as separate as possible.

[1] (a) This court has decided too often to need citation of the cases that corporations doing business in a state and having an agent there are within the jurisdiction of the state for the purpose of suit against them, and we may assume that the principle is applicable here and that the Pennsylvania corporation, the Indiana corporation and the Delaware corporation are within the jurisdiction of the state and subject to its laws, equally with the corporations of the state. It will be observed, however, that the act under review applies to all manufacturers and persons engaged in selling automobiles in the state. The act makes no distinctions between

nonresident and resident manufacturers. Wherein, then, is there discrimination? It is contended to be in the provision which reduces the tax to one-fifth of its amount—from $500 to $100—if the manufacturer of the automobiles has three-fourths of his assets invested in the bonds of the state or some of its municipalities, or in other property situated therein and returned for taxation. The provision is declared to be impossible of performance and its effect to be that a manufacturer not having such investment of property
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is *charged $500 for a license and one having such investment of property is charged only $100. And plaintiffs in error, it is asserted are necessarily in the $500 class. The contrasting assertion is that local manufacturers are in the $100 class, and that, therefore, there is illegal discrimination in their favor.

In explicit specification of such discrimination plaintiffs in error assert that the provision as applied to them is "contrary to all common sense," and that the Supreme Court conceded the improbability of compliance with it by the manufacturer of another state.

The Attorney General of the state seems to concur in the denunciation and adds to it the declaration that the insistence of the act is of an "utterly futile project" but adds, in order to remove or palliate its discrimination, it is as "futile" to manufacturers of the state as to manufacturers of other states, and considers it nugatory. His words are, "From nothing, nothing can arise," and that "discrimination cannot be predicated upon any scheme which is not workable." He therefore dismisses the provision as not applicable.

[2] May we accept his view of it, that is, regard the condition as a mere brutum fulmen, imposing no condition or burden, against the decision of the Supreme Court of the state? The court has assumed its efficacy and regarded it as a legal condition upon the Pennsylvania corporation, the Indiana corporation, and the Delaware corporation, doing business in the state. We are unable to concur in this conclusion. It is a perilous power to concede to the state, and it is immediately manifest that it can be exerted to prevent all commerce of those corporations (or other corporations) with the state except as the commerce might be through direct personal purchases and importations. In other words, the power can be exerted to exclude the products of those corporations, and every other corporation, if they have, or it has, agents in the state.

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*But if that provision can be dismissed as nugatory, as the Attorney General asserts, we encounter the alternative provision which requires the investment of a like proportion of assets of foreign manufacturers in other property in the state returned for taxation. In resistence to the assertion that the provision discriminates against nonresident manufacturers, the Attorney General contends that it is as applicable to resident manufacturers as to nonresident manufacturers, and, of course, his inference is that its condition can be performed as easily by one as by the other, and discriminates against neither.

To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. Therefore, there is a real discrimination, and an offense against the Fourteenth Amendment, if we assume that the corporations are within the state.

[3] (b) If they are not within the state, their second contention is that the act is an attempt to regulate interstate commerce. If it have that effect it is illegal for a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and if the product be that of another state, it is a tax on commerce between the states. Welton v. State of Missouri, 91 U. S. 275, 23 L. Ed. 347; Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Darnell & Son v. Memphis, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. Ed. 413. This is the assertion of plaintiffs in error; defendants in error oppose a denial to the assertion and the denial is supported by the Supreme Court on the authority of Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974. The basis of the denial and its support by the Supreme Court is that the automobiles had passed out of interstate commerce and had reached repose in the state, and blend with
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the other things of the *state, and became subject to intrastate regulation. It is doubtful if that be a justifiable deduction from the findings of the trial court. But comment is not necessary. It is the finding of the court that the automobiles were in the hands of the agents of the consigning corporations, and therefore, a tax against them was practically a tax on their importation into the state. It is not necessary to say it would be useless to send them to the state if their sale could be prevented by a prohibitive tax or one so discriminating that it would prevent competition with the products of the state. This is the ruling of the cases which we have cited. It is especially the ruling in Darnell & Son v. Memphis, supra. The imposition of such a tax is practically the usurpation of the power of Congress over interstate commerce, and therefore illegal.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice PITNEY and Mr. Justice BRANDEIS dissent.

(256 U. S. 465)

BURDEAU, Sp. Asst. Atty. Gen., v. McDOWELL.

(Argued April 11 and 12, 1921. Decided June 1, 1921.)

No. 646.

1. **Searches and seizures 🔑7—Unlawful seizure of papers by private corporation does not violate Fourth Amendment.**

Const. U. S. Amend. 4, giving protection against unlawful searches and seizures, applies only to governmental action, and that amendment is not violated by the seizure of private papers by a private corporation from the possession of a director and employé, though such seizure was unlawful.

2. **Criminal law 🔑394—Use of papers unlawfully seized by individual and turned over to government officers is not compulsory testimony.**

Const. U. S. Amend. 5, securing a citizen from compulsory testimony against himself, is not violated by the use of his private books and papers in a criminal prosecution against him, where the books and papers had been seized, even though unlawfully, by a private corporation of which he was director, without the knowledge or connivance of any public officer, and had been thereafter turned over to a special agent or the Attorney General.

Mr. Justice Brandeis and Mr. Justice Holmes, dissenting.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Petition in the District Court by J. C. McDowell for an order for the return to him of certain books and papers in possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States. From an order requiring Burdeau to deliver the papers to petitioner, and restraining the use of information obtained from them before the grand jury, Burdeau appeals. Reversed.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for appellant.

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*Mr. E. Lowry Humes, of Pittsburgh, Pa., for appellee.

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*Mr. Justice DAY delivered the opinion of the Court.

J. C. McDowell, hereinafter called the petitioner, filed a petition in the United States District Court for the Western District of Pennsylvania asking for an order for the return to him of certain books, papers, memoranda, correspondence and other data in the possession of Joseph A. Burdeau, appellant herein, Special Assistant to the Attorney General of the United States.

In the petition it is stated that Burdeau and his associates intended to present to the grand jury in and for the Western district of Pennsylvania a charge against petitioner of an alleged violation of section 215 of the Criminal Code of the United States (Comp. St. § 10385) for the fraudulent use of the mails; that it was the intention of Burdeau and his associates, including certain post office inspectors co-operating with him, to present to the grand jury certain private books, papers, memoranda, etc., which were the private property of the petitioner; that the papers had been in the possession and exclusive control of the petitioner in the Farmers' Bank Building in Pittsburgh. It is alleged that during the spring and summer of 1920 these papers were unlawfully seized and stolen from petitioner by certain persons participating in and furthering the proposed investigation so to be made by the grand jury, under the direction and control of Burdeau as special assistant to the Attorney General, and that such books, papers, memoranda, etc., were being held in the possession and control of Burdeau and his assistants; that in the taking of the personal private books and papers the person who purloined and stole the same drilled the petitioner's private safes,

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broke the locks upon his private *desk, and broke into and abstracted from the files in his offices his private papers; that the possession of the books, papers, etc., by Burdeau and his assistants was unlawful and in violation of the legal and constitutional rights of the petitioner. It is charged that the presentation to the grand jury of the same, or any secondary or other evidence secured through or by them, would work a deprivation of petitioner's constitutional rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States.

An answer was filed claiming the right to hold and use the papers. A hearing was had before the District Judge, who made an order requiring the delivery of the papers to the clerk of the court, together with all copies, memoranda and data taken therefrom, which the court found had been stolen from the offices of the petitioner at rooms numbered 1320 and 1321 in the Farmers' Bank Building in the city of Pittsburgh. The order further provided that upon delivery of the books, papers, etc., to the clerk of the court the same should be sealed and impounded for the period of ten days, at the end of which period they should be delivered to the petitioner or his attorney unless an appeal were taken from the order of the court, in which event, the books, papers, etc., should be impounded until the determination of the appeal. An order was made restraining Burdeau, Special Assistant Attorney General, the Department of Justice, its officers and agents, and the United States attorney from presenting to the United States commissioner, the grand jury or any official tribunal, any of the books, pa-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pers, memoranda, letters, copies of letters correspondence, etc., or any evidence of any nature whatsoever secured by or coming into their possession as a result of the knowledge obtained from the inspection of such books, papers, memoranda, etc.,

In his opinion the District Judge stated *472 that it was the *intention of the Department of Justice, through Burdeau and his assistants to present the books, papers, etc., to the grand jury with a view to having the petitioner indicted for the alleged violation of section 215 of the Criminal Code of the United States, and the court held that the evidence offered by the petitioner showed that the papers had been stolen from him, and that he was entitled to the return of the same. In this connection the District Judge stated that it did not appear that Burdeau, or any official or agent of the United States, or any of the departments, had anything to do with the search of the petitioner's safe, files and desk, or the abstraction therefrom of any of the writings referred to in the petition, and added that "the order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its departments but solely upon the ground that the government should not use stolen property for any purpose after demand made for its return." Expressing his views, at the close of the testimony the Judge said that there had been a gross violation of the Fourth and Fifth Amendments to the federal Constitution; that the government had not been a party to any illegal seizure; that those amendments, in the understanding of the court, were passed for the benefit of the states against action by the United States—forbidden by those amendments, and that the court was satisfied that the papers were illegally and wrongfully taken from the possession of the petitioner, and were then in the hands of the government.

So far as is necessary for our consideration certain facts from the record may be stated. Henry L. Doherty & Co. of New York were operating managers of the Cities Service Company, which company is a holding company, having control of various oil and gas companies. Petitioner was a direc- *473 tor in the Cities Service Company *and a director in the Quapaw Gas Company, a subsidiary company and occupied an office room in the building owned by the Farmers' Bank of Pittsburgh. The rooms were leased by the Quapaw Gas Company. McDowell occupied one room for his private office. He was employed by Doherty & Co. as the head of the natural gas division of the Cities Service Company. Doherty & Co. discharged McDowell for alleged unlawful and fraudulent conduct in the course of the business. An officer of Doherty & Co. and the Cities Service Company went to Pittsburgh in March, 1920, with authority of the president of the Quapaw Gas Company to take possession of the company's office. He took possession of room 1320; that room and the adjoining room had McDowell's name on the door. At various times papers were taken from the safe and desk in the rooms, and the rooms were placed in charge of detectives. A large quantity of papers were taken and shipped to the auditor of the Cities Service Company at 60 Wall street, New York, which was the office of that company, Doherty & Co., and the Quapaw Gas Company. The secretary of McDowell testified that room 1320 was his private office; that practically all the furniture in both rooms belonged to him; that there was a large safe belonging to the Farmers' Bank and a small safe belonging to McDowell; that on March 23, 1920, a representative of the company and a detective came to the offices; that the detective was placed in charge of room 1320; that the large safe was opened with a view to selecting papers belonging to the company, and that the representative of the company took private papers of McDowell's also. While the rooms were in charge of detectives, both safes were blown open. In the small safe nothing of consequence was found, but in the large safe papers belonging to McDowell were found. The desk was forced open, and all the papers *474 taken from it. *The papers were placed in cases, and shipped to Doherty & Co., 60 Wall street, New York.

In June, 1920, following, Doherty & Co., after communication with the Department of Justice, turned over a letter, found in McDowell's desk, to the department's representative. Burdeau admitted at the hearing that as the representative of the United States in the Department of Justice he had papers which he assumed were taken from the office of McDowell. The communication to the Attorney General stated that McDowell had violated the laws of the United States in the use of the mail in the transmission of various letters to parties who owned the properties which were sold by or offered to the Cities Service Company; that some of such letters, or copies of them taken from McDowell's file, were in the possession of the Cities Service Company, that the Company also had in its possession portions of a diary of McDowell in which he had jotted down the commissions which he had received from a number of the transactions, and other data which, it is stated, would be useful in the investigation of the matter before the grand jury and subsequent prosecution should an indictment be returned.

We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated by their seizure, and that having subsequently come into the possession of the prosecuting officers of the government, he was entitled to their return. The amendments involved are the Fourth and Fifth, protecting a citizen against unreasonable searches and seizures and compulsory testimony against himself. An extended consideration of the origin and purposes of these amendments would be superfluous in view of the fact that this court has had occasion to deal with those subjects in a series of cases. Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *475 Weeks v. *United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263; Perlman v. United States, 247 U. S. 7, 38 Sup. Ct. 417, 62 L. Ed. 950; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Gouled v. United States, decided February 28th, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, this term.

[1] The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

[2] The Fifth Amendment, as its terms import is intended to secure the citizen from compulsory testimony against himself. It protects from extorted confessions, or examinations in court proceedings by compulsory methods.

The exact question to be decided here is: *476 May the *government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?

We know of no constitutional principle which requires the government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpœna might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

It follows that the District Court erred in making the order appealed from, and the same is

Reversed.

Mr. Justice BRANDEIS dissenting with whom Mr. Justice HOLMES concurs.

Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

*477 *That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpœnaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.

(256 U. S. 477)

McLAREN v. FLEISCHER.

(Argued April 26 and 27, 1921. Decided June 1, 1921.)

No. 291.

Public lands 🔑102—Statutes 🔑219—Successful contestant of entry on withdrawn lands can exercise preference right within 30 days after restoration to entry; practice of land office held decision in case of doubt as to construction of statute.

The applicability of Act May 14, 1880, § 2 (Comp. St. § 4537), allowing a successful contestant 30 days after notice of the cancellation of an entry in which to enter the lands, to a case where the lands had been temporarily withdrawn before the contest was decided, so that the contestant could not exercise his preference right within 30 days, presents a question of sufficient doubt as to the intention of Congress to come within the rule that the practical construction given an act, fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect, and, if acted on for a number of years, will not be disturbed, except for cogent reasons, so that the practice of the land office of giving the successful contestant 30 days after the land is restored to entry within which to exercise his preference right will be sustained.

On Writ of Certiorari to the Supreme Court of the State of California.

Action by John McLaren against L. G. Fleischer. A judgment dismissing the complaint was affirmed by the Supreme Court of the State of California (181 Cal. 607, 185 Pac. 967), and Archie J. McLaren, administrator, who had been substituted as plaintiff after the death of the original plaintiff, brings certiorari. Affirmed.

*478

*Mr. Samuel Herrick, of Washington, D. C., for petitioner.

Mr. Patrick H. Loughran, of Washington, D. C., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This case presents a controversy arising out of conflicting applications to enter a quarter section of land under the homestead law (12 Stat. 392). While the land was public and unappropriated, one Rider made a homestead entry of it, and later it was included, with other lands, in a first-form reclamation withdrawal.[1] The withdrawal did not extinguish Rider's entry, but while in force prevented the initiation of other claims. It was largely provisional, and whenever in the judgment of the Secretary of the Interior any of the lands were not required for the purpose for which the withdrawal was made they were to be restored to public entry. While the *479 withdrawal *was in force one Fleischer instituted a contest against Rider's entry, at his own cost collected and presented evidence establishing its invalidity, and procured its cancellation. Rider acquiesced in that decision and is not concerned in the present controversy. Fleischer had no claim to the land prior to the contest, and in instituting and carrying it through acted as a common informer, which was admissible under the public land laws. To encourage the elimination of unlawful entries by such contests Congress had declared in the act of May 14, 1880, c. 89, § 2, 21 Stat. 140 (Comp. St. § 4537):

> "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

When Rider's entry was canceled the register sent to Fleischer a written notice informing him thereof and stating that he would be allowed 30 days after the tract was restored to public entry within which to enter it in the exercise of his preferred right as a successful contestant. The notice was dated February 11, 1909. Afterwards the Secretary of the Interior issued an order whereby the lands included in the withdrawal were restored to settlement on April 18, 1910, and to public entry on May 18 following. On the earlier date one McLaren made homestead settlement on this tract and on the later date both Fleischer and McLaren applied at the local land office to make homestead entry thereof—Fleischer in the exercise of his preferred right and McLaren in virtue of his settlement. Fleischer's application was allowed and McLaren's rejected, the local officers being of opinion that Fleischer had the prior and better right. McLaren appealed *480 and the action of the local *officers was sustained by the Commissioner of the General Land Office and by the Secretary of the Interior. In due course Fleischer received a patent for the land and McLaren then brought this suit to have Fleischer declared a trustee for him of the title and to compel a conveyance in execution of the trust. During the pendency of the suit McLaren died and it was revived in the name of his personal representative. Fleischer prevailed in the court of first instance and again in the Supreme Court of the State. 181 Cal. 607, 185

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[1] The withdrawal was made under the provision embodied in the first six lines of section 3 of the Act of June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. § 4702).

Pac. 967. A writ of certiorari brings the case here. 253 U. S. 479, 40 Sup. Ct. 482, 64 L. Ed. 1023.

The sole question for decision is whether the officers of the land department erred in matter of law in holding that under the act of May 14, 1880, Fleischer was entitled to 30 days after the land was restored to entry within which to exercise his preferred right of entry. The words of the act are, "shall be allowed thirty days from the date of such notice to enter said lands." Generally when an existing entry is canceled the land becomes at once open to entry and the act is easily applied. But where, as here, an existing withdrawal prevents the land from becoming open to entry for more than 30 days after the notice of cancellation issues, the application to be made of the act is not so obvious, and it becomes necessary to inquire what is intended. Does the act mean that the preferred right to enter the land is lost if not exercised within 30 days after the notice issues, even though the land is not open to entry during that period? Or does it mean that the contestant shall have 30 days during which the land is open to entry within which to exercise his preferred right, and therefore that if the land is not open to entry at the date of the notice the time during which that situation continues shall be eliminated in computing the 30-day period? In the practical administration of the act the officers of the land department have adopted and given *481 effect to *the latter view. They adopted it before the present controversy arose or was thought of, and, except for a departure soon reconsidered and corrected, they have adhered to and followed it ever since.[2] Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons.[3]

The case of Edwards v. Bodkin, 249 Fed. 562, 161 C. C. A. 488, and Bodkin v. Edwards, *482 *265 Fed. 621, in which there was a decree of affirmance by this court (255 U. S. 221, 41 Sup. Ct. 268, 65 L. Ed. 595), is cited as upholding a different view of the act. The opinions rendered by the Circuit Court of Appeals do indicate that it was disposed to think the words "thirty days from the date of such notice" should be taken literally and strictly, but a careful reading of the opinions discloses that the decision was not put on that ground. As was rightly said by the Supreme Court of the state in the present case, "the decision there was not to the effect that the contestant was by mistake of law given the preference right." Indeed, that case did not call for any expression of opinion on the subject. The plaintiff there was the original homestead entryman and was insisting that his entry had been unlawfully canceled. If that claim was well taken, as was held, the cancellation did not give rise to any preferred right. Besides, the defendant there was not claiming under an entry based on a preferred right, but under entries made after he had relinquished the entry which he claimed was based thereon. Thus the observations of the Circuit Court of Appeals respecting preferred rights were obiter dicta, and, as the decree of affirmance in this court was put on other grounds, those observations are neither authoritative nor persuasive.

Here it is not questioned that the original or first entry—that of Rider—was lawfully canceled. McLaren recognized that that entry had been lawfully eliminated when he sought to initiate a claim to the land. He should also have recognized that Fleischer, by his contest, had brought about its elimination and was entitled, as a reward, to enter the land at any time within thirty days after it was restored to entry.

We conclude that the state courts rightly refused to disturb the construction which the officers of the land department had put on the act.

Judgment affirmed.

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[2] The instructions of June 6, 1905, 33 L. D. 607, contained the following:

"Seventh. When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and cannot, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

The regulations of May 18, 1916, § 29, 45 L. D. 385, 391, contained the following:

"Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it cannot be exercised as long as the land remains so withdrawn, but should the lands involved be restored to the public domain or a farm-unit plat be approved for the lands and announcement made that water is ready to be delivered, the preference right may be exercised at any time within 30 days from notice of the restoration or the establishment of farm units."

And see Wells v. Fisher, 47 L. D. 288, for a statement and discussion of the departmental rulings.

[3] Brown v. United States, 113 U. S. 568, 571, 5 Sup. Ct. 648, 28 L. Ed. 1079; Webster v. Luther, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; United States v. Hammers, 221 U. S. 220, 228, 31 Sup. Ct. 593, 55 L. Ed. 710; Logan v. Davis, 233 U. S. 613, 627, 34 Sup. Ct. 685, 58 L. Ed. 1121; LaRoque v. United States, 239 U. S. 62, 64, 36 Sup. Ct. 22, 60 L. Ed. 147.

(256 U. S. 483)

CULPEPPER v. OCHELTREE.

(Argued April 26 and 27, 1921. Decided June 1, 1921.)

No. 292.

On Writ of Certiorari to the Supreme Court of the State of California.

Action by Robert L. Culpepper against James M. Ocheltree. A judgment dismissing the complaint was affirmed by the Supreme Court of California (181 Cal. 788, 185 Pac. 971), and plaintiff brings certiorari. Affirmed.

See, also, 253 U. S. 480, 40 Sup. Ct. 482, 64 L. Ed. 1023.

Mr. Samuel Herrick, of Washington, D. C., for petitioner.

Mr. Patrick H. Loughran, of Washington, D. C., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This case is in all material respects like McLaren v. Fleischer, 256 U. S. 477, 41 Sup. Ct. 577, 65 L. Ed. —. It was decided in the same way by the state courts and was argued with that case here. Therefore the opinion in that will suffice to dispose of this.

Judgment affirmed.

(256 U. S. 439)

GARLAND'S HEIRS v. CHOCTAW NATION.

(Argued Jan. 12, 1921. Decided June 1, 1921.)

No. 129.

1. **United States 🔑105—Delegation of Choctaw Nation to collect and pay over percentage of claim due previous delegation held agents of Nation.**

The Choctaw enactment of 1888, appointing a delegation to collect from the United States the percentage of the claim of the Nation allowed by the United States, which was due to a delegation previously appointed, for their services in securing the allowance of the claim, made the new delegation agents of the Nation to pay over to the preceding delegation the amount to which they were entitled, so that the Nation was liable for their failure to perform that duty.

2. **United States 🔑105—Compensation of individuals of delegation of Choctaw Nation to secure rights from United States held not vested in successors.**

Under a contract of the Choctaw Nation, appointing a delegation to secure from the United States its rights under certain treaties, and giving to the delegation a percentage of the amounts recovered, the interests of the delegation and its percentage of the recovery were vested in the individual members of the delegation, and not in the delegation as a body, so that the successors of the original members, who collected a percentage, were not entitled to retain the entire amount, to the exclusion of the heirs of their predecessors.

3. **United States 🔑105—Petition held to show some compensation due claimant's ancestor for negotiating Indian treaty.**

The petition and evidence on behalf of claimants under Act May 29, 1908, § 5, authorizing the Court of Claims to adjudicate certain claims against the Choctaw Nation, showing that claimants' ancestor, while a member of the delegation of the Choctaw Nation to secure from the United States its rights under certain treaties, had performed valuable services in the securing of those rights, *held* to show that the claimants were entitled to recover some compensation for their ancestor's services, so that the judgment of the Court of Claims against the claimants, based on the erroneous theory that the nation was not liable for the acts of its delegation, which collected the money from the United States and failed to pay claimants' ancestor, must be reversed, and the cause remitted to the Court of Claims, to determine the value of the services.

Appeal from the Court of Claims.

Suit by the heirs of Samuel Garland, deceased, against the Choctaw Nation. Judgment for defendant (54 Ct. Cl. 55), and claimants appeal. Reversed.

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*Messrs. Harry Peyton, of Washington, D. C., and W. N. Redwine, of McAlester, Okl., for appellants.

Mr. Solicitor General Frierson, of Chattanooga, Tenn., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

This suit is based, as its ultimate foundation, on an Act of Congress of May 29, 1908, c. 216, § 5, 35 Stat. 444, 445, which provides as follows:

> "That the Court of Claims is hereby authorized and directed to hear and adjudicate the claims against the Choctaw Nation of Samuel Garland, deceased, and to render judgment thereon in such amounts, if any, as may appear to be equitably due. Said judgment, if any, in favor of the heirs of Garland shall be paid out of any funds in the treasury of the United States belonging to the Choctaw Nation, said judgment to be rendered on the principle of quantum meruit for services rendered and expenses incurred. Notice of said suit shall be served on the governor of the Choctaw Nation, and the Attorney General of the United States shall appear and defend in said suit on behalf of said Nation."

The case is not easily stated, though simple in ultimate resolution. It turns upon the relation of Samuel Garland and his right to compensation as one of the delegation of the Choctaw Nation to procure for the Nation a recognition and payment of money due from the United States in settlement of or in payment for lands east of the Mississippi river ceded to the United States under certain treaties.

The case as made by the petition is this:

Samuel Garland was a member of the Choctaw Tribe of Indians, and in 1853 he, with four others, were created a delegation and authorized to settle all unsettled business between the Choctaw Nation and the United *441 States. In *1855 the Chiefs of the Nation agreed to pay the delegation, naming them, 20 per cent. upon all the claims arising to the Nation or individuals for their services in negotiating the treaty and for other services which were to be rendered thereafter in Washington.

In pursuance of this authority they entered into negotiations with the United States for settlement of the controversies concerning what, if anything, was due on account of matters growing out of certain treaties (they are set out in the petition) and for the payment for lands ceded to the United States by the Choctaws.

The result was the direction by an Act of Congress (1888; 25 Stat. 239) of the payment to the Choctaw Nation of the sum of $2,858,798.62 in satisfaction of a judgment of the Court of Claims in favor of the Nation.

On February 25, 1888, the Nation, on account of the death of Samuel Garland, and for the purpose of paying his estate and the other members of the delegation, appointed Campbell Le Flore and Edmund McCurtain agents of the Nation to make requisition upon the United States for the amount due Garland and the other delegates for the services rendered the Nation, and for moneys expended by them. Twenty per cent. of the amount appropriated by Congress to pay the judgment of the Court of Claims was the amount fixed to be paid.

The appointment of Le Flore and McCurtain was without the consent of Garland's estate or the consent of his heirs.

Le Flore and McCurtain collected from the United States $638,919.43, the same being 20 per cent. of the judgment of the Court of Claims, and were charged with the duty of distributing the same equally.

In 1889 they paid to the heirs of Garland $43,943.20, but refused to pay the balance due, amounting to $115,786.65.

The Nation has never denied the indebt- *442 edness to the *estate of Garland, but recognized it by an act passed by its General Council in 1897, and authorized its payment by warrants issued by the national auditor.

The act was vetoed, for the reason that it would exhaust the available funds in the treasury of the Nation and force the closing of the Choctaw schools. The estate, having no power to sue the Nation, could not do so until authorized by an act of Congress.

The petition sets forth the respective interests of the heirs of Garland.

The Court of Claims found some of these facts, but found other facts, and concluded from them that the contract of the Nation was with the delegates as a body, and that the Nation was not responsible for any failure on the part of Le Flore to pay the estate of Garland all that was due Garland. In other words, the court held that Le Flore and McCurtain were not the "'agents' of the Choctaw Nation for whose misapplication of the fund, if they did misapply it, the Nation was liable," but that they were, when dealt with, "the delegation, the successors of the original delegation, standing in such relation to the Nation and to other members of the delegation or their beneficiaries that the payment made to them, as it was made, is to be held an acquittance of the Nation."

The conception of the opinion is that the delegation was a unit, constituted such, and intended to act as such, the survivors or even the survivor of those appointed succeeding to the powers and rights of deceased delegates; that the Nation so regarded and so dealt with them; and that, therefore, Le Flore and McCurtain succeeded to the rights of the delegation, could receive the powers conferred upon them by the enactment of February 25, 1888, and could accept any sums that came to them under that enactment "as a complete payment and a final discharge of all debts and obligations of the Choctaw Nation to" the delegation under the contract of 1853.

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*This being the conception of the court, its final conclusion was that the payment made to Le Flore and McCurtain served to discharge the Nation from any further liability to the delegation, or any member thereof, or their representatives, and on that ground it ordered the case to be dismissed.

As we have seen, there was a delegation constituted, and Garland was a member of it, and its compensation was agreed to be "20 per cent. upon all claims arising or accruing to" the "Nation or individuals under the treaty of June 22, 1855, for their services in negotiating said treaty and for other services which are to be rendered hereafter at Washington." It will be observed there was no disposition of the amount that might be received, nor distribution of it, nor of the services that might be required to be performed, nor designation of who was to receive or control it.

Delegates, however, died, and others were appointed in like generality, and finally there was a concentration in Le Flore and McCurtain, and, the National Council reciting that the delegates preceding Le Flore and McCurtain had recovered from the United States $2,858,798.62, and that the delegates were entitled to 20 per cent. of the amount, that percentage was appropriated out of the fund and directed to be paid to Le Flore and McCurtain as delegates and successors of the delegates of 1853, "to enable them [Le Flore and McCurtain] to pay the expenses and discharge the obligation in the prosecution of said claim [the claim of the Nation against the United States], and to settle with the respective distributees of said delegation."

There was also an appropriation for other sums due the delegation, and it was enacted that all of the sums should be paid to Le Flore and McCurtain, describing them as successors to the other delegates, and when so paid to be accepted "as a complete payment *444 and a final *discharge of all debts and obligations of the Choctaw Nation to said delegation" under the contract of their appointment; and it was enacted that the amounts provided to be paid should "be accepted as full and final settlement of the amount due under their respective contracts," and the remainder of the amount appropriated by Congress should be retained in the treasury of the United States, subject to the legislation and requisition of the Nation.

In 1873, however, there was a recognition of liability to the delegates, and it was provided that the national treasurer be authorized to receive the appropriation and to pay (among other obligations) "20 per cent. of such appropriation for the delegates of 1853 and 1854, to enable them to discharge all liabilities and obligations under said contracts [there were other contracts than that with the delegates] and all expenses necessarily incurred in recovering said claim." It was provided that all just debts due the Nation from the delegation should first be deducted.

[1] The enactment of 1888 was a deputation to Le Flore and McCurtain to collect and disburse the congressional appropriation, and they became for that purpose the agents of the Nation, not the agents of the delegation, and it was the first deputation of that power. By a prior enactment the payments made to the delegation were from the national treasury, and another (1867) provided for such payment. In other words, until the enactment of February 25, 1888, the control of the appropriation was in the Nation and payments out of it by the Nation.

[2] Our conclusion, therefore, from the record, is not that of the Court of Claims. There was implication, at least, of liability to the delegates individually; and this was the understanding of the delegates. Le Flore so understood it, and the payment made to Garland's estate was a recognition of it. The payment is distinctly in opposition *445 *to the contention of the government and the conclusion of the Court of Claims. Both the contention and conclusion assert a unity in the delegation, the rejection of any individual payment or reward to the delegates, a time limit upon compensation for their services, however great or effective, a kind of jus accrescendi in the successors of deceased delegates. If such right existed at all, it would have existed, even though the succession had come a moment before the congressional appropriation was made, and no services whatever rendered by the successors of deceased delegates.

And these views must have impressed Congress, and induced its enactment authorizing suit against the Choctaw Nation; not, it is true, upon the contract, because other services than Garland's were rendered in procurement of the appropriation and should be considered, and Congress therefore required the judgment in the suit "to be rendered on the principle of quantum meruit" for what Garland did and expended.

[3] It is objected, however, that the suit was not asserted or prosecuted on that basis, and that there is no description of the services of Garland or their value, and therefore no elements for a judgment established, such as the statute authorized. It authorized, the explicit contention is, a judgment on a quantum meruit, and that therefore "no judgment can be rendered on a petition which seeks to recover merely upon the ground of a contract."

The contention under the facts disclosed in the petition is technical. The petition showed services rendered, and, if the petition be true, valuable services—and for them there should have been recovery, if the Nation was liable, and we think it was. How much we do not say, nor did the Court of Claims consider; it being of opinion that the Nation was not liable for anything. Upon the return of the case it may determine the *446 amount due Garland, if *anything, dependent upon what his services contributed in securing the congressional appropriation.

The judgment of the Court of Claims must therefore be reversed; and it is so ordered.

Reversed.

Mr. Justice McREYNOLDS and Mr. Justice CLARKE took no part in the consideration and decision of this case.

(256 U. S. 531)

CHOCTAW, O. & G. R. CO. et al. v. MACKEY, County Treasurer, et al.

(Argued April 21, 1921. Decided June 1, 1921.)

No. 211.

1. **Municipal corporations 🔑426—Use of railroad by government as instrument for development of Indian coal lands does not prevent assessment for improvement.**

The fact that a railroad right of way granted by Act Feb. 18, 1888, was intended to be used as an instrumentality for developing Indian coal lands, does not make the right of way and station grounds an instrumentality of the federal government, so as not to be subject to assessment for street improvements by a city, especially after the railroad, originally intended as a branch to the coal veins, had become an integral part of through main lines.

2. **Municipal corporations 🔑479—Description in assessment for improvements held sufficient.**

An assessment of railroad right of way and station grounds for street improvements, which described the premises in the proper quarter blocks on the designated map prepared by the city engineer, as required by Comp. Laws Okl. 1909, § 724, for the description of unplatted property, is sufficient, though the map referred to was inadvertently removed from the city files and not returned until after the lapse of a considerable time, where the railroad had full knowledge of the proceedings and did not claim to have been misled by the temporary absence of the map.

3. **Municipal corporations 🔑479—Insufficient description in assessment for improvements does not invalidate assessment.**

The insufficiency of description of land assessed for street improvement does not entitle the abutting landowners to have the assessment declared void, but merely entitles them to reassessment conforming to the regulations, in view of Laws Okl. 1907–08, c. 10, §§ 7, 8.

4. **Municipal corporations 🔑426—Possible reverter of railroad to Indian tribe does not prevent assessment for street purposes.**

The fact that a railroad right of way was granted from the lands of an Indian tribe, so that, in the event the use as a railroad was abandoned, the property would revert to the tribe, does not prevent the assessment of a right of way and station grounds for the improvement of an abutting street.

5. **Municipal corporations 🔑425(1)—May be assessed for paving street adjoining right of way and station.**

Street paving is a class of betterment for which a railroad right of way and station property is subject to assessment.

6. **Municipal corporations 🔑425(1)—That sale for street improvement would sever integral part of railway does not invalidate assessment.**

An assessment against a railroad right of way and station for a street improvement cannot be declared void because the effect of a sale to pay the assessment would be to sever an integral part of the railway.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Choctaw, Oklahoma & Gulf Railroad Company and another against B. W. Mackey, as County Treasurer of Hughes County, Okl., the City of Holdenville, and others, to have declared void a special assessment for street improvement made against part of the railroad right of way and station grounds. A decree of the District Court for the plaintiffs was reversed by the Circuit Court of Appeals, with directions to dismiss the bill (261 Fed. 342), and plaintiffs appeal, under Judicial Code, § 241 (Comp. St. § 1218). Affirmed.

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*Messrs. C. O. Blake, of El Reno, Okl., W. R. Bleakmore, of Oklahoma City, Okl., and R. A. Tolbert and Roy St. Lewis, both of El Reno, Okl. (Thomas P. Littlepage, of Washington, D. C., of counsel), for appellant.

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*Messrs. J. B. Furry and George S. Ramsey, both of Muskogee, Okl., W. H. Harris and J. B. Harbaugh, both of Toledo, Ohio, and W. T. Anglin and Alfred Stevenson, both of Holdenville, Okl., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought in the United States District Court for the Eastern District of Oklahoma by the Chicago, Rock Island & Pacific Railway Company, to have declared void a special assessment for street improvement made against part of its right of way and station grounds in the city of Holdenville, Okl., and to enjoin the taking of any proceedings to enforce the same. The Choctaw, Oklahoma & Gulf Railroad Company, the lessor, was joined as plaintiff. The defendants are the county treasurer, the city, and the holders of bonds issued to pay for the improvement. The street improved, called Oklahoma avenue, runs parallel to the main tracks. The station grounds abut on the avenue for a distance of 1,641 feet, and the parcel assessed extends back from the avenue 150 feet to the center of the right of way. Over this street a large part of the traffic to and from the station necessarily passes,

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for between it and the main *tracks lie the passenger depot, the freight houses, the express office, the cotton platform, an oil warehouse, grain elevators, coal bins, and the team tracks. The assessment is assailed as invalid on several grounds. The chief contention is that the property is immune from assessment by the state because that part of the railroad was an instrumentality of the federal government. The other grounds of attack are that in laying the assessment the property was not sufficiently identified, and that the assessment of a railroad right of way and station grounds is not authorized by the law of the state. The District Court entered a decree for plaintiffs, which was reversed by the Circuit Court of Appeals, with directions to dismiss the bill. 261 Fed. 342. The case comes here under section 241 of the Judicial Code (Comp. St. § 1218).

First. The claim of immunity from assessment rests upon these facts: The right of way and station grounds are on land which had belonged to the Creek Nation before the town (now city) was established under direction of the Secretary of the Interior, pursuant to the original Creek Agreement. Act of March 1, 1901, c. 676, § 10, 31 Stat. 861, 864. The Rock Island acquired its interest on March 24, 1904, under a lease from the Choctaw, Oklahoma & Gulf, for a period of 999 years, of all of its railroad property. The lessor company had, in locating its railroad through Holdenville, taken, besides the right of way 100 feet wide, an additional strip for station purposes 200 feet wide, with a length of 3,000 feet, having acquired the power so to do by succeeding to the powers and franchises of the Choctaw Coal & Railway Company. To that company Congress had in 1888 granted the right to build a railroad in Indian Territory, with a branch line to coal mines leased from the Choctaw Nation.[1]

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[1] *The contention is that the railroad is an instrumentality through which the government undertook to perform its obligation to develop coal lands belonging to the Indians, and that, if the railroad's interest in the right of way and station grounds could be subjected to a special assessment and possible sale thereunder apart from the railroad franchises, the congressional purpose might be obstructed. Choctaw, Oklahoma & Gulf Railroad Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234. See, also, Northern Pacific Railway Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779.

The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation. The most that can be said here is that among the public served by this railroad are some mines on land leased from the Choctaw Nation. The right of way and station grounds in question, instead of being, as was perhaps originally contemplated by the Act of February 18, 1888, part of a branch to leased "coal veins," have become *537 an integral *part of through lines of a great railroad system.[2] Holdenville is on the main line of the Choctaw, Oklahoma & Gulf, which extends from the west bank of the Mississippi river, through Arkansas and Oklahoma, to the Texas state line, a distance of nearly 650 miles. By the lease to the Rock Island, this railroad has become a part of the through lines of a much larger system. And even though it be granted that the federal government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid. Railroad Co. v. Peniston, 18 Wall. 5, 36, 21 L. Ed. 787; Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, 546–548, 8 Sup. Ct. 961, 31 L. Ed. 790; Central Pacific Railroad Co. v. California, 162 U. S. 91, 125, 16 Sup. Ct. 766, 40 L. Ed. 903; Thomas v. Gay, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740.

[2] Second. Equally unfounded is the contention that the assessment did not sufficiently identify the property, and was hence a denial of due process of law. The Oklahoma statute under which the assessment was made (Compl. Laws 1909, § 724), provides that:

> "If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided."

[3] The railroad premises not having been platted, the mayor and council adopted a map of the city engineer, on which the right of way and station grounds were set forth in proper quarter block districts. The premises *538 *assessed were those quarter blocks thereon designated as abutting on that portion of Ok-

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[1] Act Cong. Feb. 18, 1888, c. 13, 25 Stat. 35. Section 2 provides:

"That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal & Railway Company, and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road. * * *

"Provided further, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."

See, also, Act Feb. 13, 1889, c. 152, 25 Stat. 668: Act Oct. 1, 1890, c. 1252, 26 Stat. 640; Act Feb. 21, 1891, c. 249, 26 Stat. 765; Act Jan. 22, 1894, c. 14, 28 Stat. 27; Act Aug. 24, 1894, c. 330, 28 Stat. 502; Act April 24, 1896, c. 122, 29 Stat. 98; Act March 28, 1900, c. 111, 31 Stat. 52.

[2] When Congress authorized the purchasers of the property and franchises of the insolvent Choctaw Coal & Railway Company to reorganize as the Choctaw, Oklahoma & Gulf, it conferred upon the latter "perpetual succession." Act Aug. 24, 1904, c. 330, § 5, 28 Stat. 502, 503. Later it greatly enlarged its powers, conferring authority without limit to construct its railroad over any Indian reservation and to acquire and consolidate with practically any connecting line. Act April 24, 1896, c. 122, 29 Stat. 98; Act March 28, 1900, c. 11, 31 Stat. 52.

lahoma avenue which was improved, and the designation was clear. Some time after the passage of the ordinance providing for the assessment this map was inadvertently removed from the city files, sent to the purchasers of the bonds issued for the improvement, and not returned until after the lapse of a considerable time. But the railroad companies had full knowledge of the proceedings relating to the assessment and of the commencement, the progress and the completion of the improvement. There is not even a suggestion that they were injured or misled by the temporary absence of the map from the city files. Such removal did not invalidate the assessment. Furthermore, mere insufficiency of description or other irregularity in the proceeding would not entitle abutting landowners to the relief sought here. Their right would be limited to having the mayor and council make a reassessment conforming to the regulations prescribed by the statute. See Laws Okl. 1907–08, p. 176, §§ 7, 8; Oklahoma Railway v. Severns, etc., Co., 251 U. S. 104, 40 Sup. Ct. 73, 64 L. Ed. 168.

[4] Third. The remaining contention is that the statutes of the state do not authorize assessment for betterments upon a railroad right of way and station grounds. The mere fact that there is a possible right of reverter in the Creek Nation does not preclude the railroad's interest from being subject to general taxation. See Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242; Maricopa & Phœnix Railroad v. Arizona, 156 U. S. 347, 352, 15 Sup. Ct. 391, 39 L. Ed. 447. The railroad's interest, as stated in Rio Grande Railway Co. v. Stringham, 239 U. S. 44, 47, 36 Sup. Ct. 5, 6, 60 L. Ed. 136, is—

> "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reversion in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."

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In *effect the railroad is the absolute owner of the land. Its use is, and necessarily must be, exclusive. The betterment for which the assessment was levied is of a nature to enhance the value of that use. And it is the railroad, as distinguished from the Creek Nation, owner of a possible reversionary interest, to which the benefit from the improvement enures. For the railroad's use will continue indefinitely, while the specific improvement to be paid for can have but a short life.

[5, 6] Street paving is a class of betterment to which the railroad right of way and station property is generally held to be subject. See Louisville & Nashville Railroad Co. v. Barber Asphalt Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215. The rule appears to have been accepted in Oklahoma. Compare Missouri, Kansas & Texas Railway Co. v. Tulsa, 45 Okl. 382, 145 Pac. 398; Oklahoma Railway Co. v. Severns Paving Co., 251 U. S. 104, 40 Sup. Ct. 73, 64 L. Ed. 168. It is urged that, if the assessment is left unpaid, a sale to enforce the lien would sever an integral part of the railway. The same objection might be urged against the validity of a lien for general taxes locally assessed upon railroad property or a mechanic's lien upon the same. The objection is clearly unsound. Compare Kansas City Southern Railway Co. v. Tansey, 41 Okl. 543, 139 Pac. 267; Same v. Rosier, 38 Okl. 231, 132 Pac. 908; Same v. Wallace, 38 Okl. 233, 132 Pac. 908, 46 L. R. A. (N. S.) 112. If the validity of the assessment is established, it may be assumed that due payment will follow. At all events, we have no occasion to deal with the method and means to be pursued in enforcing it.

Affirmed.

(256 U. S. 566)

WESTERN UNION TELEGRAPH CO. v. ESTEVE BROS. & CO.

(Argued April 12 and 13, 1921. Decided June 1, 1921.)

No. 491.

1. Telegraphs and telephones 🔑54(7)—Assent essential to limitation on common-law liability.

Prior Act June 18, 1910, making telegraph and cable companies subject to the Act to Regulate Commerce, a limitation on the liability of a telegraph company for negligence in the transmission of a message was in the nature of a contract, and the provision for such limitation had to be brought home to the sender of the message, and assented to by him, in order to be legally binding upon him.

2. Telegraphs and telephones 🔑54(7)—Limitation of liability included in rates filed under Interstate Commerce Act binding on sender without notice.

Under Act June 18, 1910, § 7 (Comp. St. § 8563), making telegraph and cable companies subject to the Act to Regulate Commerce, a limitation of the liability of the telegraph company for an unrepeated message to the amount of its portion of the toll for the transmission thereof, which was part of its tariff and rates filed with the Interstate Commerce Commission, is no longer based on contract, but on law; so that such limitation is binding on the sender of an unrepeated message, though he did not know of it, since to permit any sender to avoid such limitation would be to permit discrimination in his favor contrary to law.

3. Telegraphs and telephones 🔑34—Uniformity of rates required.

The fact that telegraph companies may initiate rates without filing their tariffs with the

Interstate Commerce Commission, while a railroad rate can only be established by filing the tariff with the Commission, which is merely a matter of procedure, does not show any intention to make a distinction between the requirement of uniformity of rates and service in the transmission of telegrams from the requirement in the carriage of freight.

4. Telegraphs and telephones 🔑54(5)—Limitation of liability on repeated message does not invalidate stricter limitation on unrepeated message.

Even if the limitation of liability of a telegraph company for error in the transmission of a repeated message is invalid, because there is no rate on file at which a message can be transmitted without limitation of liability, that fact does not invalidate the limitation of the telegraph company's liability for the transmission of an unrepeated message to the amount of the toll received by it.

Mr. Justice Pitney and Mr. Justice Clarke dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Esteve Bros. & Co. against the Western Union Telegraph Company. A judgment for plaintiff was affirmed by the Circuit Court of Appeals (268 Fed. 22), and defendant brings certiorari. Reversed.

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*Messrs. Rush Taggart and John G. Milburn, both of New York City, W. B. Spencer, of New Orleans, La., and Francis R. Stark and Joseph L. Egan, both of New York City, for petitioner.

Mr. Monte M. Lemann, of New Orleans, La., for respondent.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

In September, 1917, the Western Union Telegraph Company delivered to Esteve Bros. & Co., at New Orleans, La., an unrepeated cable message from the latter's main office at Barcelona, Spain, directing a sale for future delivery of 2,000 bales of cotton. The message actually sent had directed the sale of 200 bales. The error in transmission resulted in a loss to Esteve Bros. & Co. of $31,095. To recover compensation for this loss they sued the Western Union in a state court of Louisiana. The case was removed to the federal District Court, and there was tried by jury upon these additional stipulated facts:

The message was sent over lines of the Spanish Government Telegraph from Barcelona to Paris and thence over lines of the French government to Havre. There it was delivered to the Western Union, transmitted by its cable to New York City, and thence over its land lines to New Orleans. The error in transmission occurred on these land lines. The charge of $6.60, paid at Barcelona for transmitting the message represented the sum of the local rates on the several connecting lines. The Western Union's share was $4.65, and of this $3.75 was apportioned to the cable system and 90 cents to the land lines. This Western Union rate was established by its tariff of telegraph and cable rates, in force since some time prior to June 18, 1910. Under the act of that date (chapter 309, 36 Stat. 544 [Comp. St. § 8563]), making telegraph and cable companies subject to the Act to Regulate Commerce, this tariff had been filed with the Interstate Commerce Commission in May, 1916, by its permission and pursuant to an appropriate resolution of the company. The tariff so filed embodied the long used classification of messages, rules and regulations, including the provision *569 that the company "shall not *be liable for mistakes * * * in transmission * * * of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to it." The plaintiffs did not in in fact assent to this limitation of liability. They did not, in sending the message at Barcelona, use a blank containing the provisions so limiting liability. They did not have actual knowledge of the resolution of the company or of the filing of the tariffs with the Interstate Commerce Commission.

The plaintiffs contended at the trial that in view of the above facts they were entitled to a verdict for the full amount of their loss. The company contended that, since the message had not been repeated, the verdict should be limited to $4.65, the amount received by it as tolls. A verdict was directed for $31,095, with interest; judgment thereon was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit (268 Fed. 22), and a petition for writ of certiorari was granted (254 U. S. 624, 41 Sup. Ct. 13, 65 L. Ed. —). The sole question presented for our decision is the amount of damages recoverable.

[1] For more than 50 years prior to the transaction here in suit the Western Union had maintained these two classes of rates for general cable and telegraph service. The usual or basic rate was for service practically at the sender's risk; liability being limited to the amount of the toll collected. Another special rate entitled the sender to have the message repeated back to the point of origin and rendered the company liable in case of mistake or nondelivery up to fifty times the amount of the extra charge. The extra charge for this additional service was for telegrams one-half and for cables one-quarter of the basic rate. In Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, decided in 1894, this classification of rates and the limitations upon the company's liability were declared by this court to be reasonable and valid, in the absence of willful misconduct

*570 or gross negligence. The *limitation upon the company's common-law liability was held to be in the nature of contract, and this liability, unlike that of a common carrier, was not an insurer's. It was merely for the damage flowing from failure to use due care in transmission. Primrose v. Western Union Telegraph Co., supra, 154 U. S. 14, 14 Sup. Ct. 1098, 38 L. Ed. 883. Since the limitation of liability was in the nature of contract, the provision had to be brought home to the sender of a message in order to be legally binding upon him. Assent by the sender was ordinarily established, if the message was written upon one of the company's blanks which set forth the limitation of liability. Primrose v. Western Union Telegraph Co., supra, 154 U. S. 25, 14 Sup. Ct. 1098, 38 L. Ed. 883. Compare Cau v. Texas & Pacific Ry. Co., 194 U. S. 427, 431, 24 Sup. Ct. 663, 48 L. Ed. 1053. Whether, in view of long-established practice, the mere sending of a message, although not written on such a blank, imported assent to the usual terms of the rate, involved, then, an issue of fact. See New Jersey Navigation Co. v. Merchant's Bank, 6 How. 344, 383, 12 L. Ed. 465. The question presented for our decision is whether, since the amendment of June 18, 1910, to the Act to Regulate Commerce, the sender is, without assent in fact, bound as matter of law by the provision limiting liability, because it is a part of the lawfully established rate.

[2] The Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544 (Comp. St. § 8563), broadened the scope of the Act to Regulate Commerce to include "telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from [a] state * * * to any foreign country." And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act. Galveston, H. & S. A. Ry. Co. v. Woodbury, 254 U. S. 357, 41 Sup. Ct. 114, 65 L. Ed. ——. In the third paragraph of section 1 of the amended act Congress provided *571 that messages might be "classified *into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rate [might] be charged for the different classes of messages." Acting, in May, 1916, under the authority of that provision, the Western Union by appropriate action approved the tariff involved in the present case, and by permission of the Interstate Commerce Commission filed with it the tariff, including the provisions here in question. The company was not required so to do by the terms of the act or by any order of the Commission. Compare 25th Annual Report I. C. C. (1911) pp. 5, 6. But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. Postal Tel.-Cable Co. v. Warren-Godwin, 251 U. S. 27, 30, 40 Sup. Ct. 69, 64 L. Ed. 118; Clay County Produce Co. v. Western Union Telegraph Co., 44 Interst. Com. Com'n R., 670, 674.

The lawful rate having been established, the company was by the provisions of section 3 of the Act to Regulate Commerce prohibited from granting to any one an undue preference or advantage over the public generally. For, as stated in Postal Tel.-Cable Co. v. Warren-Godwin Co., supra, 251 U. S. 30, 40 Sup. Ct. 70, 64 L. Ed. 118, the "act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates." If the general public upon paying the rate for an unrepeated message accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage extend different treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.

The act of 1910 introduced a new principle into the legal relations of the telegraph *572 companies with their *patrons which dominated and modified the principles previously governing them. Before the act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by Boston & Maine Railroad v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915B, 593, and Galveston, H. & S. A. Ry. Co. v. Woodbury, 254 U. S. 357, 41 Sup. Ct. 114, 65 L. Ed. ——, decided by this court December 13, 1920. In the former case it was said:

> "If the charges filed were unreasonable, the only attack which could be made upon such regulation [limiting liability] would be by pro-

ceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce."

So here the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission.

[3] It is strongly argued that the rule is not applicable to the situation before us, because of the difference in the provisions of law which govern the establishment of railroad and of telegraph rates. The railroad rate is established, and can only be *573 established by filing the tariff with *the Commission. Telegraph companies may initiate rates without filing tariffs with the Commission. Clay County Produce Co. v. Western Union Telegraph Co., supra. Plaintiffs insist that it is the filing and subsequent publication of the railroad rate which gives it the force of law and requires the shipper to take notice of it. But the contention, by dwelling unduly upon the procedural features of the act, would defeat the end which Congress had in view. Both railroad and telegraph-cable rates are initiated by the carrier. It is true that a railroad rate does not have the force of law, unless it is filed with the Commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger. The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in section 3 of the Act to Regulate Commerce (Comp. St. § 8565). Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. Congress apparently concluded, in the light of discrimination theretofore practiced by railroads among shippers and localities, that in transportation by rail equality could be secured only by provisions involving the utmost definiteness and constant official supervision. Accordingly by section 6 (Comp. St. § 8569) it forbade a carrier of goods from engaging in transportation unless its rates had been filed with the Commission; and it prohibited, under heavy penalties, departure in any way from the terms of those rates when filed. In the case of telegraph and cable companies Congress appears to have considered that such stringent provisions were not required to secure the end in view. It did not make filing with the Commission a condition precedent to the existence of a lawful telegraph and cable rate. When, therefore, the Western Union initiated and established this *574 *reasonable rate, the principle of equality and uniformity laid down in section 3 required that it should have exactly the same force and effect as the rate initiated by a rail carrier and filed according to the provisions of section 6.

[4] It was suggested that the attempted limitation of liability must fail under the rule recently applied in Union Pacific Railroad Co. v. Burke, 255 U. S. 317, 41 Sup. Ct. 283, 65 L. Ed. 656, decided February 28, 1921, because both the alternative rates offered in the Western Union tariff for cable messages were for limited liability, and because, therefore, no offer was made to the sender of a rate under which the company would assume full liability for all losses suffered through its negligence. It is by no means clear that the rule of the Burke Case—established for common carriers of goods—should be applied to telegraph and cable companies. See the Primrose Case, supra, 154 U. S. 14, 14 Sup. Ct. 1098, 38 L. Ed. 883. In any event, it is not applicable here. The Western Union did not, as in the case of telegrams, offer to send cable messages upon a special valuation to be made by the sender and paid for by an extra charge "based upon such value equal to one-tenth of 1 per cent. thereof." But it offered alternative rates for repeated and for unrepeated cable messages. This long-established classification was expressly recognized as just and reasonable for cable as well as for telegraph messages in the amendment made by the Act of June 18, 1910, to section 1 of the Act to Regulate Commerce. The provision in the terms offered by the company is:

> "To guard against mistakes or delays the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one quarter of the unrepeated message rate is charged in addition. Unless indicated on its face this is an unrepeated message and paid for as such.
>
> "* * * This company shall not be liable for mistakes or delays in transmission or delivery * * * of any un*575 *repeated message, beyond the amount of that portion of the tolls which shall accrue to this company, * * * [nor] of an repeated message, beyond fifty times the extra sum received by this company from the sender for repeating such message over its own lines. * * *"

The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it.

Reversed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent.

(256 U. S. 490)

In re STATE OF NEW YORK et al.

Petition of WALSH et al.

(Argued Dec. 13 and 14, 1920. Decided June 1, 1921.)

No. 25.

1. Prohibition 🔑3(2) — Remedy by appeal does not always prevent writ against proceedings without jurisdiction.

The fact that the objection to the jurisdiction of a court of admiralty might be raised by appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, under the authority conferred on the Supreme Court by Judicial Code, § 234 (Comp. St. § 1211), in cases of admiralty and maritime jurisdiction, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction.

2. States 🔑191(1) — State cannot be sued without its consent.

The entire judicial power granted by the United States Constitution does not embrace authority to entertain a suit by private parties against the state without the consent of the state, whether it is brought by citizens of another state or by subjects of a foreign state, in which case it is contrary to the Eleventh Amendment, or is brought by its own citizens, contrary to the fundamental rule that a state may not be sued without its consent.

3. States 🔑191(2)—Rule against suit without consent applies to admiralty suits in personam.

The rule that a state may not be sued without its consent applies to an admiralty suit in personam, though the Eleventh Amendment in terms refers only to actions at law and suits in equity.

4. States 🔑191(2)—Suit against officers for official acts is suit against state.

A suit brought against the state officers as representing the state's action and liability, thus making it the real party in interest, is a suit against the state, which cannot be maintained without its consent, though the state is not a party to the record, and though the object of the suit is not to compel the state specifically to perform its contract, but is to require it to make pecuniary satisfaction for liability.

5. States 🔑191(2)—Suit in admiralty against state superintendent of public works for damages caused by navigation of tug by him is a suit against the state.

A monition issued by an admiralty court against a state superintendent of public works under the fifty-ninth (now fifty-sixth) admiralty rule, as the charterer of the tugs against which a libel had been filed to recover damages resulting from a collision between their tows, is equivalent to a libel in personam against the state, over which the District Court is so clearly without jurisdiction that a writ of prohibition will issue without permitting the suits to run their course to final decree, which would be necessarily invalid.

6. States 🔑191(2) — Exemption of states from libels in personam does not destroy harmony of law.

The contention that exemption of states from libels in admiralty without their consent would destroy the harmony and symmetry of admiralty law is without substance, since the symmetry and harmony to be maintained consists in the uniform operation of the principles and rules of the maritime law on all who are subject to the jurisdiction of admiralty.

On Petition for Writs of Prohibition and Mandamus.

Petition by the State of New York and Edward S. Walsh, as its superintendent of Public Works, for writs of prohibition and mandamus, directed to the United States District Court (268 Fed. 561). Writ of prohibition issued.

See, also, 256 U. S. 503, 41 Sup. Ct. 592, 65 L. Ed. —; 41 Sup. Ct. 622.

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*Mr. Edward G. Griffin, of Albany, N. Y., for petitioners.

Mr. Ellis H. Gidley, of Buffalo, N. Y., for respondent.

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*Mr. Justice PITNEY delivered the opinion of the Court.

Three separate libels in rem were filed in the United States District Court for the *495 Western District of New *York—two against the steam tug Charlotte, her engines, boilers, machinery, etc., by one Dolloff and one Wagner, respectively, both residents and presumably citizens of the state of New York, to severally recover for damages alleged to have been caused to certain canal boats owned by them while navigated upon the Erie Canal in tow of the Charlotte; the other against the steam tug Henry Koerber, Jr., her boilers, engines, tackle, etc., by Murray Transportation Company, a corporation of the state of New York, bailee of a certain coal barge, to recover damages alleged to have been received by the barge while navigated upon the Erie Canal in tow of the Koerber. In each case the tug was claimed by Frank F. Fix and Charles Fix, partners in business under

the name of Fix Bros., of Buffalo, N. Y., and released from arrest on the filing of satisfactory stipulations. Claimants filed answers to the several libels, and at the same time filed petitions under admiralty rule 59, 29 Sup. Ct. xxii (new rule 56, 40 Sup. Ct. xxi), setting up in each case that at the time of the respective disasters and damage complained of the tugs were under charter by claimants to Edward S. Walsh, superintendent of public works of the state of New York, who had entered into such charter parties under authority reposed in him by an act of the Legislature of the state of New York, being chapter 264 of the Laws of 1919, and had the tugs under his operation, control, and management; that if decrees should be ordered in the respective causes against the tugs the claimants, because of their ownership of the vessels, would be called upon for payment, and thus would be mulcted in damages for the disasters, to which they were total strangers; and that by reason of these facts Edward S. Walsh, superintendent of public works of the state of New York, ought to be proceeded against in the same suits for such damages in accordance with the rule. The District Court, pursuant to the prayer of these petitions, caused monitions to be
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issued in all *three cases against Edward S. Walsh, superintendent of public works, citing him to appear and answer, and in case he could not be found that "the goods and chattels of the state of New York used and controlled by him" should be attached. The monitions were served upon Walsh within the jurisdiction of the court.

The Attorney General of the state appeared in all three cases specially in behalf of the state and the people thereof, and of Walsh, and filed a suggestion that the court was without jurisdiction to proceed against Walsh, as superintendent of public works, for the reason that, as appeared upon the face of the proceedings, they were suits against the state of New York in which the state had not consented to be sued. The District Court denied motions to dismiss the monitions (The Henry Koerber, Jr. [D. C. N. Y.] 268 Fed. 561), whereupon the Attorney General, on behalf of the state and the people thereof, and of Walsh, as superintendent and individually, under leave granted, filed in this court a petition for writs of prohibition and mandamus. An order to show cause was issued, to which the District Judge made a return, and upon this and the proceedings in the District Court the matter has been argued.

The record shows that the charters had expired according to their terms, and the tugs were in possession of the claimants, neither the state nor Walsh having any claim upon or interest in them. At no time has any res belonging to the state or to Walsh, or in which they claim any interest, been attached or brought under the jurisdiction of the District Court. Nor is any relief asked against Mr. Walsh individually; the proceedings against him being strictly in his capacity as a public officer.

[1] The power to issue writs of prohibition to the District Courts when proceeding as courts of admiralty and maritime jurisdiction is specifically conferred upon this court by section 234, Judicial Code (Act March 3, 1911,
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c. 231, 36 *Stat. 1087, 1156 [Comp. St. § 1211]). And the fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction. In re Cooper, 143 U. S. 472, 495, 12 Sup. Ct. 453, 36 L. Ed. 232.

[2] That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification. Beers v. Arkansas, 20 How. 527, 529, 15 L. Ed. 991; Railroad Co. v. Tennessee, 101 U. S. 337, 339, 25 L. Ed. 960; Hans v. Louisiana, 134 U. S. 1, 10–17, 10 Sup. Ct. 504, 33 L. Ed. 842; North Carolina v. Temple, 134 U. S. 22, 30, 10 Sup. Ct. 509, 33 L. Ed. 849; Fitts v. McGhee, 172 U. S. 516, 524, 19 Sup. Ct. 269, 43 L. Ed. 535; Palmer v. Ohio, 248 U. S. 32, 34, 39 Sup. Ct. 16, 63 L. Ed. 108; Duhne v. New Jersey, 251 U. S. 311, 313, 40 Sup. Ct. 154, 64 L. Ed. 280.

[3] Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule. It is true the amendment speaks only of suits in law or equity; but this is because, as was pointed out in Hans v. Louisiana, supra, the amendment was the outcome of a purpose to set aside the effect of the decision of this court in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, which happened to be a suit at law brought against the state by a citizen of another state, the decision turning upon the construction of that clause of section 2 of article 3 of the Constitution establishing the judicial power in cases in
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law and equity between a state *and citizens of another state, from which it naturally came to pass that the language of the amendment was particularly phrased so as to reverse the construction adopted in that case. In Hans v. Louisiana, supra, 134 U. S. 15, 10 Sup. Ct. 504, 33 L. Ed. 842, the court dem-

onstrated the impropriety of construing the amendment so as to leave it open for citizens to sue their own state in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a state in the admiralty jurisdiction by individuals, whether its own citizens or not.

Among the authorities to which we are referred is Mr. Justice Story, who, in his commentaries on the Constitution (1st Ed., § 1683; 5th Ed., § 1689), stated that it had been doubted whether the amendment extended to cases of admiralty and maritime jurisdiction where the proceeding was in rem and not in personam, and whose doubt was supported by a declaration proceeding from Mr. Justice Washington at the circuit. United States v. Bright (1809) Brightly, N. P. 19, 25, note, 24 Fed. Cas. 1232, 1236, No. 14,647, 3 Hall's L. J. 197, 225. But the doubt was based upon considerations that were set aside in the reasoning adopted by this court in Hans v. Louisiana. In Governor of Georgia v. Madrazo, 1 Pet. 110, 124, 7 L. Ed. 73, the question whether the Eleventh Amendment extended to proceedings in admiralty was alluded to, but found unnecessary to be decided, because, if it did not, the case was one for the original jurisdiction of this court and not of the District Court in which it was brought; and it was held, further, that the decree could not be sustained as a proceeding in rem, because the thing was not in possession of the District Court. Subsequently, in Ex parte Madrazzo, 7 Pet. 627, 632, 8 L. Ed. 808, an application was made to this court to entertain a suit in admiralty against the state of Georgia, and it was held that as there was no property in the custody of the court of admiralty, or brought within its jurisdiction and in the possession of any private person, *499 *the case was not one for the exercise of the admiralty jurisdiction, and that, being a mere personal suit against a state to recover proceeds in its possession, it could not be entertained, since "no private person has a right to commence an original suit in this court against a state." Atkins v. Disintegrating Co., 18 Wall. 272, 300, et seq., 21 L. Ed. 841, and In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991, are aside from the point, since they relate merely to a question of statutory construction—whether the provision of section 11 of the Judiciary Act of 1789 (1 Stat. 79, c. 20, reenacted in section 739 of the Revised Statutes, and in section 1 of Act March 3, 1875, c. 137, 18 Stat. 470 [Comp. St. § 1033]), to the effect that no civil suit should be brought against a person by original process in any district other than that of which he was an inhabitant or in which he should be found, applied to suits in personam in admiralty, so as to prevent the court from acquiring jurisdiction over a corporation through attachment of its goods or property in a district other than that of its residence (in the former case), or by service of process upon its appointed agent (in the latter).

Much reliance is placed upon Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. But that dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant, and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case. Thus at page 566 of 179 U. S., at page 217 of 21 Sup. Ct. (45 L. Ed. 314):

> "The contention is, although the corporation *had general capacity to stand in judgment*, and was therefore *subject to the process* of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law," etc. "But the maritime law affords no justification for this contention, and no example is found in such law, where one who is *subject to suit and amenable to process* is allowed to es- *500 *cape liability for the commission of a maritime tort, upon the theory relied upon."

We repeat, the immunity of a state from suit in personam in the admiralty brought by a private person without its consent, is clear.

[4] As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (Osborn v. U. S. Bank, 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record (Louisiana v. Jumel, 107 U. S. 711, 719, 720, 723, 727–728, 2 Sup. Ct. 128, 27 L. Ed. 448; Hagood v. Southern, 117 U. S. 52, 67, et seq., 6 Sup. Ct. 608, 29 L. Ed. 805; In re Ayers, 123 U. S. 443, 487–492, 8 Sup. Ct. 164, 31 L. Ed. 216; Pennoyer v. McConnaughy, 140 U. S. 1, 10, et seq., 11 Sup. Ct. 699, 35 L. Ed. 363; Smith v. Reeves, 178 U. S. 436, 438–440, 20 Sup. Ct. 919, 44 L. Ed. 1140; Murray v. Wilson Distilling Co., 213 U. S. 151, 168–170, 29 Sup. Ct. 458, 53 L. Ed. 742; Lankford v. Platte Iron Works, 235 U. S. 461, 469, 35 Sup. Ct. 173, 59 L. Ed. 316).

Thus examined, the decided cases have fallen into two principal classes, mentioned in Pennoyer v. McConnaughy, 140 U. S. 1, 10, 11 Sup. Ct. 608 (35 L. Ed. 363):

> "The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts [citing cases]. The other class is where a suit is brought against defendants who, claiming to act

as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state."

The first class, in just reason, is not confined to cases where the suit will operate so

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as to com*pel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. Smith v. Reeves, 178 U. S. 436, 439, 20 Sup. Ct. 919, 44 L. Ed. 1140.

[5] As has been shown, the proceedings against which prohibition is here asked have no element of a proceeding in rem, and are in the nature of an action in personam against Mr. Walsh, not individually, but in his capacity as superintendent of public works of the state of New York. The office is established and its duties prescribed by the Constitution of the state. Article 5, § 3. He is "charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals," with exceptions not material. By chapter 264 of the Laws of 1919, effective May 3, the superintendent is authorized to provide such facilities as in his judgment may be necessary for the towing of boats on the canals of the state, the towing service to be furnished under such rules and regulations as he shall adopt, and for that service he is authorized to impose and collect such fees as in his judgment may seem fair and reasonable; the moneys so collected to be deposited by him in the state treasury. For the carrying into effect of this act the sum of $200,000 was appropriated. Under these provisions of law Mr. Walsh, as superintendent of public works, chartered the tugs Henry Koerber, Jr., and Charlotte, in the name and behalf of the people of the state of New York, for periods beginning May 15 and ending at latest December 15, 1919, and it was under these charters that they were being operated when the disasters occurred upon which the libels are founded and the petitions under rule 59 are based. The decrees sought would affect Mr. Walsh in his official capacity, and not otherwise. They might be satisfied out of any property of the state of New York in his hands as superintendent of public works, or made a basis for charges upon the treas-

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ury of the state under *section 46 of the Canal Law (Consol. Laws 1909, p. 264), which provides that the commissioners of the canal fund may allow claims for moneys paid by the superintendent of public works or other person or officer employed in the care, management, superintendence, and repair of the canals for a judgment recovered against them or any of them in any action instituted for an act done pursuant to the provisions of the canal law. In either case their effect, whether complete or not, would expend itself upon the people of the state of New York in their public and corporate capacity. Section 47 of the Canal Law provides for an action before the Court of Claims for certain kinds of damages arising from the use or management of the canals; but in terms it is provided that this "shall not extend to claims arising from damages resulting from the navigation of the canals." There is no suggestion that the superintendent was or is acting under color of an unconstitutional law, or otherwise than in the due course of his duty under the Constitution and laws of the state of New York. In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the state of New York, and therefore—since no consent has been given—beyond the jurisdiction of the courts of the United States.

[6] There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in Workman v. New York City, 179 U. S. 552, 557–560, 21 Sup. Ct. 212, 45 L. Ed. 314; Southern Pacific Co. v. Jensen, 244 U. S. 205, 215, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Union Fish Co. v. Erickson, 248 U. S. 308, 313, 39 Sup. Ct. 112, 63 L. Ed. 261; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 160, 40 Sup. Ct. 438, 64 L. Ed. 834. The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law

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*as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 382, 384, 38 Sup. Ct. 501, 62 L. Ed. 1171. It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

The want of authority in the District Court to entertain these proceedings in personam under rule 59 (now 56) brought by the claimants against Mr. Walsh as superintendent of public works of the state of New York is so clear, and the fact that the proceedings are in essence suits against the state without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile result, the writ of prohibition should be issued as prayed. Ex parte Simons, 247 U. S. 231, 239, 38 Sup. Ct. 497, 62 L. Ed. 1094; Ex parte Peterson, 253 U. S. 300, 305, 40 Sup. Ct. 543, 64 L. Ed. 919.

Rule absolute for a writ of prohibition.

(256 U. S. 503)

In re STATE OF NEW YORK et al.

THE QUEEN CITY.

(Argued Dec. 14, 1920. Decided June 1, 1921.)

No. 26.

1. Evidence 🔑383(4)—Verified suggestion by state Attorney General that vessel seized is property of the state establishes that fact.

A verified suggestion by the Attorney General of the state that a vessel seized under process of the admiralty court was the absolute property of the state is sufficient to establish that fact, at least in the absence of a specific denial of such ownership.

2. Admiralty 🔑43 — State-owned vessel is exempt from seizure on libel in rem.

A vessel absolutely owned by the state and used by it in the performance of its governmental functions is exempt from seizure on process issued on a libel in rem by an admiralty court, even though the rule exempting war vessels of a friendly power from such seizure, based on international law of comity, is limited to war vessels.

On Petition for Writs of Prohibition and Mandamus.

Petition for writs of prohibition and mandamus by the State of New York and others, as owners of the steam tug Queen City. Writ of prohibition granted.

See, also, 256 U. S. 490, 41 Sup. Ct. 588, 65 L. Ed. ——.

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*Mr. Edward G. Griffin, of Albany, N. Y., for petitioners.

Mr. Irving W. Cole, of Buffalo, N. Y., for respondent.

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*Mr. Justice PITNEY delivered the opinion of the Court.

In October, 1920, Martin J. McGahan and another, as administrators of Evelyn McGahan, deceased, filed a libel in admiralty in the District Court of the United States for the Western District of New York against the steam tug Queen City, her tackle, apparel, and furniture, to recover damages alleged to have been sustained through the death of deceased by drowning, due to the negligent operation of the Queen City upon the Erie Canal, in said district. The Attorney General of the state of New York appeared specially for the purpose of questioning the jurisdiction of the court, and filed a verified suggestion of the want of such jurisdiction over the Queen City, for the reason that at all times mentioned in the libel and at present she was the absolute property of the state of New York, in its possession and control, and employed in the public service of the state for governmental uses and purposes, and, at the times mentioned in the libel, was authorized by law to be employed only for the public and governmental uses and purposes of the state of New York; such purposes being the repair and maintenance of the improved Erie Canal, a public work owned and operated by the state, and particularly the towing of dredges, the carrying of material and workmen, the towing of barges and vessels containing material, and the setting, replacing, and removing of buoys and safety devices. He prayed that the vessel be declared immune from process and free from seizure and attach-

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ment, and *that the libel and all proceedings thereunder be dismissed for want of jurisdiction.

The District Court overruled the suggestion and awarded process in rem, under which the Queen City was arrested. Thereupon the Attorney General, in behalf of the state, filed in this court, under leave granted, a petition for a writ of prohibition to require the District Court to desist from further exercise of jurisdiction and for a mandamus to require the entry of an order declaring the Queen City to be immune from arrest. An order to show cause was issued, to which the District Judge made return, embodying by reference the admiralty proceedings; and the matter was argued together with No. 25, original, Ex parte New York et al., Petitioners, 256 U. S. 490, 41 Sup. Ct. 588, 65 L. Ed. ——, just decided.

[1] To the suggestion that the Queen City is the property of the state of New York, in its possession and control and employed in its public governmental service, it is objected at the outset that the record and proceedings in the suit in admiralty do not disclose the identity of the owner of the vessel or that she was employed in the governmental service of the state. We deem it clear, however, that the verified suggestion presented by the Attorney General of that state, in his official capacity as representative of the state and the people thereof, amounts to an official certificate concerning a public matter presumably within his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge. The suggestion was overruled and denied, with costs, and process thereupon ordered to issue against the vessel, without any intimation that there was doubt about the facts stated in the suggestion, or opportunity given to verify them further. It would be an unwarranted aspersion upon the honor of a great state to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court,

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as now requiring *verification. In re Muir, Master of the Gleneden, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. ——, decided January 17, 1921, differs widely, for there the suggestion that the vessel was exempt because of its ownership and character came not through official channels, but from private counsel appearing as amici curiæ, who, on being challenged to submit proof in support of the allegations in the suggestion, refused to do so. Of course, there were other and more fundamental differences; but it is the one mentioned that especially concerns us upon the question of practice.

[2] Accepting, as we do, the facts stated in the suggestion of the Attorney General, the record—aside from whether a suit in admiralty brought by private parties through process in rem against property owned by a state is not in effect a suit against the state, barred by the general principle applied in Ex parte New York, No. 25, original—presents the question whether the proceeding can be based upon the seizure of property owned by a state and used and employed solely for its governmental uses and purposes.

By the law of nations, a vessel of war owned by a friendly power and employed in its service will not be subjected to admiralty process; and this upon general grounds of comity and policy. Schooner Exchange v. M'Faddon, 7 Cranch, 116, 144–147, 3 L. Ed. 287. In a case before Judge Francis Hopkinson in the admiralty court of Pennsylvania in 1781, on a plea to the jurisdiction, it was adjudged that marines enlisting on board a ship of war or vessel belonging to a sovereign independent state could not libel the ship for their wages. Moitez v. The South Carolina, Bee, 422, Fed. Cas. No. 9,697. The question whether by international law the rule of The Exchange is to be applied to other kinds of public vessels owned or controlled by friendly powers (see The Parlement Belge [1880] L. R. 5 Prob. Div. 197), was stirred in In re Muir, supra, but found unnecessary to be decided. It does not now press for solution; for, aside from the obligations of inter*national law, though upon principles somewhat akin, it is uniformly held in this country that even in the case of municipal corporations, which are not endowed with prerogatives of sovereignty to the same extent as the states by which they are created, yet because they exercise the powers of government for local purposes, their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. As Mr. Chief Justice Waite said, speaking for this court in Klein v. New Orleans, 99 U. S. 149, 150, 25 L. Ed. 430:

"To permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself."

The rule was applied in the admiralty by the same learned Chief Justice, sitting on appeal at the circuit, in The Fidelity, 16 Blatch. 569, Fed. Cas. No. 4,758, upon a well-considered opinion. To the same effect, The Seneca (1876) Fed. Cas. No. 12,668; Long v. The Tampico (1883, D. C.) 16 Fed. 491, 494; The Protector (1884, C. C.) 20 Fed. 207; The F. C. Latrobe (1886, D. C.) 28 Fed. 377, 378; The John McCraken (D. C.) 145 Fed. 705, 706.

The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state used and employed for public and governmental purposes.

Upon the facts shown, the Queen City is exempt, and the prohibition should be issued.

Rule absolute for a writ of prohibition.

(256 U. S. 554)

MISSOURI PAC. R. CO. et al. v. AULT.

(Argued and Submitted March 22, 1921. Decided June 1, 1921.)

No. 252.

1. Railroads 🔑5½, New, vol. 6A Key-No. Series—Companies not liable at common law for acts of federal Director General.

The corporations owning a railroad are not liable at common law for any of the acts of the Director General of Railroads during the time the roads were in control of the federal government under the President's proclamation pursuant to Act Aug. 29, 1916 (Comp. St. § 1974a), confirmed by Federal Control Act March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), during which time the corporations were completely separated from the control and management of their railroad systems.

2. Railroads 🔑5½, New, vol. 6A Key-No. Series—Companies not liable under Federal Control Act for acts of Director General; "carriers."

Within Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), making carriers under federal control subject to all laws and liabilities as common carriers the term "carriers" was used as meaning the transportation systems, as distinguished from the corporations owning or operating them, which is its meaning in common speech, as well as the meaning given by section 1 of the Federal Control Act (section 3115¾a), so that section 10 does not make the companies owning the railroads liable as such for acts of the employees of the Director General during the period of federal control.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.]

3. Railroads 🔑5½, New, vol. 6A Key-No. Series—Executive order authorizing substitution of Director General as defendant authorized.

Since the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p) did not impose liability on the companies in any cause of action arising out of the operation of their systems by the government, the provision in the Director General's Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending, was within his power, and a judgment against a railroad company after the refusal of such substitution must be reversed.

4. Railroads 🔑5½, New, vol. 6A Key-No. Series—Suit for penalty under state law not authorized by Federal Control Act.

The provision of Federal Control Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), subjecting carriers under federal control to all loss and liabilities as common carriers, whether arising under state or federal laws or at common law, merely gave the consent of Congress that the United States, through its Director General, might be sued to recover compensation for injuries sustained by any person through the operation of the carriers, but did not give consent to a suit for the enforcement of a state law imposing a penalty on the carrier for violation by its employee of Kirby's Dig. Ark. § 6649, as amended by Acts 1905, p. 537, imposing a penalty of double wages for failure to pay a discharged employee within the time fixed.

5. Courts 🔑371(9)—Whether double wages imposed by state law on Director General is a penalty is a question of federal law not controlled by state decision.

The question whether the right to recover double wages from a railway company which failed to pay wages within the time after a discharge fixed by Kirby's Dig. Ark. § 6649, as amended by Acts 1905, p. 537, in a proceeding brought against the Director General, is a question of federal law, not of state law, so that the federal courts are not bound by the decision of the Supreme Court of the state that it was not technically a penalty.

In Error to the Supreme Court of the State of Arkansas.

Action by H. A. F. Ault against the Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads. A judgment for plaintiff was affirmed by the Supreme Court of Arkansas (140 Ark. 572, 216 S. W. 3), and defendants bring error. Reversed and writ of certiorari denied.

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*Mr. Robert E. Wiley, of Little Rock, Ark., for plaintiffs in error.

Mr. Frank Pace, of Little Rock, Ark., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an employee, with or without cause, it shall pay him his full wages within seven days thereafter and that if payment is not duly made "then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid." Kirby's Digest, § 6649, as amended by Act of 1905, No. 210. Proceeding under this statute, in August, 1918, Ault brought suit before

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a justice of the peace against the *Missouri Pacific Railroad Company, alleging that he had been employed by the company at the rate of $2.50 per day, that he had been discharged on July 29, 1918, and that $50 was then due him as wages but had not been paid. He recovered judgment by default. The company appealed to the Circuit Court and there moved, in January, 1919, to substitute as defendant the Director General of Railroads. This substitution the court refused to make; but it joined the Director General as defendant and entered judgment against both him and the company upon a verdict that Ault recover the sum of $50 as debt and $390 as penalty. That judgment was affirmed by the Supreme Court of Arkansas. 140 Ark. 572, 216 S. W. 3.

The President had taken possession and control of the Missouri Pacific Railroad on December 28, 1917, pursuant to the proclamation of December 26, 1917, 40 Stat. 1733, under the Act of August 29, 1916, c. 418, 39 Stat. 619, 645 (Comp. St. § 1974a).[1] He was operating it through the Director General under the Federal Control Act (Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p]) when Ault was employed, when he was discharged and when the judgment under review was entered. See Transportation Act 1920, Act of February 28, 1920, c. 91, 41 Stat. 456. The company had claimed seasonably that under the acts of Congress it could not be held liable either for the wages or the penalty and that, if the state and federal statutes should be construed as creating such liability, they were in that respect void as to it under the federal Constitution. The Director General did not contest liability for wages actually due, *but claimed that under the legislation of Congress he was not liable for the penalty and that the state statute as applied to him was void under the federal Constitution. The claims of both defendants having been denied by the highest court of the state, they brought the case here by writ of error.

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[1] First. The company is clearly not answerable in the present action if the ordinary principles of common law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner companies, but by means of a Director General through "one control, one

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[1] "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." 40 Stat. 645.

administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing." Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 505 (63 L. Ed. 897). This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing proclamation of March 29, 1918, 40 Stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were "required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration." U. S. R. R. Adm. Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, § 5; page 198 et seq.; page 330 et seq. It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner companies as their interest in and control over the systems were completely suspended.

[2] The contention that the company is *558 liable for acts or *omissions of the Director General in operating the Missouri Pacific Railroad rests wholly upon the following provision of section 10 of the Federal Control Act (section 3115¾j):[2]

> "That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. * * * But no process, mesne or final, shall be levied against any property under such federal control."

It is urged that, since section 10, in terms, continues the liability of "carriers while under federal control" and permits suit against them, it should be construed as subjecting the companies to liability for acts or omissions of the Railroad Administration although they are deprived of all power over the properties and the personnel. And it is said that this construction would not result in hardship upon the companies since the just compensation provided by the act would include *559 any loss from judg*ments of this sort. Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. United States v. Delaware & Hudson Co., 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. There is none such here.

The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control.

This purpose Congress accomplished by providing that "carriers while under federal control" should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore. Here the term "carriers" was used as it is under*560 stood in common *speech; meaning the transportation systems as distinguished from the corporations owning or operating them. Congress had in section 1 (section 3115¾a) declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such (Bull. No. 4, p. 113). Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, Id. p. 170. Each federal treasurer was to deal with the finances of a single system; his bank account was to be designated "(Name of Railroad), Federal Account." General Order No. 37, Id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, Id. pp. 198, 200. And throughout the orders and circulars there are many such expressions as "two or more railroads or boat lines under federal control." See General Order No. 11, Id. p. 170.[3] It is this conception of a transportation system as an entity which dominates section 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the *561 liability of the transportation *system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

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[2] The provision in section 10 concerning suits is in substance the same as that contained in the following paragraph of the proclamation of the President of December 26, 1917:

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

Thus, under section 10, if the cause of action arose prior to governmental control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial.[4] If the cause of action arose while the government was operating the system, the "carrier while under federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See Gracie v. Palmer, 8 Wheat. 605, 632–633, 5 L. Ed. 696. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the government liable. It doubtless seemed, as suggested in McNulta v. Lochridge, 141 U. S. 327, 331, 332, 12 Sup. Ct. 11, 35 L. Ed. 796, that suit should be brought against the transportation company "by name 'in the hands of' or 'in the possession of' a receiver," or Director General. All doubt as to how suit *562 should be brought was cleared *away by General Order No. 50 which required that it be against the Director General by name.[5]

[2] As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the government, the provision in Order No. 50 authorizing the substitution of the Director General as defendant in suits then pending within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted; and the judgment against it should, therefore, be reversed.[6]

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[3] By section 12 of the act (section 3115¾l) receipts from the operation of each carrier are the property of the United States and, unless otherwise directed by the President, they are to be kept in the custody of the same officers and accounted for in the same way as before federal control. Disbursements are to be made from this fund without appropriation in the manner provided by the accounting regulations of the Interstate Commerce Commission. Under those regulations judgments for damages are chargeable to the operation of the railroad and are payable out of the general receipts.

[4] Muir v. Louisville & Nashville R. Co. (D. C.) 247 Fed. 888; Wainwright v. Pennsylvania R. Co. (D. C.) 253 Fed. 459; Di Tommaso v. Railroad Co., 28 Pa. Dist. R. 473; Bolton v. Hines (Ark.) 221 S. W. 459; Le Clair v. Montpelier, etc., R. Co., 93 Vt. 92, 106 Atl. 587; Benjamin Moore & Co. v. Atchison, T. & S. F. R. Co., 106 Misc. Rep. 58, 174 N. Y. Supp. 60; Special Rules of Practice During Federal Control, 50 Interst. Com. Com'n R. 797, 798.

[5] "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures. * * *

"The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom."

[6] The great weight of authority in the federal courts is in favor of this view. See Rutherford v. Union Pacific Ry. Co. (D. C.) 254 Fed. 880; Dahn v. McAdoo (D. C.) 256 Fed. 549; Id. (C. C. A.) 267 Fed. 105; Mardis v. Hines (D. C.) 258 Fed. 945; Id. (C. C. A.) 267 Fed. 171; Hatcher & Snyder v. Railroad (D. C.) 258 Fed. 952; Haubert v. B. & O. R. Ry. Co. (D. C.) 259 Fed. 361; Nash v. Southern Pacific Co. (D.C.) 260 Fed. 280; Westbrook v. Director General (D. C.) 263 Fed. 211; Blevins v. Hines (D. C.) 264 Fed. 1005; Erie R. Co. v. Caldwell (C. C. A.) 264 Fed. 947; Pullman Co. v. Sweeney (C. C. A.) 269 Fed. 764; Hines v. Smith (C. C. A.) 270 Fed. 132. Contra, Jensen v. Lehigh Valley Ry. Co. (D. C.) 255 Fed. 795; Johnson v. McAdoo (D. C.) 257 Fed. 757; Dampskibs v. Hustis (D. C.) 257 Fed. 862; The Catawissa (D. C.) 257 Fed. 863.

The cases in the state courts show a considerable diversity of view. See Commonwealth v. Louisville & Nashville R. Co., 189 Ky. 309, 224 S. W. 847; McGrath v. Northern Pacific Ry. Co. (N. D.) 177 N. W. 383; Peacock v. Detroit, etc., Ry. Co., 208 Mich. 403,

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[4] *Second. The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute is rested specifically upon the clause in section 10 to the effect that the carriers "shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law," and the provision in section 15 (section 3115¾o) that the "lawful police regulations of the several states" shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and federal, which prescribed how the duty of a common carrier by railroad should be performed and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of the operation of the railroad were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed. The government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish *564 it. Congress is *not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the government's railway employees. The Director General adopted a much more effective and direct method:

> "Now that the railroads are in the possession and control of the government, it would be futile to impose fines for violations of said laws and orders upon the government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for willful and inexcusable violations thereof upon the person or persons responsible therefor." General Order No. 8, Id. p. 167.

The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order:

> "Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

[5] Wherever the law permitted compensatory damages they may be collected against the carrier while under federal control. Such damages may reasonably include interest and costs. See Hines v. Taylor (Fla.) 84 South. 381. But double damages, penalties and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See Hines v. Taylor, supra; Jackson-Tweed Lumber Co. v. Southern Ry. Co., 113 S. C. 236, 101 S. E. 924. The amount recovered in the present case over and above the wages due and unpaid with interest is in the nature of a punishment. It is called a penalty in the state statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring:

> "It is allowed for a double purpose, as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the *565 elements *and serves all the purposes of exemplary damages." Leep v. Railway, 58 Ark. 407, 440, 441, 25 S. W. 75, 85 (23 L. R. A. 264, 41 Am. St. Rep. 109).

But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of state, but of federal law. Whatever name be applied, the element of punishment clearly predominates and Congress has not given its consent that suits of this character be brought against the United States. The judgment against the Director General, so far as it provided for recovery of the penalty, was erroneous.

The case is properly here on writ of error. The petition for writ of certiorari, consideration of which was postponed to the hearing on the merits, is therefore denied.

Judgment reversed.

(256 U. S. 565)

NORFOLK-SOUTHERN R. CO. v. OWENS.

(Argued March 17, 1921. Decided June 1, 1921.)

No. 223.

On writ of Certiorari to the Supreme Court of the State of North Carolina.

Action by M. R. Owens against the Norfolk-Southern Railroad Company. A judgment for plaintiff was affirmed by the Supreme Court of North Carolina (178 N. C. 325, 100 S. E. 617), and defendant brings certiorari. Reversed.

Mr. W. B. Rodman, of Norfolk, Va., for petitioner.

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*Mr. Justice BRANDEIS deivered the opinion of the Court.

This case comes here on writ of certiorari (251 U. S. 550, 40 Sup. Ct. 342, 64 L. Ed. 409) to the Supreme Court of North Carolina, which affirmed (Owens v. Hines, 178 N. C. 325, 100 S. E. 617) a judgment of $21 against the Nor-

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175 N. W. 580, 8 A. L. R. 964; Castle v. Southern Ry. Co., 112 S. C. 407, 99 S. E. 846, 8 A. L. R. 959; Robinson v. Railroad Co. (Ga.) 102 S. E. 532; Galveston, etc., Railroad v. Wurzbach (Tex. Civ. App.) 219 S. W. 252. Contra, Railroad Co. v. Jobe, 122 Miss. 696, 84 South. 910; Rinquist v. Railroad, 145 Minn. 147, 176 N. W. 344.

folk-Southern Railroad Company in favor of Owens, a shipper. The amount was assessed under a statute of the state as a penalty for undue delay in making delivery of an intrastate shipment made March 27, 1918. At that time the railroad was in the possession and control of the government, and was being operated by the Director General under the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p). The only question presented for decision is whether the company was liable for the penalty. We are of opinion that it was not, for the reasons stated in Missouri Pacific Railroad Co. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. —, decided this day.

Reversed.

(256 U. S. 662)

WESTERN UNION TELEGRAPH CO. v. POSTON.

(Argued Oct. 20, 1920. Decided June 6, 1921.)

No. 293.

1. **Telegraphs and telephones 🔑26¾, New, vol. 7A Key-No. Series—Not liable under common law for negligence during federal control.**

Under the joint resolution authorizing the President to take possession and control of any telegraph system, and the President's proclamation taking such possession and control, a telegraph company is not liable under the common law for damages caused by negligent delay in the transmission of a message while its system was under the government control.

2. **Telegraphs and telephones 🔑26¾, New, vol. 7A Key-No. Series—Federal control did not make companies operating agents of government.**

The provisions of the proclamation of the President taking possession and control of the telegraph system, that such systems should continue to be operated by the owners, managers, directors, officers, and employees in the names of their respective companies, and the Postmaster General's orders to the same effect, did not make the companies the operating agents of the United States, so as to render them liable for negligence of the employees during federal control.

3. **Telegraphs and telephones 🔑26¾, New, vol. 7A Key-No. Series—Indemnity contract created no liability for negligence during federal control.**

The provision of a contract between the Postmaster General and a telegraph company, which was taken under federal control, that the Postmaster General should save the owner harmless from all judgments or decrees recovered because of actions arising out of federal control, does not authorize the rendition of a judgment against the owning company for negligence of an employee while the company's system was under government control.

4. **Telegraphs and telephones 🔑26¾, New, vol. 7A Key-No. Series—Failure to provide remedy for negligence during federal control not ground for recovery.**

If Congress has provided no remedy against the government for damages caused by the negligence of telegraph employees while the system was under government control, that fact does not justify the rendition of a judgment for such damages against the company owning the system.

On Writ of Certiorari to the Supreme Court of South Carolina.

Action by S. B. Poston against the Western Union Telegraph Company. Judgment for the plaintiff was affirmed by the Supreme Court of South Carolina, and defendant brings certiorari. Reversed.

Messrs. Rush Taggart and Francis Raymond Stark, both of New York City, and Henry E. Davis, of Washington, D. C., for petitioner.

Mr. Philip H. Arrowsmith, of Florence, S. C., for respondent.

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*Mr. Justice BRANDEIS delivered the opinion of the Court.

The Supreme Court of South Carolina (107 S. E. 516) affirmed a judgment of the trial court against the Western Union Telegraph Company for damages resulting from negligent delay in delivering an intrastate message sent November 17 [October 2], 1918. Its telegraph system was at that time in the exclusive possession and control of the government, and was being operated by the Postmaster General pursuant to the joint resolution of Congress of July 16, 1918, c. 154, 40 Stat. 904, and the proclamation of the President of July 22, 1918, 40 Stat. 1807. The state court declared that while the action and the judgment recovered therein were in form against the Western Union Telegraph Company, yet, in effect, they were against the Postmaster General; that in suing the company the plaintiff had pursued the course directed by the President's proclamation and confirmed by the contract dated October 9, 1918, between the Postmaster General and the company concerning compensation; and that since under this contract the Postmaster General would have to pay any judgment rendered against the company, the entry of judgment would not deprive it of property without due process of law. This court granted a writ of certiorari. 253 U. S. 480, 40 Sup. Ct. 482, 64 L. Ed. 1028. Whether the company can be held liable is the only question presented here.

[1] Our decision must depend primarily upon the authority conferred by Congress in the joint resolution which provided:

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*"That the President during the continuance of the present war is authorized and empower-

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ed, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war: * * * Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President."

Under this resolution the President might, doubtless, have limited his function to mere supervision of the telegraph and telephone system's, leaving them in the possession and under the control of the companies. But the resolution also empowered him "to take possession and assume control" of the systems; and this he did (Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163, 183, 185, 39 Sup. Ct. 507, 508 [63 L. Ed. 910, 4 A. L. R. 1623]), the proclamation declaring:

> "I * * * do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies. * * *
>
> "From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice." * * *

In conferring upon the President power "to take possession and assume control" of the telegraph systems the resolution adopted language identical with that which had been employed in the Act of August 29, 1916, c. 418, 39 Stat. 619, 645 (Comp. St. § 1974a), pursuant to which the railroads were brought under federal control. See Missouri Pacific Railroad *665 *Co. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. —, decided June 1, 1921. We held there that the supplementary legislation known as the Federal Control Act did not impose liability upon the company, and that, since the Government was operating the property, the railroad company could not be held liable under the established principles of the common law governing liability. These principles are equally applicable here.

In respect to telegraph systems there was no supplementary legislation similar to the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p); so that the argument mainly relied upon by plaintiff in the Missouri Pacific Case is not made here. But it is contended that the proclamation, the order of the Postmaster General of August 1, 1918, and the contract between him and the company concerning compensation authorized suit against the company as the operating agent of the government in the same way that the Federal Control Act authorized suit against the Director General. We find in them no basis for such liability.[1] Obviously neither proclamation, order, nor contract could create a liability not authorized by the resolution of Congress on which they rest. Nor did they attempt to do so.

[2] (a) The provision in the proclamation relied upon to establish the liability is this:

> "Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph *666 *and telephone system shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

This provision is in no way inconsistent with holding that the President took possession of and operated the telegraph systems as distinguished from taking over the companies and operating them. The companies were not made the operating agents of the United States. The officers of the companies were to operate the properties for the United States and it was to be done "in the names of their respective companies."

(b) The Postmaster General's Order No. 1783, dated August 1, 1918, was of like effect. It merely directed that:

> "Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. * * * All officers, operators and employees * * * will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

[3] (c) The contract of October 9, 1918, between the Postmaster General and the Western Union, did not purport to make the company liable. It merely provided indemnity. The provision relied upon is this:

> "The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation and use of the property taken over during the period of federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against,

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[1] This view has been taken also by state courts. Canidate v. Western Union Telegraph Co., 203 Ala. 675, 85 South. 10; Western Union Telegraph Co. v. Glover (Ala. App.) 86 South. 154; Western Union Telegraph Co. v. Davis, 142 Ark. 304, 218 S. W. 833; Mitchell v. Cumberland Telephone Co., 188 Ky. 263, 221 S. W. 547, 10 A. L. R. 946; Foster v. Western Union Telegraph Co. (Mo. App.) 219 S. W 107; Western Union Telegraph Co. v. Conditt (Tex. Civ. App.) 223 S. W. 234; Western Union Telegraph Co. v. Robinson (Tex. Civ. App.) 225 S. W. 877. See contra, Witherspoon v. Postal Telegraph-Cable Co. (D. C.) 257 Fed. 758; Spring v. Amer. Telegraph & Tel. Co. (W. Va.) 103 S. E. 206, 10 A. L. R. 951.

and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of federal control or anything done or omitted in the possession, operation, use or control of its property during the period of federal *667 *control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

This provision is substantially the same as that inserted in the compensation agreement entered into between the Director General of Railroads and the railroad companies.[2]

[4] It is urged that telegraph companies should be held liable because otherwise those using the system would be without remedy for losses suffered thereby. Whether this is true, or whether under the Tucker Act (24 Stat. 505) the sender of a message would have a remedy in the Court of Claims or in a federal District Court, we have no occasion to consider in this case.[3] If Congress has omitted to provide adequately for the protection of rights of the public, Congress alone can provide the remedy.

Reversed.

(256 U. S. 668)

WEBER ELECTRIC CO. v. E. H. FREEMAN ELECTRIC CO.

(Argued April 21, 1921. Decided June 6, 1921.)

No. 273.

1. Patents 🔑328 — 743,206, claims 1 and 4, for incandescent lamp socket, held not infringed.

Weber patent, No. 743,206, claims 1 and 4, for improvements in a socket for incandescent electric lamps, in which the sleeve and cap were automatically interlocked with a snap action when telescopically applied to each other, *held* not infringed by a socket in which the interlocking was accomplished by a longitudinal movement and the only snap action was to prevent a reverse longitudinal movement.

2. Patents 🔑168(3) — Patentee cannot claim construction to include feature eliminated in Patent Office to avoid anticipation.

An applicant, who amended his claim in the Patent Office to avoid rejection on reference to a prior patent, by limiting it to a specific construction in which there was no rotational movement between the sleeve and cap of his socket, cannot thereafter assert a construction of his claim as allowed, or a range of equivalents, which would establish infringement by a socket in which the connection between sleeve and cap was made by a rotational movement.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit for infringement by the Weber Electric Company against the E. H. Freeman Electric Company. A decree for complainant was reversed by the Circuit Court of Appeals (262 Fed. 769), and complainant brings certiorari. Decree of the Circuit Court of Appeals affirmed.

Mr. Charles Neave, of New York City, for petitioner.

*669 *Mr. Livingston Gifford, of New York City, for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit for infringement of letters patent of the United States, No. 743,206, granted to August Weber, Sr., on November 3, 1903. The District Court held claims 1 and 4 valid and infringed, but the Circuit Court of Appeals, while affirming the validity of the claims, reversed the holding that they were infringed. A supposed conflict of this decision as to infringement with one by the Circuit Court of Appeals of the Second Circuit, with respect to the same patent, serves to bring the case here for review on writ of certiorari.

The patent is a simple and, as we shall see, a narrow one. As described in the specification it relates to new and useful improvements in incandescent electric lamp sockets, the principal object of which is to provide a simple and effective automatic lock or connection between the sleeve and the cap of such a socket.

Nothing new electrically or in the general form of the cap or sleeve is claimed—the invention relates solely to the method of fastening the overlapping cap to the sleeve, or, as it is sometimes called, the shell or casing.

The validity of the claims involved is conceded in argument, and, having regard to the disclaimer with respect to claims 2 and 3, which has been filed by the petitioner since the decision by the Circuit Court of Appeals, we regard the issue as now narrowed to the infringement of the fourth claim.

The familiar incandescent lamp consists of a glass bulb, attached to a screw threaded base, adapted to be screwed into a properly insulated block, through which the necessary electrical connections are made, and which *670 is in*closed by a cylindrical "sleeve" of sheet metal. In order to complete the lamp this detached sleeve supporting the bulb and inclosing the insulated block must be fitted and securely fastened into the usual cap, which is attached to the wall or fixture, for if the fastening should become loose, the light might fail, or the bulb fall, or a fire hazard be created. To invent a device by which the sleeve and cap could be easily and securely attached to each other and yet be readily detached when desired, was the problem to which the patentee addressed himself, and his solution of it is thus described in the fourth claim of the patent:

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[2] See Form A, October 22, 1918, for "Agreement between the Director General of Railroads and the —— Company," Bulletin No. 4 (Revised) pp. 39, 47, § 4, par. *i*.

[3] In Heil v. United States, 273 Fed. 729 (U. S. District Court, Southern District of New York, June 15, 1920), a petition under the Tucker Act for damages arising from failure to transmit a prepaid cable message over the Commercial Cable Company's lines was held by Learned Hand, D. J., on demurrer to state a good cause of action. See, also, discussion in Senate, June 10, 1919, vol. 58, Cong. Rec. p. 920.

> "In a device of the class described, and in combination a pair of members comprising a sheet metal sleeve having a slotted end, and a sheet metal cap adapted to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located *transverse slit and the wall on one side thereof displaced to form a* projection beveled or inclined toward said recessed member and terminating abruptly *at said slit*, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by *manual* compression of said slotted sleeve, substantially as described."

To make the device thus described, it was only necessary to cut two transverse slits, each about one-quarter of an inch in length, in opposite sides of the flange of an ordinary cap, and to then, with a punch or die, force outward the upper edges or walls of the slits to the extent desired to create the necessary "recesses" which must "terminate" at the lower, sharp edges of the slits. A similar operation on a slotted sleeve would produce a similar result, but when viewed from the outer surface of the sleeve the recesses would become the projections of the quoted *671 fourth claim. When such sleeve is teles*copically applied to—pushed or pressed into—the cap, it is obvious that with the recesses in the cap and the projections in the sleeve properly positioned and of a suitable size, when the projections shall register with the recesses, the resiliency of the metal will cause the two to engage with a snap action and the sharp lower edges of the slots in the cap will then prevent the cap and sleeve from being separated by a longitudinal movement only, until the sleeve shall be manually compressed to release the projections from the recesses.

It is to be noted, for it will be of significance in the interpretation of the claim involved, that it is required that the projections on the sleeve shall be "beveled or inclined toward said recessed member," and in the specification it is provided that the projections shall be "beveled or inclined from the inner end of the sleeve toward the outer end." With such construction it would seem plain, even without the exhibits, which show it to be true, that, friction aside, projections so beveled or inclined could readily be released by rotative movement from similarly shaped recesses without compression of the sleeve.

It was admitted at the bar that sockets made as specified in the patent in suit were never put upon the market, but the record shows that with a feature added which is covered by another patent owned by petitioner, the socket met with large commercial success. This other patent is No. 916,812 and was granted March 30, 1909, to the patentee of the patent in suit and two others, on an application filed July 18, 1904. Figure 8 from the drawings of this patent, showing the cap and sleeve of the petitioner's socket as manufactured by it, will aid in describing the additional "improvement" which it made to the device of the patent in suit and will also be of service in comparing this device with what is claimed to be the infringing socket of the respondent.

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*This patent is also for improvements in incandescent electric light sockets and contains 14 claims, of which only the terms of the first need be noticed. It claims as new and useful "a pair of tubular, sheet metal members, one adapted to telescopically receive the other, having mutually abutting cut-metal edges on the respective members (the slot *19* in the cap and projection *20* in the sleeve), to prevent relative rotative movement, and automatically interlocking means for preventing a telescopic movement of separation of one member from the other (the recesses *17* in the cap and the projections *15* in the sleeve), said means permitting, without manipulation thereof, the telescopic application of the members to each other." This language, with slight additions and omissions, not significant, is repeated in claims 3, 13, and 14.

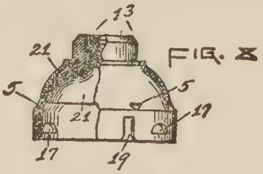


FIG. 8

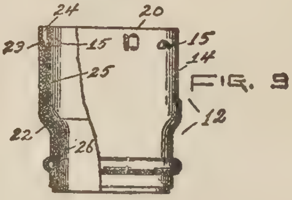


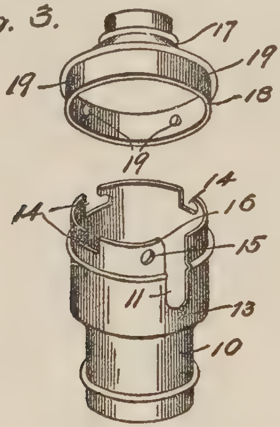
FIG. 9

This device for preventing "relative rotative movement" of the cap on the sleeve is the feature which the petitioner added to the socket of the patent in suit before putting it upon the market, and it consists, as the figure supra shows, in the open slot (*19*) *673 cut to the edge of the *flange of the cap, into which passes the projection on the sleeve (*20*) when the two are "telescopically applied" to each other. This projection (*20*) is formed by cutting two longitudinal slits in the sleeve and then pressing outward the narrow strip of metal between them. It is perfectly true, as stated in 4 of the claims and as asserted with much emphasis in the specification, that this added device effectively prevents any relative rotative movement of the cap and sleeve upon each other.

Coming now to the construction of the respondent, which it is claimed infringes the fourth claim of the patent in suit.

This (respondent's) socket has been manufactured since 1909, under patent No. 927,344, and it may most readily be described by reference to the following, Figure 3 of the drawing, which was a part of the specification of the patent.

Fig. 3.



It will be seen from this drawing that instead of outwardly extending recesses in the *674 flange of the cap, formed *by slits and displacing of the metal, such as are in the petitioner's socket, respondent's cap has four inwardly projecting lugs (*19*), each of which is a separate piece of metal riveted to the flange. Each of these lugs is circular in outline, with a flat inner end or face and presents abrupt shoulders on opposite sides. In the upper edge of the sleeve are three bayonet slots of the familiar form (*14*), so positioned that the studs on the cap may enter them when the sleeve is slipped into the cap, but when the sleeve has been telescoped, or pushed, into the cap so that the lugs have been pressed to the end or bottom of the longitudinal part of the bayonet slots (*14*) rotation of the sleeve is obviously necessary to bring them into the transverse parts of the slots, so that the two members will be locked against longitudinal separation. (No such rotative movement of the two members is mentioned in the patent in suit, it is expressly provided against in petitioner's second patent, and it is not possible in its commercial socket.)

This rotative movement accomplishes a second result.

Reference to the figure, supra, shows a longitudinal slot in the sleeve, which in the key socket affords a passage for the key, but in the keyless socket is narrower, and serves only to render the sleeve compressible. To the left of this slot in the sleeve is cut a round hole (*15*) so positioned that when three of the lugs in the cap are brought by the rotative movement to the ends of the transverse parts of the bayonet slots the fourth end will snap into the hole (*15*). This hole (*15*) is placed in such a relative position that when the three lugs enter the longitudinal part of the bayonet slots, the fourth stud rides upon the metal near the edge of the slot in the sleeve, and to facilitate this movement the corner of the slot (*16*) is bent slightly inward. Thus the adjustment of the studs in the cap is practically a universal adjustment between the cap and shell, so that if *675 any one lug is in *position to enter any bayonet slot two others will be in position to enter the other bayonet slots and the fourth will be in a position to enter the hole (*15*) when the sleeve and cap have been so pressed together that the (three) other studs have reached the ends of the longitudinal part of the bayonet slots and the rotation described of the one upon the other has been completed. A slight compression of the sleeve suffices to release the members when desired.

[1] This description shows that the structural features of the two sockets are strikingly different. Instead of slits and outwardly extending recesses in the cap of the one there are inwardly extended studs riveted to the cap of the other. And instead of slits and outward protections of the sleeve to lock by snap action with recesses in the cap against longitudinal movement in the one, there are the bayonet slots in the sleeve to lock with studs in the cap of the other to accomplish the same result without snap action. But these different constructions not only differ radically in structural features but they do not function in the same manner, for locking against longitudinal movement in the one is by snap action upon direct longitudinal thrust of the sleeve into the cap, while the other requires first a longitudinal movement or thrust, and then a rotative movement, without which it is entirely ineffective, whereby it locks against longitudinal movement without snap action.

But it is argued that the infringement lies especially in the locking hole (*15*) in respondent's socket and the associated lug which operate by snap action and afford a positive lock against rotation of the two members on each other.

The sufficient answer to this is that the patent in suit makes no suggestion of a lock against the rotative movement of the cap and sleeve on each other and contains no disclosure providing for it, but, on the contrary, because *676 *the beveled sides which are required by claim 4 for the projections on the sleeve permitted such movement, a subsequently patented addition was added to prevent it. The petitioner cannot read into the patent in suit the additional slot in the cap and the additional projection on the sleeve of patentee's second patent, and without them there is no lock against rotative movement in the socket of the first patent to be infringed by the stud snapping into the locking hole of the sleeve of respondent's socket.

[2] This is sufficient to dispose of the case, but we also fully agree with the Circuit Court of Appeals that the prior art, the file wrapper and the second patent to the same patentee, No. 916,812, supra, require that the expressions in the fourth claim "telescopically received" and "telescopically applied" must be restricted to a direct longitudinal movement or thrust of the sleeve into the cap and that for this reason the construction of respondent requiring a rotary movement to render it effective, does not infringe that of the petitioner.

In the application for the patent in suit this fourth claim, originally the seventh, read as we have quoted it omitting the words in italics. In this form it was promptly rejected by the Patent Office on reference to the Oetting patent, No. 642,825, and to the Kenney patent, No. 712,686, and it is clear that the chief concern of the applicant thereafter was to distinguish his construction from that of Kenney, which is very similar to that of respondent. The Kenney socket has lugs in the cap and bayonet slots in the sleeve, to lock against longitudinal movement, as respondent's socket has, and also slots with open ends and locking holes similarly placed in the sleeve to lock against rotary movement when the lugs in the cap engage with them. The chief difference between the Kenney and respondent's socket is that in Kenney the lug passes down the slot to a position opposite the locking hole

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and *then with the rotary movement mounts and rides over the narrow strip of metal—"the bridge"—into the hole, while in the respondent's socket the lugs having plain faces ride on the metal near to the edge of the slot during the longitudinal movement and from that position pass into the locking holes with the rotative movement.

When his application was rejected by the Patent Office on reference to the Kenney patent thus described, the applicant, without objection or appeal, amended his claim 7 (numbering it 4) by adding the words in italics, and in his explanatory "remarks," when submitting these amendments, it was said:

> "Claim 4, originally 7, is now *drawn to a specific structure*, having advantages not found in either of the references cited. By transversely slitting the sheet metal shell and displacing the wall on one side of said slit to form a beveled or inclined projection the parts are permitted to be applied to each other *by simply inserting one within the other*, without manually compressing the inner member."

And again:

> "Kenney's device is adapted to *unlock by simply rotating one member upon another in the same manner that the parts are locked together*, no manual compression of the inner member being necessary."

Thus the patentee, in order to avoid infringing Kenney's construction, voluntarily restricted himself to a "specific structure" operative when the sleeve was "simply" inserted in the cap, without suggesting any rotary movement whatever, but, on the contrary, by his reference to Kenney as locking and unlocking by "simply rotating one member upon the other," clearly implying that no such rotary movement was necessary in the adjustment of his socket. Having thus narrowed his claim against rotary movement in order to obtain a patent the patentee may not by construction, or by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments, which amount to a *disclaimer of rotation as an operative feature of his devise. Shepard v. Carrigan, 116 U. S. 593, 598, 6 Sup. Ct. 493, 29 L. Ed. 723; Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95.

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But that no rotary movement was implied in the use of "telescopically received" and "telescopically applied" in the patent in suit is further unmistakably shown by the frequent use of the same or equivalent expressions in the specification and claims of patentee's later patent, No. 916,812, supra, in which claims 1, 3, 13, and 14 relate almost wholly to an improvement which renders rotation of the members one upon the other impossible and which petitioner added to the construction of the patent in suit before putting the sockets upon the market. That the inventor did not intend to claim, and that he certainly did not disclose, that any such rotary movement was necessary in his socket as was required to render the socket of the respondent effective, is, we think, for these reasons, so clear that it is not necessary to consider the dictionary definitions of the words used, upon which the Circuit Court of Appeals, with sound reason, relied in reaching this same conclusion.

For the reasons thus elaborated, we conclude that the socket of the respondent does not infringe the fourth claim of the patent in suit because there is no claim made therein of a lock against rotative movement of the cap and sleeve upon each other, and also because the file-wrapper and the subsequent patent show that the disclosure is, and was intended to be, limited to a construction operative by direct longitudinal movement or thrust without such rotative movement.

The contention, pressed strenuously upon our attention, that the added open slot in the cap and projection on the sleeve provided for in the second patent were devised simply to secure the alignment of the projections and recesses of the first patent in making telescopic application of the two members *679 to each other, is not con*vincing in the presence of the fact that claims 1, 3, 13, and 14 of the second patent are devoted almost wholly to claiming that this improved construction is intended "to prevent relative rotative movement" of one member upon the other, while only claims 11 and 12 refer, quite incidentally, to what is now claimed to be the chief function of the added parts, that of a guide to the positioning of the recesses and projections of the first patent with reference to each other. Without a guide, the difficulty should not be very great of aligning projections and recesses distant from each other but a fraction of an inch when the edges of the cap and sleeve are in contact. The constructions held by the Circuit Court of Appeals of the Second Circuit to infringe the patent in suit, were so essentially different from that of the respondent that we regard discussion of them as quite unnecessary.

It results that the decree of the Circuit Court of Appeals as to claims 1 and 4 must be

Affirmed.

(256 U. S. 658)

KANSAS CITY SOUTHERN RY. CO. et al. v. ROAD IMPROVEMENT DIST. NO. 6 OF LITTLE RIVER COUNTY, ARK.

(Argued March 16 and 17, 1921. Decided June 6, 1921.)

No. 205.

1. Constitutional law 🔑233 — Highways 🔑122—Basis of taxation for local improvements held not unconstitutional unless palpably arbitrary.

A state Legislature may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without violating the Fourteenth Amendment, unless its action is palpably arbitrary, and ordinarily the levy may be made upon land especially benefited according to value, position, area, or the front-foot rule.

2. Constitutional law 🔑233 — Highways 🔑122—Arbitrary assessment of railroad for road improvement when other property was assessed on basis of area and position held to deny equal protection of the laws.

An assessment by a road improvement district against a railroad made without any designated basis while other land in the district was assessed on the basis of area and position is so palpable and arbitrary a discrimination as to deny the railroads the equal protection of the laws, especially where the assessment against less than 10 miles of railroad for the construction of 11 miles of highway amounted to a sum greater than any probable, or even possible, benefits could amount to.

3. Highways 🔑140 — Benefits must be estimated on standard producing approximately correct general results.

In assessing taxes for local improvements, the benefits from such improvements must be estimated according to some standard which will probably produce approximately correct general results.

4. Constitutional law 🔑211 — Classification without reason is not permissible.

Though classification is permitted without denying the equal protection of the laws, a classification based on no adequate reason is invalid.

In Error to the Supreme Court of the State of Arkansas.

Proceedings by Road Improvement District No. 6 of Little River County, Ark., for the assessment of benefits for the improvement of a highway. The assessment of improvements against the Kansas City Southern Railway Company and the Texarkana & Ft. Smith Railway Company were sustained by the Supreme Court of Arkansas on appeal by the Companies (139 Ark. 424, 215 S. W. 656), and the Railway Companies bring error. Reversed and remanded.

Messrs. Samuel W. Moore, of New York City, and James B. McDonough, of Ft. Smith, Ark., for plaintiffs in error.

Messrs. John J. Du Laney, of Ashdown, Ark., and William H. Arnold, of Texarkana, Ark., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Proceeding under Act 338, 1915 Session, Arkansas Legislature, the county court created and fixed the *659 *boundaries of "road improvement district No. 6 of Little River county." They include approximately 25,000 acres, and within them there are 9.7 miles of main track railroad owned and operated by petitioners, Kansas City Southern Railway Company and Texarkana & Ft. Smith Railway Company, together with the corresponding right of way, covering 130 acres, and requisite station buildings.

Little River county is distinctly agricultural, has an area of 546 square miles, and 16,000 inhabitants. The improvement district was created for the purpose of constructing 11.2 miles of gravel road through taxation upon real property, defined by the statute as "land, improvements thereon, railroads, railroad right of way and improvements thereon, including public buildings, side tracks, etc., and tramroads."

A duly appointed board assessed the benefits to plaintiff in error's property on account of the proposed road at $7,000 per mile of main track—$67,900. They divided the farming lands into five zones, determined by distance from the highway, and assessed uniform benefits upon all within the same zone without regard to improvements or market value—in the first $12 per acre, second $10, third $8, fourth $6, and fifth $4. Town lots were likewise assessed without reference to value or improvements at $10, $15, $20, and $25 each, according to location. A pipe line, telephone line, and telegraph line were severally assessed at $2,500, $300, and $300 per mile, without any designated basis.

Plaintiffs in error duly maintained that the assessment upon their property was unequal, arbitrary, unreasonable, and in violation of the due process and equal protection clauses of the Fourteenth Amendment. The state courts held to the contrary, and in effect declared the statute providing for the road improvement district authorized the action taken by the board, and that, so construed, it was a

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*valid enactment. 139 Ark. 424, 215 S. W. 656, 217 S. W. 773. The validity of the statute having been adequately challenged, the cause is properly here upon writ of error, and the petition for certiorari will be denied.

[1] The settled general rule is that a state Legislature "may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse." Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; Houck v. Little River Drainage District, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266. Ordinarily the levy may be upon lands specially benefited according to value, position, area, or the front-foot rule. French v. Barber Asphalt Co., 181 U. S. 324, 342, 21 Sup. Ct. 625, 45 L. Ed. 879; Cass Farm Co. v. Detroit, 181 U. S. 396, 397, 398, 21 Sup. Ct. 644, 645, 45 L. Ed. 914, 916; Louisville & Nashville R. R. v. Barber Asphalt Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; Withnell v. Ruecking Construction Co., 249 U. S. 63, 39 Sup. Ct. 200, 63 L. Ed. 479; Hancock v. City of Muskogee, 250 U. S. 454, 39 Sup. Ct. 528, 63 L. Ed. 1081; Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 113, 64 L. Ed. 215.

[2] If, however, the statute providing for the tax is "of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact." Gast Realty Co. v. Schneider Granite Co., supra.

The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from

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freight and passengers *which would enhance its value, considered as a component part of the system.

[3, 4] Obviously the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road, seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. Royster Guano Co. v. Virginia, 253 U. S. 412, 415, 40 Sup. Ct. 560, 64 L. Ed. 989. It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.

The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

(256 U. S. 642)

BOWMAN, Atty. Gen. of New Mexico, et al. v. CONTINENTAL OIL CO.

(Argued April 11, 1921. Decided June 6, 1921.)

No. 695.

1. Statutes 🔑64(8)—Collection of excise tax on domestic business may be permitted under statute not separable as to domestic and interstate business.

Although the provisions of Laws N. M. 1919, c. 93, imposing an excise tax on gasoline, were not separable as to domestic and interstate business, the divisible nature of the subject renders it feasible to control the operation of the tax so as to prevent it from being imposed on sales in interstate commerce while allowing its enforcement as to domestic transactions, and therefore an injunction against the collection will be limited to the tax in so far as it is levied on interstate transactions.

2. Statutes 🔑64(8)—License tax on interstate gasoline distributors held inseparable and wholly void.

The provisions of Laws N. M. 1919, c. 93, requiring an annual license tax from distributors of gasoline and prohibiting any sales of gasoline until the tax had been paid, are not separable as to domestic and interstate distributors, and therefore the assessment and collection of license tax will be restrained as to all dealers, notwithstanding the statement by the state officers that they did not intend to collect from dealers whose transactions were entirely interstate.

3. Commerce 🔑72—Excise tax may be imposed on gasoline brought from other state and used by distributor after breaking packages.

Where a distributor of gasoline shipped into the state from another state broke the original packages and mingled the gasoline therein with other gasoline, the state can levy an excise tax on the amount of the gasoline which the distributor thereafter used for his own trucks.

4. Taxation 🔑40(2)—Excise tax on domestic gasoline sales held within requirement of equality and uniformity; "property tax"; "equal and uniform upon subjects of taxation of same class."

A tax on the sale or use of gasoline is an excise and not a property tax, and therefore not affected by the provision of Const. N. M. art. 8, § 1, requiring taxes upon tangible property to be levied in proportion to value, and where that tax operates impartially upon all domestic sales within the state it is equal and uniform upon subjects of taxation of same class within that provision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equal and Uniform Taxation; Property Tax.]

5. Constitutional law 🔑229(1), 283—Taxation 🔑53—Excise tax on gasoline does not violate due process and equal protection of laws.

An excise tax levied by state on all domestic sales and use of gasoline does not infringe the gasoline distributors' rights under Const. Amend. 14, guaranteeing due process of law and equal protection of the laws.

Appeal from the District Court of the United States for the District of New Mexico.

Suit by Continental Oil Company against O. O. Askren, Attorney General of the State of New Mexico, and others, in which Harry S. Bowman, as Attorney General, was substituted on his succeeding the original defendant in office. Decree for complainant, and defendants appeal. Reversed and remanded.

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*Mr. Harry S. Bowman, Atty. Gen., of Santa Fé, N. M., for appellants.

Messrs. Charles R. Brock, of Denver, Colo., and E. R. Wright, of Santa Fé, N. M., for appellee.

Mr. Justice PITNEY delivered the opinion of the Court.

This suit was brought by the Continental Oil Company against the Attorney General and certain other officials of the state of New Mexico to restrain the enforcement against the company, a distributor of and dealer in gasoline and other petroleum products in that state, of the provisions of an act of the Legislature (Laws New Mexico 1919, c. 93, p. 182) imposing an excise tax of 2 cents for each gallon of gasoline sold or used, and an annual license tax of $50 for each distributing station or place of business. The case was here before under the name of Askren, Atty. Gen., v. Continental Oil Co., 252 U. S. 444, 40 Sup. Ct. 355, 64 L. Ed. 654, on review of an order of the District Court (three judges sitting) granting a temporary injunction. It is now here for review of the final decree; and, Mr. Askren's term as Attorney General having expired, Mr. Bowman, his successor in office, has been substituted as a party in his stead.

On the former appeal it appeared upon the face of the bill that plaintiff (appellee) purchases gasoline in various states other than New Mexico and ships it into that state, there to be sold and delivered; that it carries on business in two ways: First, gasoline is brought in from other states either in tank cars, in barrels, or in packages containing not less that two five-gallon cans, and sold and delivered to customers in the original packages, in the same form and condition *644 as when received by plaintiff in the state *of New Mexico, as to which we held plaintiff is engaged in interstate commerce and not liable to pay to the state a license tax for purchasing, shipping, and selling gasoline in that manner; secondly, a part of plaintiff's business consists of selling gasoline from the tank cars, barrels, and packages in quantities to suit purchasers, and we held that business of this kind is properly taxable by the laws of the state, although the gasoline is brought into the state in interstate commerce; that the mere fact that it was produced in another state does not show a discrimination against the products of such state; and that sales from broken packages in quantities to suit purchasers are a subject of taxation within the legitimate power of the state. But these latter sales were little emphasized in the bill, which stressed the sales in original packages; and, since from its averments it was impossible to determine whether the sales from broken packages were of substantial importance, we did not at that stage of the case go into the question whether the act was separable, but reserved it for the final hearing, while affirming the order for a temporary injunction.

Upon the going down of the mandate, plaintiff amended its bill by averring that in addition to carrying on the business of buying and selling gasoline and other petroleum products, it is using gasoline at each of its distributing stations within the state of New Mexico (37 in number) in the operation of its automobile tank wagons and otherwise; that under the terms of the act it is prohibited from using this gasoline except upon the payment of the excise tax of 2 cents per gallon therefor; that this is a property tax, void under section 1 of article 8 of the state Constitution because not levied in proportion to the value of the gasoline; and that the imposition of the tax denies to plaintiff the equal protection of the laws and amounts to a taking of its property without due process of law, in contravention of the Fourteenth Amendment, and further is in *violation of the commerce clause of the Constitution of the United States.

Defendants answered, alleging that plaintiff's sales in tank cars or other unbroken packages are insignificant as compared with its sales made after original packages have been broken; denying that the act exacts of the plaintiff payment of a license tax for the privilege of shipping or selling gasoline in interstate commerce, or of an excise tax on the gasoline sold in such commerce; averring that the state of New Mexico and its officers charged with enforcement of the law do not construe the act as affecting interstate commerce, and have no purpose or intention to enforce it so as to do so, or otherwise than so far as intrastate commerce is concerned; and averring that any gasoline used by plaintiffs at its distributing stations is no longer in interstate commerce, but has become commingled with the general mass of property in the state, and a tax upon its use is not void under the state Constitution or a violation of the commerce clause (Const. art. 1, § 8), or the Fourteenth Amendment.

The case came on for final hearing upon stipulated facts as to the course of plaintiff's business, from which it appeared that during the years 1918 and 1919 and the first seven months of 1920 its sales of gasoline in bulk or from broken packages constituted about 94.5 per cent. of its aggregate business, and sales in original barrels, packages, or tank cars without breaking the packages about 5.5 per cent., in addition to which the company consumed in the conduct of its own business gasoline equal to about 8 per cent. of its total sales. It was further stipulated that this represents the ordinary course of business of the company, but that future percentages will depend upon the demands of customers.

The trial court, after referring to our decision in 252 U. S., proceeded to pass upon the question whether the statute is separable and capable of being sustained so far *as it imposes a tax upon domestic business legitimately taxable. Reciting the language of the act, and reading it as including every distributor of gasoline, whether selling at retail or in original packages, as imposing an excise tax upon all gasoline, whether sold in one way or the other, and as making no exemption from either the license or the excise tax for persons selling gasoline or for gasoline sold in original packages, the court declared that it could not read an exemption into it without giving it a meaning the Legislature might never have intended, and held the act not separable, but void as to both interstate and domestic business. Having reached this conclusion, the court found it unnecessary to pass upon the question whether the imposition of an excise tax of 2 cents per gallon upon the gasoline used by plaintiff in its automobiles and trucks employed in the business of distributing its wares for sale was in violation of the provision of section 1, art. 8, of the Constitution of the state because not levied in proportion to the value of the gasoline so used.

[1] Assuming that, upon the question of construction, the District Court was right, and that the act manifests an intent to tax interstate as well as domestic transactions in gasoline, and is not in this respect capable of separation, still, so far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according to the number of gallons sold and used—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions; and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States. The applicable rule is that laid down in Ratterman v. Western Union Tel. Co., 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229, where, in response to a question whether a single tax, assessed by a state

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upon *the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the state, but returned and assessed in gross and without separation or apportionment, was wholly invalid or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the state it was valid. This case has been cited repeatedly with approval and its principle accepted. W. U. Telegraph Co. v. Alabama, 132 U. S. 472, 476, 477, 10 Sup. Ct. 161, 33 L. Ed. 409; Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192, 200, 201, 12 Sup. Ct. 806, 36 L. Ed. 672; Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, 697, 14 Sup. Ct. 1094, 38 L. Ed. 871; Western Union Tel. Co. v. Kansas, 216 U. S. 1, 31, 30 Sup. Ct. 190, 54 L. Ed. 355.

[2] But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of Leloup v. Port of Mobile, 127 U. S. 640, 647, 8 Sup. Ct. 1380, 32 L. Ed. 311, Crutcher v. Kentucky, 141 U. S. 47, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649, Williams v. Talladega, 226 U. S. 404, 419, 33 Sup. Ct. 116, 57 L. Ed. 275, and other cases of that character.

Upon the question of severability, we are constrained to concur in the view adopted by the District Court; and this notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the federal Constitution. Ohio Tax Cases, 232 U. S. 576, 591, 34 Sup. Ct. 372, 58 L. Ed. 737; St. Louis Southwestern Ry. v. Arkansas, 235 U. S. 350, 369, 370, 35 Sup. Ct. 99, 59 L. Ed. 265. The act, in its second section, requires every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency, requires it to be paid in advance, and renders it unlawful to carry

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on the business without having paid it. *Section 8 declares that any person who shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. United States v. Reese, 92 U. S. 214, 221, 23 L. Ed. 563; Trade-Mark Cases, 100 U. S. 82, 99, 25 L. Ed. 550; Poindexter v. Greenhow, 114 U. S. 270, 304, 305, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108.

No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence it cannot be enforced at all.

[3, 4] With the excise tax as imposed upon the use of gasoline by plaintiff at its distributing stations, in the operation of its automobile tank wagons and otherwise, we have no difficulty. Manifestly gasoline thus used

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has passed *beyond interstate commerce, and the tax can be imposed upon its use, as well as upon the sale of the same commodity in domestic trade, without infringing plaintiff's commercial rights under the federal Constitution. Section 1, art. 8, of the state Constitution, invoked by plaintiff, reads:

> "Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class."

Clearly the first part of this refers to property taxation. The tax imposed by the act under consideration upon the "sale or use of all gasoline sold or used in this state" is not property taxation, but in effect, as in name, an excise tax. We see no reason to doubt the power of the state to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale and use; and since the tax operates impartially upon all, and with territorial uniformity throughout the state, we deem it "equal and uniform upon subjects of taxation of the same class," within the meaning of section 1 of article 8.

[5] There is no substance in the objection that the excise tax, as applied to domestic sales and domestic use of gasoline, infringes plaintiff's rights under the due process and equal protection clauses of the Fourteenth Amendment. The contention that it interferes with interstate commerce because the

gasoline is the product of other states already has been disposed of.

The decree under review should be reversed, and the cause remanded, with directions to grant a decree enjoining the enforcement as against plaintiff of the license tax without qualification, and of the excise tax upon the sale or use of gasoline only with respect to sales of gasoline brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels, or other packages, and in the same form and condition *650 as when *received by plaintiff in that state, but without prejudice to the right of the state, through appellants or other officers, to enforce collection of the excise tax with respect to sales of gasoline from broken packages in quantities to suit purchasers, notwithstanding such gasoline may have been brought into the state in interstate commerce, and with respect to any and all gasoline used by plaintiff at its distributing stations or elsewhere in the state in the operation of its automobile tank wagons or otherwise, and without prejudice to the right of the state, through appellants or other officers, to require plaintiff to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the state may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated.

Decree reversed, and the cause remanded for further proceedings in conformity with this opinion.

(256 U. S. 616)

In re HUSSEIN LUTFI BEY.

(Submitted February 28, 1921. Decided June 6, 1921.)

1. Prohibition 🔑4 — Not matter of right in admiralty if jurisdiction is debatable.

Even in admiralty a writ of prohibition issues as a matter of right only where the absence of jurisdiction is plain, and where the jurisdiction is debatable the granting or refusal of the writ is discretionary.

2. Mandamus 🔑10 — Prohibition 🔑10(2) —Want of jurisdiction over merchant vessel of foreign sovereign held not so clear as to authorize prohibition and mandamus.

The question whether court of admiralty has jurisdiction over a vessel seized on its process which was owned by a foreign sovereign, but used by him as merchant vessel for ordinary commercial trading, and whether the fact that the sovereign owning vessel had severed diplomatic relations with the United States affected the jurisdiction, are debatable questions so that writs of prohibition and mandamus will not be issued to prevent the district court from exercising jurisdiction over such vessel.

Original motion by Hussein Lutfi Bey, master of the Gul Djemal, for leave to file a petition for writ of prohibition and writ of mandamus. Leave to file denied.

See, also, 254 U. S. 619, 41 Sup. Ct. 217, 65 L. Ed. ——.

Messrs. William A. Purrington, John M. Woolsey, and Frank J. McConnell, all of New York City, for petitioner.

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*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a motion for leave to file a petition for a writ of prohibition and a writ of mandamus. The circumstances leading up to the motion can be shortly stated. The Steamship Gul Djemal, now in the port of New York, was arrested and is being held under process issued against her in several suits in admiralty in the District Court for that district. She is a merchant ship and came from Constantinople to New York under a time charter party, for a purely commercial purpose, shortly before the suits were brought. The claims sought to be enforced in them amount to $80,585 and are for wharfage, fuel, supplies, and other necessaries furnished to the ship at Gibraltar in the course of her voyage and at New York after her arrival. Her master, Hussein Lutfi Bey, appearing specially in the suits, applied to have her released from arrest, and in support of his application alleged that she was owned, manned and operated by the Turkish or Ottoman government, that she therefore was not subject to the court's process, and that he, as the representative and agent of that government, was her true and lawful bailee and as such entitled to her immediate possession. The court declined to order her release, and in the petition now proffered the master seeks a writ of prohibition forbidding further proceedings in the suits and a writ of mandamus commanding that the order denying his application be vacated and another entered releasing the ship. The questions involved are, first, whether the ship of a foreign government which it uses and operates as a merchant vessel is, when within the waters of the United States, immune from process in suits *619 such as have *been described; and, secondly, whether such immunity properly can be claimed in respect of the ship of a government which has severed and not resumed diplomatic relations with the United States. Both questions are important and also new. Their proper solution is not plain but debatable. This is frankly recognized in the brief supporting the motion.

[1] Even in admiralty cases a writ of prohibition goes as a matter of right only where the absence of jurisdiction is plain. Where the jurisdiction is debatable the granting or refusal of the writ is discre-

tionary. In re Muir, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. —.

[2] It is not plain that there is an absence of jurisdiction here, for the question is an open one and of uncertain solution. On application to the State Department, it declined to ask the Attorney General to present to the District Court a suggestion avowing that the ship belonged to the Turkish or Ottoman government and was immune from seizure. We regard the situation as one in which to refuse the writ would be a proper exercise of discretion. There are stronger reasons against granting a writ of mandamus.

Leave to file petition denied.

(256 U. S. 650)

HARRIS v. DISTRICT OF COLUMBIA.

(Argued January 24, 1919. Decided June 6, 1921.)

No. 16.

1. **Municipal corporations 🔑728—Not liable for manner of exercising discretionary powers of public character.**

When acting in good faith, municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character.

2. **Municipal corporations 🔑733(1)—Sweeping streets is exercise of discretionary power to protect public health and comfort.**

When sweeping the streets, a municipality is exercising its discretionary powers to protect the public health and comfort, and not performing a special corporate or municipal duty to keep them in repair, and therefore it is not liable for the negligent acts of its employees engaged in sweeping the streets.

Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting.

On a Certificate from the Court of Appeals of the District of Columbia.

Action by Adelbert Harris, by his next friend, Albert Harris, against the District of Columbia. On a question certified from the Court of Appeals of the District of Columbia. Question answered in the affirmative.

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*Messrs. Rossa F. Downing and George A. Berry, both of Washington, D. C., for plaintiff.

Messrs. F. H. Stephens and Robert L. Williams, both of Washington, D. C., for the District of Columbia.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The Court of Appeals, District of Columbia, has certified the following question (Judicial Code, § 251 [Comp. St. § 1228]):

"Is the sprinkling of the streets to keep down dust for the purpose of the comfort and health of the general public, a public or governmental act as contradistinguished from a private or municipal act, which exempts the District of Columbia from liability for the injuries caused by one of its employees engaged therein?"

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*In order to prepare the streets of Washington for sweeping, it was the practice to sprinkle them from portable tanks. While filling one of these tanks through a hose connected to a water plug, a corporate employee negligently dropped the plug cover and injured Adelbert Harris, a young child. He brought suit against the District of Columbia for damages.

[1] It is established doctrine that when acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character. A different rule generally prevails as to their private or corporate powers. Dillon on Municipal Corporations (5th Ed.) § 1626 et seq., and cases cited.

[2] Application of these general principles to the facts of particular cases has occasioned much difficulty. The circumstances being stated, it is not always easy to determine what power a municipal corporation is exercising. But, nothing else appearing, we are of opinion that, when sweeping the streets, a municipality is exercising its discretionary powers to protect public health and comfort and is not performing a special corporate or municipal duty to keep them in repair. This conclusion, we think, accords with common observation, harmonizes with what has been declared heretofore concerning liability of the District of Columbia for torts, and is supported by well-considered cases. Weightman v. Corporation of Washington (1861) 1 Black, 39, 17 L. Ed. 52; Barnes v. District of Columbia (1875) 91 U. S. 540, 551, 23 L. Ed. 440; District of Columbia v. Woodbury (1890) 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472; Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565; Haley v. City of Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005; Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1147.

In Weightman v. Corporation of Washington, supra, the corporation was held liable for injuries resulting from an insecure bridge placed by the charter under its exclusive control and management. Among other

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things, through *Mr. Justice Clifford, this was said:

> "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally re-

garded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. * * * Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced."

Barnes v. District of Columbia, supra, presented a case of injury arising from a defective street. The District was held liable and, for the court Mr. Justice Hunt said, concerning the point presently important:

"Some cases hold that the adoption of a plan of such a work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. Child v. City of Boston, 4 Allen, 41; Thayer v. Boston, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. City of Detroit v. Blackely, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

"The authorities establishing the contrary doctrine that a city is responsible for its mere *654 negligence, are so *numerous and so well considered, that the law must be deemed to be settled in accordance with them" (citing many cases).

District of Columbia v. Woodbury, supra. Woodbury claimed damages for injuries resulting from a sidewalk, negligently permitted to remain out of repair. Held, that the principle of Barnes v. District of Columbia applies, notwithstanding the form of the District government had been changed.

In Roth v. District of Columbia, 16 App. D. C. 323, Brown v. District of Columbia, 29 App. D. C. 273, 25 L. R. A. (N. S.) 98, District of Columbia v. Tyrrell, 41 App. D. C. 463, and Coates v. District of Columbia, 42 App. D. C. 194, freedom of the District of Columbia from liability on account of matters within its governmental powers is recognized.

Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, is not applicable. The proceeding being in admiralty, rights and liabilities of the parties depended upon the maritime code and not upon local laws of New York. Here common-law principles apply. See Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900.

The certified question must be answered in the affirmative.

Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice CLARKE dissent.

(256 U. S. 655)

SEABOARD AIR LINE RY. v. UNITED STATES.

(Argued March 16, 1920. Restored to the Docket for Reargument Nov. 15, 1920. Reargued April 12, 1921. Decided June 6, 1921.)

No. 62.

United States 🔑111—Provision against transfer of claims does not apply to transfer by merger of railway companies.

The provision of Rev. St. § 3477 (Comp. St. § 6383), that transfers of a claim against the United States shall be void, unless made with prescribed formalities after the allowance of the claim and the issuance of a warrant, does not prevent the allowance of a claim originally payable to a railroad company the right to which had vested in another corporation formed by the merger of that company and another under the provisions of Civ. Code Ga. 1895, § 2173, and Gen. St. Fla. 1906, § 2812, since Congress intended merely to prevent evils resulting from trafficking in claims, and not to discourage or hinder the proper merger of corporations as authorized by the states.

Appeal from the Court of Claims.

Suit in the Court of Claims by the Seaboard Air Line Railway against the United States to recover balances for transportation services originally payable to the Florida Central & Peninsular Railroad Company. From a judgment dismissing the petition (53 Ct. Cl. 107), claimant appeals. Reversed and remanded, with directions.

Mr. Benjamin Carter, of Washington, D. C., for appellant.

Mr. Frank Davis, Jr., of Columbus, Ohio, for appellee.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Appellant sued in the Court of Claims to recover balances for transportation services originally payable to the Florida Central & Peninsular Railroad Company, to whose rights it had succeeded through merger or consolidation. Holding that because of section 3477 R. S. (9 Stat. 41, and 10 Stat. 170 [Comp. St. § 6383]) appellant could not maintain the action, that court dismissed its petition.

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*Section 3477:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *"

The Seaboard Air Line Railway was originally chartered under the laws of Virginia; by authorized union with others, it became a consolidated corporation under the laws of Virginia, North Carolina, South Carolina, Georgia, and Alabama; and in 1903 under "articles of agreement of merger and consolidation" and the statutes of Georgia and Florida (section 2173, Civil Code Ga. 1895; section 2812, Gen. Stat. Fla.), the Florida Central & Peninsular Railroad, a Florida corporation, was united with it. As agreed and provided by the laws of the two states, the rights, privileges, franchises, and all property, real, personal, and mixed, and all debts on every account, as well as stock subscriptions and other things in action belonging to each of the constituents, were transferred to and vested in the consolidated corporation without further act or deed, "as effectually as they were in the former companies."

Section 3477 has been before this court many times for construction and application. United States v. Gillis, 95 U. S. 407, 24 L. Ed. 503; Erwin v. United States, 97 U. S. 392, 24 L. Ed. 1065; Spofford v. Kirk, 97 U. S. 484, 24 L. Ed. 1032; Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229; St. Paul, etc., R. R. v. United States, 112 U. S. 733, 5 Sup. Ct. 366, 28 L. Ed. 861; Bailey v. United States, 109 U. S. 432, 3 Sup. Ct. 272, 27 L. Ed. 988; Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; Hager v. Swayne, 149 U. S. 242, 13 Sup. Ct. 841, 37 L. Ed. 719; Ball v. Halsell, 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622; Price v. Forrest, 173 U. S. 410, 19 Sup. Ct. 434, 43 L. Ed. 749.

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*In Erwin v. United States, Goodman v. Niblack, and Price v. Forrest, certain exceptions to the general language of the section were recognized because not within the evil at which the statute aimed. It was intended to prevent frauds upon the Treasury, and the mischiefs designed to be remedied "are mainly two: First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one and by the introduction of a party who was a stranger to the original transaction. Second, that by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest."

We cannot believe that Congress intended to discourage, hinder or obstruct the orderly merger or consolidation of corporations as the various states might authorize for the public interest. There is no probability that the United States could suffer injury in respect of outstanding claims from such union of interests and certainly the result would not be more deleterious than would follow their passing to heirs, devisees, assignees in bankruptcy, or receivers, all of which changes of ownership have been declared without the ambit of the statute. The same principle which required the exceptions heretofore approved applies here.

The judgment of the court below is reversed and the cause remanded with direction to afford reasonable opportunity to both sides for taking any additional proof rendered necessary by the withdrawal by the United States of a stipulation upon which reliance had been placed, and for further proceedings in conformity with this opinion.

(256 U. S. 619)

TEXAS CO. v. HOGARTH SHIPPING CORPORATION, Limited.

(Argued Jan. 26 and 27, 1921. Decided June 6, 1921.)

No. 555.

1. Shipping 🔑39—Voyage charter party becomes charter party for particular vessel after designation and acceptance.

A charter party for a particular voyage, in which the name of the ship was not given, became, after the designation of the ship by the owner and its acceptance by the charterer, an ordinary charter party for the voyage by the designated ship, and the owner was not obliged to furnish nor the charterer to accept another ship, in the absence of any provision for substitution, after the designated ship was requisitioned by its government.

2. Shipping 🔑58(2)—Evidence held not to show owner connived at requisition of chartered vessel by government.

On a libel to recover damages for breach of a voyage charter party, evidence *held* not to sustain the charterer's contention that the owner connived at or consented to the requisition of the chartered vessel by its government before the time for commencing the voyage.

3. Shipping 🔑51—Telegraphic notification of requisition of chartered vessel held sufficient against attack by charterer.

Where it was the custom for a foreign government to requisition vessels for war purposes by telegraphic notification to the owner confirmed by letter, but possession was taken on the telegraphic notice, a telegram, notifying owner of a chartered vessel of its requisition, in which he acquiesced, is a sufficient requisition, although the customary confirmatory letter was not sent, as against the charterer for a voyage which the requisition prevented her from making.

4. Appeal and error 🔑1036(6)—Amicus curiæ intervention by foreign ambassador harmless, if it did not affect decree.

Error of the district court in permitting a foreign ambassador to intervene as amicus curiæ to show that the requisition of the chartered vessel was a governmental act was not prejudicial to charterer, where the intervention and certificate of the ambassador were not considered, but the decree for the owner was rested on evidence otherwise presented.

5. Shipping ⊂⊃51—Governmental requisition of ship chartered for particular voyage excuses performance of charter party.

The performance of the charter party for a particular voyage by a designated ship is, in the absence of an express condition, impliedly conditioned on the ship remaining available for the voyage, so that the owner is excused from performing, where the vessel was requisitioned by its home government before the time for the voyage, and held by the government until long after the charter period, even though the charter contained no "restraint of princes" clause.

6. Shipping ⊂⊃51—Requisition of foreign vessel by her government excuses performance of charter party made in United States.

The fact that the charter party for a voyage by the foreign vessel was made in this country does not make the owner liable for nonperformance of the charter after the vessel was requisitioned by her own government while in her home waters.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit in admiralty by the Texas Company against the Hogarth Shipping Corporation, Limited, to recover damages for an alleged breach of charter party. A decree for the respondent (265 Fed. 375) was affirmed by the Circuit Court of Appeals (267 Fed. 1023), and libelant brings certiorari. Affirmed.

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*Mr. John W. Griffin, of New York City, for petitioner.

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*Mr. John M. Woolsey, of New York City, for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit in admiralty to recover damages for an alleged breach of a voyage charter party entered into in New York, February 6, 1915, between a British corporation, which owned the Baron Ogilvy and other freight ships, and a Texas corporation, which was engaged in shipping and marketing petroleum products. The charter party did not name a particular ship as the subject of the hiring, but required that one of a certain type be designated from among the ships of the British company, on or before March 15. In due time that company named the Baron Ogilvy, and the Texas Company assented. The intended voyage was from a port in Texas to another in South Africa with a full cargo of refined petroleum in cases. The ship was to be tendered at the initial port ready to load between April 15 and May 15, 1915, and in case of *default the Texas Company

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was given the option of canceling or maintaining the charter party. If the vessel was then at that port, the option was to be exercised at once, and if she was not then there, it was to be exercised within 24 hours after her arrival. There was no clause expressly excepting restraints of princes, etc. April 10, 1915, the Baron Ogilvy, while in British waters and being provisioned for the intended voyage, was requisitioned by the British government and pressed into its war service, in which she continuously was retained until October 20 following. On April 12 the British company notified the Texas Company that the vessel had been requisitioned and therefore would not be available to carry out the charter party. The Texas Company thereupon procured another vessel to make the voyage at the time intended, but at an increased freight rate, and subsequently brought this suit against the British company on the theory that the latter had broken the charter party and was liable in damages for the difference between the rate which it was to receive and that actually paid to the other vessel. On the final hearing the District Court rendered a decree for the respondent, the principal grounds of the decision being (a) that when in accordance with the terms of the charter party the Baron Ogilvy was named as the ship to make the voyage the contract became an ordinary voyage charter party for that ship, and none other, and (b) that that ship, before the time for the voyage, was taken in invitum by the owner's government for war use for a period likely to extend beyond the time for the intended voyage, and that this dissolved the charter party and excused the owner from furnishing the ship. (D. C.) 265 Fed. 375. The decree was affirmed by the Circuit Court of Appeals, 267 Fed. 1023; and a writ of certiorari brings the case here. 254 U. S. 625, 41 Sup. Ct. 15, 65 L. Ed. —.

[1] We agree that after the designation of the Baron Ogilvy, *conformably to a provision in the charter party, every element of an ordinary voyage charter party for a particular ship was present. It was then as if that vessel had been named at the outset. And, as there was no provision for substituting another ship, there was no obligation on the part of the owner to furnish, nor on the part of the charterer to accept, another. Nickoll & Knight v. Ashton, Edbridge & Co., [1901] 2 K. B. 126, 131. The contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties.

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[2] The libelant challenges the good faith of the owner and seeks by taking mere fragments of the evidence here and there to show that the owner invited the requisition, welcomed it as promising a better return than the charter

party, and in effect voluntarily turned the vessel over to the government. But the fragments to which attention is invited must be read with the context and all the evidence must be considered. When this is done it becomes very plain that there is no basis for the challenge. The owner made the usual preparations for complying with the charter party, earnestly sought to prevent the requisitioning of the vessel, urged the existence of the charter party as a reason for leaving her free, and respected the requisition, when made, because no other course was reasonably open. It may not be material, but in fact the charter party gave promise of a better return and called for a service which would be less hazardous. The vessel was taken by the government for the use to which she was subjected and after the taking the owner agreed to furnish certain additional facilities by reason of which a higher compensation was obtained than otherwise would have been allowed. Beyond this the owner was accorded no voice in the matter.

[3] As the ship was British and in British *628 waters and the *owner was a British corporation the power of the British government to requisition the ship is beyond question. But the libelant insists that those who assumed to exert this power did not proceed in the mode prescribed, and therefore that the requisition was invalid. The facts adequately proved are as follows: A royal proclamation of August 3, 1914, authorized and empowered the Lords Commissioners of the Admiralty, "by warrant under the hand of their Secretary," "to requisition and take up" British vessels within British waters for use as transports and auxiliaries. The Baron Ogilvy was requisitioned by an order of the Lords Commissioners, and the order was communicated to the owner by a telegram signed "Transports" and saying: "SS. Baron Ogilvy is requisitioned under royal proclamation for government service." The telegram was sent by the Assistant Director of Military Sea Transports, the officer through whom requisitioning orders were executed. This was the usual mode of communicating such orders. Formal warrants never were issued. Generally, the telegraphic communication was followed, after a time, by a letter of like import bearing a block (printed) signature of the Secretary; but in this instance, through an error in office routine, no letter was sent. These letters were intended to be corroborative, but were not deemed essential; and in actual practice the Lords Commissioners and those who executed their orders proceeded on the theory that the ship was taken when the order was received by the owner, however the order was communicated, and that a telegraphic communication of it was effective and must be obeyed. Indeed, the evidence is that if the telegraphic order was not obeyed the vessel would be taken by force. The owner here—six of whose ships had been requisitioned theretofore—so understood the practice and respected the order. It does not appear that the government at any time or in any way disapproved of the practice, but *629 it does appear that in *this instance the government treated the telegraphic order as effective by using the ship as a transport for more than six months and compensating the owner accordingly. In these circumstances, the contention that the requisition was invalid is quite untenable. Whether in different circumstances it could and should be pronounced invalid here we need not consider. See Underhill v. Hernandez, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047; Oetjen v. Central Leather Co., 246 U. S. 297, 303, 304, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., 246 U. S. 304, 309, 38 Sup. Ct. 312, 62 L. Ed. 733; Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 467–468, 25 Sup. Ct. 84, 49 L. Ed. 269.

[4] In the District Court the British Ambassador was permitted to intervene as amicus curiæ, object to the adjudication of the libelant's claim and present a certificate avowing that the requisition was a governmental act. Complaint is made of this. The permission was improvidently granted, as was afterwards indicated by this court in other cases. In re Muir, 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. —; The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592. But the libelant was not prejudiced, for the intervention and certificate ultimately were not considered and the decree was rested on the evidence otherwise presented.

[5] Finally, the libelant insists that the requisition, even if valid and not invited by the owner, did not operate to dissolve the charter party or to excuse the owner from performing it. The courts below held otherwise, and we think rightly so.

It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be regarded as subject to an implied condition that, if before the time *630 for performance *and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it. Taylor v. Caldwell, 3 Best & Smith, 826, 839; In re Shipton, Anderson & Co., [1915] 3 K. B. 676; Horlock v. Beal, [1916] 1 A. C. 486, 494, 496, 512; Bank Line, Limited, v. Arthur Capel & Co., [1919] A. C. 435, 445; The Tornado, 108 U. S. 342, 349–351, 2 Sup. Ct. 746, 27 L. Ed. 747;

Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 37 L. Ed. 625; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Clarksville Land Co. v. Harriman, 68 N. H. 374, 44 Atl. 527; Emerich Co. v. Siegel, Cooper & Co., 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114. The principle underlying the rule is widely recognized and applied to various classes of contracts. The Kronprinzessin Cecilie, 244 U. S. 12, 22–24, 37 Sup. Ct. 490, 61 L. Ed. 960. But, of course, it does not apply where the risk is fully covered by a term of the contract, nor where performance is not practically cut off, but only rendered more difficult or costly. Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399, 410 et seq., 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648. Perhaps the oldest and most familiar application of the principle is to contracts for personal service, where performance is prevented by death or illness. Robinson v. Davison (1871) L. R. 6 Exch. 269; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7. Another application widely recognized is where a ship chartered for a voyage, after the date of the charter party and before the time for the voyage, is accidentally destroyed by fire, lost at sea, or injured in such degree as not to be available for the service. The Tornado, supra, was a suit on a contract of affreightment where the ship, before beginning the voyage, was accidentally burned and thereby prevented from undertaking it. This court held that the contract was dissolved, saying (108 U. S. 349, 2 Sup. Ct. 750, 27 L. Ed. 747):

> "We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, the circumstances *631 with reference to which the *contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the shipowner were wanting at the time when the earning of freight could commence."

Here the ship, although still in existence and entirely seaworthy, was rendered unavailable for the performance of the charter party by the requisition. By that supervening act she was impressed into the war service of the British government for a period likely to extend—and which as it turned out did extend—long beyond the time for the charter voyage. In other words, compliance with the charter party was made impossible by an act of state, the charterer was prevented from having the service of the ship and the owner from earning the stipulated freight. The event apparently was not anticipated, and there was no provision casting the risk on either party. Both assumed that the ship would remain available, and that was the basis of their mutual engagements. These, we think, must be regarded as entered into on an implied condition that, if before the time for the voyage the ship was rendered unavailable by such a supervening act as the requisition, the contract should be at an end and the parties absolved from liability under it.

[6] That the charter party was entered into in this country is not material. The important consideration is that it became impossible of performance through a supervening act of state which operated directly on the ship and the parties could not avoid.

Decree affirmed.

(256 U. S. 632)

UNITED STATES v. WOODWARD et al.

(Argued April 18, 1921. Decided June 6, 1921.)

No. 811.

Internal revenue 🔑7—Estate tax is to be deducted in computing income of estate.

Under Revenue Act 1918, § 214 (Comp. St. Ann. Supp. 1919, § 6336⅛g), allowing a deduction, in computing the net income of an estate on which its income tax is levied under sections 210–213, 219 (sections 6336⅛e–6336⅛ff, 6336⅛ii) of taxes paid or accrued in the taxable year, imposed by the United States, except income, war profits and excess profits taxes, the amount of estate tax imposed under Revenue Act 1916 (Comp. St. §§ 6336½a–6336½m), which became due in 1918 and was paid in 1919, may be deducted from the gross income of the estate for the year 1918, in computing the income tax of the estate for that year.

Appeal from the Court of Claims.

Suit by Alan H. Woodward and others, as executors of the estate of J. H. Woodward, deceased, against the United States, to recover an income tax claimed to have been erroneously exacted from the estate. From a judgment for the executors, the United States appeals. Affirmed.

Messrs. Solicitor General Frierson and Frank Davis, Jr., of Columbus, Ohio, for the United States.

Mr. E. J. Smyer, of Birmingham, Ala., for appellees.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from a judgment in favor of the executors of Joseph H. Woodward, *633 deceased, for money *claimed to have been erroneously exacted from them as a tax on the income of his estate while in their hands.

The testator died December 15, 1917. The Revenue Act of 1916[1] "imposed upon the transfer of the net estate of every decedent" dying thereafter a tax which it called an "estate tax." The act fixed the amount of the tax at a named percentage "of the value of the net estate," made the tax a lien upon the "entire gross estate," required that it be paid "out of the estate" before distribution, declared that it should "be due one year after the decedent's death," charged the executor or administrator with the duty of paying it, and declared that the receipt therefor should entitle him to a credit for the amount in the usual settlement of his accounts. Under that act these executors were required to pay an estate tax of $489,834.07. The tax became due December 15, 1918, and they paid it February 8, 1919. Shortly thereafter the executors made a return, under the Revenue Act of 1918,[2] of the income of the testator's estate for the taxable year 1918 and claimed in the return that in ascertaining the net income for that year the estate tax of $489,834.07 should be deducted. The Commissioner of Internal Revenue refused to allow the deduction and assessed an income tax of $165,075.78 against the estate. Had the deduction been allowed, there would have been no taxable net income for that year, and no part of the $165,075.78 would have been collectible. Payment of that sum, as so assessed, was pressed on the executors, and they paid it under duress. Then, after taking the necessary steps to entitle them to do so, they brought this suit in the Court of Claims to recover the money thus exacted from them.

The sole question for decision is: Was the *634 estate tax *paid by the executors, and claimed by them as a deduction in the income tax return for the year 1918, an allowable deduction in ascertaining the net taxable income of the estate for that year? The Court of Claims held that it was.

The solution of the question turns entirely upon the statutory provisions under which the two taxes were severally collected. The act of 1918, by sections 210, 211 and 219, subjects the net income "received by estates of deceased persons during the period of administration or settlement" to an income tax measured by fixed percentages thereof, by sections 212 and 219 requires that the net income be ascertained by taking the gross income, as defined in section 213, and making the deductions named in section 214, and by section 214 makes express provision for the deduction of "taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war profits and excess profits taxes." This last provision is the important one here. It is not ambiguous, but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones particularly excepted. Indeed, the same act, by sections 400–410 (Comp. St. Ann. Supp. 1919, §§ 6336¾a–6336¾k), expressly provides for their continued imposition and enforcement. Thus their omission from the excepting clause means that Congress did not intend to except them.

The act of 1916 calls the estate tax a "tax" and particularly denominates it an "estate tax." This court recently has recognized that *635 it is a duty or excise and is *imposed in the exertion of the taxing power of the United States. New York Trust Co. v. Eisner, 256 U. S. 345, 41 Sup. Ct. 506, 65 L. Ed. —. It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. It becomes due not at the time of the decedent's death, as suggested by counsel for the government, but one year thereafter, as the statute plainly provides. It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for purposes of administration, as counsel contend, but is made a general charge on the gross estate and is to be paid in money out of any available funds, or, if there be none, by converting other property into money for the purpose.

Here the estate tax not only "accrued," which means became due, during the taxable year of 1918, but it was paid before the income for that year was returned or required to be returned. When the return was made the executors claimed a deduction by reason of that tax. We hold that under the terms of the act of 1918 the deduction should have been allowed.

Judgment affirmed.

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[1] Chapter 463, title II, 39 Stat. 777 (Comp. St. §§ 6336½a-6336½m); chapter 159, title III, 39 Stat. 1002 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336½b, 6336½bb); chapter 63, title IX, 40 Stat. 324 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336½bbb, 6336½bbbb).

[2] Chapter 18, title II, §§ 210-214, 219, 1405, 40 Stat. 1062-1067, 1071, 1151 (Comp. St. Ann. Supp. 1919, §§ 6336⅛e-6336⅛g, 6336⅛ii, 6371¾c).

(256 U. S. 610)

MISSOURI, K. & T. RY. CO. v. UNITED STATES.

(Submitted April 26, 1921. Decided June 6, 1921.)

No. 52.

1. **Post office 🔑21(4)—Contract for carrying mails held subject to regulation by subsequent statute.**

A contract between a railroad company and the Post Office Department for the carrying of the mails, which was made after express notice by the department that the railroad would be subject to all the postal laws and regulations, which were then or might become applicable during the term of the service, is subject to a readjustment of the compensation under a statute enacted after the contract was made, especially where the readjustment was made because of the discontinuance by the railroad of an important item of the services on which the compensation was computed.

2. **Post office 🔑21(4)—Statute authorizing readjustment of compensation after diversion of mails held to apply to existing contracts.**

Act Aug. 24, 1912, § 4 (Comp. St. § 7493), providing for a readjustment of compensation for carrying the mails, when, after a weighing of the mails, mails are diverted from or to the railroad, and authorizing readjustment for diversions occurring before its enactment, permits a readjustment of compensation for carrying the mails under a contract entered into before the statute was enacted, and which was made subject to subsequent postal laws.

3. **Post office 🔑21(4)—Compensation may be readjusted, if diversion amounts to 10 per cent. on some one of the routes affected.**

The proviso to Act Aug. 24, 1912, § 4 (Comp. St. § 7493), that no readjustment of compensation for carrying the mails shall be made unless the diverted mails equal at least 10 per centum of the average daily weight on any of the routes affected, permits a readjustment if the diverted mails equal 10 per cent. of the average daily weight on some one of the routes affected, though it might not equal that percentage of the weight of the mails carried on all the routes affected.

Appeal from the Court of Claims.

Claim by the Missouri, Kansas & Texas Railway Company against the United States for additional pay for carrying the mails. From a judgment of the Court of Claims, denying allowance of the claim (53 Ct. Cl. 641), claimant appeals. Affirmed.

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*Messrs. Alexander Britton and Evans Browne, both of Washington, D. C., for appellant.

Messrs. Assistant Attorney General Davis, J. Robert Anderson, of Washington, D. C., and Assistant Attorney General Stewart, for appellee.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a claim for $9,429.92 additional pay for carrying mails between July 1, 1912, and July 1, 1914. The claimant had been transporting them under an adjustment of compensation that expired on June 30, 1910. In contemplation of the usual quadrennial readjustment by weighing, the Postmaster General sent to the claimant the customary form of Distance Circulars to be filled out and to be accompanied by the latest working schedules of trains operated over the routes concerned. The circular contained this clause:

> "The Company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to Railroad Mail Service."

The claimant signed the circular protesting against certain regulations, and was answered on June 30, 1910, that the department would not enter into contract with any railroad company by which it might be excepted from the operation or effect of any postal laws or regulations and that it must be understood that from the beginning of the contract term named *612 *and during the continuance of the service the company would be "subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of the service." In answer to a reply to this letter it was reiterated that it must be understood that the Company would be "subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter" of June 30, 1910. The weighings took place and on September 15, 1910, by a notice approved by the Postmaster General on September 22, the claimant was informed that the compensation for route No. 153010, (the route chiefly concerned,) had been fixed from July 1, 1910, to June 30, 1914 "(unless otherwise ordered)," at certain sums, "upon returns showing the amount and character of the service," for the usual time (ninety working days). The notice added:

> "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

This correspondence is relied upon by the claimant as a contract fixing its pay for four years.

In 1906 the claimant had established a fast mail train from Parsons, Kansas, that connected with the Frisco System train No. 3, at Vinita, Oklahoma, with further connections that carried the mail to Houston, Galveston and San Antonio, Texas. It had guaranteed the maintenance of the service until July 1, 1910, and was maintaining it at the time of the readjustment in that year. Its return on the Distance Circular for route No. 153010 showed Vinita as a station where mails were put on and put off trains, and the adjustment showed allowances for mails from Parsons to Vinita and from Vinita to Texas. The claimant gave no notice that the fast train would be discontinued. Early in 1912, however, it was discontinued, the Postoffice Department protesting that it was a violation of contract, and being compelled

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thereby to *make other provisions for the mails concerned. Thereafter, on November 22, 1912, the Department ordered the mails diverted to other lines to be weighed for twenty-one days beginning on November 26, so far as such mails could be definitely identified, the mail not to be weighed in case of doubt—that provision of course being favorable to the road. The result was an order of February 13, 1913, approved by the Postmaster on March 1, 1913, by which the compensation on route No. 153010 was diminished by $10,914.04 a year, from July 1, 1912, and that of two other routes increased by $6,199.08. The claimant contending that the whole proceeding was illegal sues for the difference between the new and the old allowance for the two years when the new order was enforced.

The Government justifies the Department's course under the arrangement that we have recited, the previously existing law and the Act of August 24, 1912, c. 389, § 4, 37 Stat. 539, 554 (Comp. St. § 7493).

> "When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: Provided, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: Provided further, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversons occurring after January first, nineteen hundred and twelve."

The claimant contends that it had a contract that could not be affected by this statute and that the statute was not followed in what was done.

[1] The contention that the arrangement

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between the De*partment and the claimant was a contract that the statute could not affect is sufficiently answered by Delaware, Lackawanna & Western R. R. Co. v. United States, 249 U. S. 385, 39 Sup. Ct. 348, 63 L. Ed. 659, and The Mail Divisor Cases, 251 U. S. 326, 40 Sup. Ct. 162, 64 L. Ed. 290, coupled with the express notice that the railroad would be "subject to all the postal laws and regulations which are now or may become applicable during the term of the service." Moreover it is an extravagant interpretation of the adjustment to suppose that the railroad could discontinue an important item of the services upon which the compensation was computed, and still demand the same pay.

[2] The construction of the statute also seems to us to be tolerably plain upon the points mainly argued. The effect of the diversion of mails may be ascertained by "a weighing of such mails" (that is, very plainly, the diverted ones) for such number of days as the Postmaster General may determine. This is not a recurrence to the expensive quadrennial weighing for ninety days but a limited investigation for a limited purpose. The result of the last general weighing, which is sufficient to afford a satisfactory basis for payment, is accepted by the statute as a near enough basis for the ten per cent. test that it creates; the object of the test being merely to show that the diversion has been substantial. The ratio fixed had no other importance than to indicate a case for readjustment and was not necessary even for that, as was shown by the repeal of the proviso in a few years. Act of May 18, 1916, c. 126, § 5, 39 Stat. 159, 161.

The statute itself contemplates a readjustment in respect of past services, since it was not approved until August 24, 1912, and allows a readjustment from the first of the previous July. As the change in the pay is made in respect of a change that has occurred in the service by which the current pay was fixed, the railroad suffers no injustice, and, as we have said, by the terms of its arrangement it took the risk of such a statute being passed.

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[3] *There is an ambiguity in the words "ten per centum on any of the routes affected." The railroad seems to have contended that they required the diverted mails to equal ten per cent. of the average daily weight on all of the routes affected. The Department construed them to mean that it was enough if the diversion amounted to the ten per cent. on any one of the routes. The first interpretation that occurs to a reader may be that the routes are considered separately and that no readjustment shall be made in respect of any route unless the diversion on the route equals ten per cent. But the routes mentioned are supposed to be all affected by the same diversion and therefore are considered collectively. If a readjustment is made as to one route it is reasonable to take into account the offsets on others arising from the same change. That being so there is a literal plausibility in the railroad's contention—but having in mind what we have suggested to be the only purpose of the requirement, we are disposed to accept the construction adopted by the Department and the Court of Claims, that the statute denies a readjustment only if the diverted mails do

not equal ten per cent. of the average daily weight upon any, that is, upon some one of the routes. If the proviso had meant them to amount to ten per cent. upon all the routes, "all" not "any" is the word that naturally would have been used.

Judgment affirmed.

(256 U. S. 635)

MERCHANTS' NAT. BANK OF RICHMOND, VA., v. CITY OF RICHMOND.

(Argued and Submitted March 21, 1921. Decided June 6, 1921.)

No. 240.

1. Courts 🔑400—Supreme Court can make findings omitted by state court because of erroneous view of law.

On writ of error to a state court, the Supreme Court can make findings of fact based on the evidence which the state courts omitted to make because, under the erroneous construction of the federal statute adopted by them, they considered such findings immaterial.

2. Taxation 🔑12—Statute preventing state taxation discriminating against shareholders of national banks not limited to discrimination in favor of state banks; "moneyed capital."

Rev. St. § 5219 (Comp. St. § 9784), providing that state taxation of shares of national banks shall not be at greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, is not limited to protecting national bank shareholders from higher taxation than is assessed against shares in state banks, but the expression "moneyed capital in hands of individual citizens" includes investments in securities that will be money at interest and other evidences of indebtedness, such as normally entered into in banking.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moneyed Capital.]

3. Taxation 🔑12—State tax held to discriminate between national bank stock and capital invested in competition therewith.

A tax imposed pursuant to Acts Va. 1915, c. 85, and a city ordinance enacted under the authority thereof, which, in connection with the tax under Acts Va. 1915, c. 117, amounted to $1.75 on each $100 invested in bank stock, whether national or state, while the rate was only 95 cents on each $100 valuation of intangible property, including bonds, notes, and other evidences of indebtedness, is contrary to Rev. St. § 5219 (Comp. St. § 9784), providing that the state tax on national bank shares shall not exceed the tax levied on moneyed capital in hands of individual citizens, where it was clearly shown that the capital taxed at lower rate was in relatively material competition with the banks of the state.

Mr. Justice Brandeis dissenting.

In Error to the Supreme Court of Appeals of the State of Virginia.

Petition by the Merchants' National Bank of Richmond against the City of Richmond to correct a tax assessment. The proceeding was dismissed, and the Supreme Court of Appeals of Virginia denied an application for writ of error to review the judgment (124 Va. 522, 98 S. E. 643), and petitioner brings error. Application for writ of certiorari denied. Reversed and remanded.

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*Messrs. Legh R. Page and E. Warren Wall, both of Richmond, Va., for plaintiff in error.

Messrs. Henry R. Pollard and George Wayne Anderson, both of Richmond, Va., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

The court of last resort of Virginia sustained a tax assessed by the city of Richmond in the year 1915, in form against plaintiff in error, a national banking association, in substance and effect against its shareholders, overruling a contention based upon the Constitution and laws of the United States. To review its judgment a writ of error has been sued out and allowed, and application has been made also for the allowance of a writ of certiorari. The proceeding originated in the hustings court of the city of Richmond with a petition filed by the bank against the city to correct the assessment as erroneous. The first hearing resulted in an order granting the relief prayed for, upon grounds not now material; but, upon review by the Supreme Court of Appeals, this was reversed (124 Va. *637 522, 98 S. E. 643), and the case remanded *for further proceedings in conformity with the views of that court; in consequence of which, correction of the alleged erroneous assessment was refused by the trial court, and the proceeding dismissed. An application for a writ of error to review this judgment was denied by the Supreme Court of Appeals, with the effect of affirming the judgment of the hustings court.

The tax was imposed pursuant to an ordinance approved April 9, 1915, passed under the powers conferred upon the city by its charter and an act of the General Assembly approved March 15, 1915 (Acts Va. 1915, c. 85, p. 119). The opinion of the court of last resort shows that plaintiff in error drew in question the validity of the ordinance and statute, as construed and applied, upon the ground of their alleged repugnance to section 5219, Rev. Stat. U. S. (Comp. St. § 9784), and that the court sustained their validity notwithstanding. Under section 237, Judicial Code, as amended by Act of Sept. 6, 1916, c. 448, 39 Stat. 726 (Comp. St. § 1214), a writ of error is the appropriate process for reviewing the final judgment in this court, and the petition for allowance of a writ of certiorari will be denied.

It will not be necessary to recite the provisions of the statute and ordinance, beyond saying that, taken in connection with another act of the General Assembly, approved March 17, 1915 (Acts Va. 1915, c. 117, p. 160), they authorized the imposition for the year 1915 upon bank stocks, state and national, of a tax for state purposes at the rate of 35 cents and a tax for city purposes at the rate of $1.40—a total of $1.75—upon the $100 of valuation, while upon intangible personal property in general, including bonds, notes, and other evidences of indebtedness, the state rate was 65 cents and the city rate 30 cents, an aggregate of 95 cents, upon each $100 of valuation.

The bank's petition alleged, and the evidence showed without dispute, that in the *638 city of Richmond, in 1915, *city and state taxes at the rates first mentioned were imposed upon national bank stocks (including that of plaintiff in error) to the aggregate value of more than $8,000,000, and stocks of state banks and trust companies to the value of $6,000,000 and upwards, while taxes at the lower aggregate rate of 95 cents per $100—city tax, 30 cents; state tax, 65 cents—were imposed for the same year upon bonds, notes, and other evidences of indebtedness aggregating $6,250,000. It is to be inferred that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market.

[1] Neither of the state courts passed upon this evidence or made findings of fact thereon, doubtless because, under their respective views of the applicable law, the facts referred to were immaterial. But this omission does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the state court, if plaintiff in error's contention upon the question of federal law should be sustained, and the facts thereby shown to be material. Carlson v. Curtiss, 234 U. S. 103, 106, 34 Sup. Ct. 717, 58 L. Ed. 1237.

[2] The Supreme Court of Appeals entertained the view that the purpose of section 5219, Rev. Stat., was confined to the prevention of discrimination by the states in favor of state banking associations as against national banking associations, and that since none such is shown here there was no repugnance to the federal statute. This, however, is too narrow a view of section 5219. It traces its origin to section 41 of the Act of June 3, 1864, c. 106, 13 Stat. 99, 111, 112, in which, besides the restriction that state taxation of the shares of national banking associ- *639 ations should not be at a *greater rate than that assessed upon other moneyed capital in the hands of individual citizens of such state, there was an express proviso that the tax should not exceed the rate imposed upon the shares of state banks. But this was modified by Act of February 10, 1868, c. 7, 15 Stat. 34 (Comp. St. § 9784), in a manner which, as was pointed out in Boyer v. Boyer, 113 U. S. 689, 691, 692, 5 Sup. Ct. 706, 28 L. Ed. 1089, precluded the possibility of an interpretation permitting the states, while imposing the same taxation upon national bank shares as upon shares in state banks, to discriminate against national bank shares in favor of moneyed capital not invested in state bank stock. "At any rate," said the court, "the Acts of Congress do not now permit any such discrimination." In the amended form the provision was carried into the Revised Statutes as section 5219, which prescribes that state taxation of shares in the national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

By repeated decisions of this court, dealing with the restriction here imposed, it has become established that while the words "moneyed capital in the hands of individual citizens" do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking. In Evansville Bank v. Britton, 105 U. S. 322, 324, 26 L. Ed. 1053, the court said:

> "The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations *640 *are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. *But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.* * * * We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

And in Mercantile Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, the court speaking by Mr. Justice Matthews, after reviewing previous decisions and pointing out (121 U. S. 154, 7 Sup. Ct. 826, 30 L. Ed. 895) the policy and purpose of the act as the key to its proper interpretation, proceeded to declare (121 U. S. 157, 7 Sup. Ct. 836, 30 L. Ed. 895):

> "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. *It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.* In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Proceeding then to quote the passage we have cited from Evansville Bank v. Britton, supra.

*641

[3] *In Amoskeag Savings Bank v. Purdy, 231 U. S. 373, 390, 391, 34 Sup. Ct. 114, 58 L. Ed. 274, the above-mentioned declaration of the court in Mercantile Bank v. New York, 121 U. S. 138, 157, 7 Sup. Ct. 826, 30 L. Ed. 895, including the citation from Evansville Bank v. Britton, was repeated, and it was pointed out that the rule of construction thus laid down had since been consistently adhered to. No decision of this court to which our attention is called has qualified that rule, or construed section 5219 as leaving out of consideration the rate of state taxation imposed upon moneyed capital in the hands of individual citizens invested in loans or securities for the payment of money, either for permanent or temporary purposes, where such moneyed capital comes into competition with that of the national banks. Thus, in Bank of Commerce v. Seattle, 166 U. S. 463, 464, 17 Sup. Ct. 996, 41 L. Ed. 1079, the precise ground of decision was the want of a showing that "the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks." To the same effect First National Bank of Wellington v. Chapman, 173 U. S. 205, 219, 19 Sup. Ct. 407, 43 L. Ed. 669. In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of plaintiff in error was assessed, as construed and applied, exceeded the limitation prescribed by section 5219, Rev. Stat., and hence that the tax is invalid.

Application for writ of certiorari denied.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BRANDEIS dissents.

MEMORANDUM DECISIONS

Disposed of at October Term, 1920

No. —, original Ex parte In the matter of Geromina SANGUINETTI et al., petitioners. Nov. 22, 1920. Messrs. Benjamin Carter and Frank Carter Pope, both of Washington, D. C., for petitioners. Motion for leave to file petition for a writ of mandamus herein submitted by Mr. Benjamin Carter and Mr. Frank Carter Pope for the petitioners, and motion denied.

No. —, original. Ex parte In the matter of The STATE OF NEW YORK et al., Owners of The steam tug "QUEEN CITY," petitioner. Nov. 22, 1920. See, also, 256 U. S. 503, 41 Sup. Ct. 592, 65 L. Ed. —. Motion for leave to file petition for a writ of prohibition and for a writ of mandamus herein granted, and rule to show cause awarded returnable Monday, December 13 next.

(256 U. S. 685)

No. —, original. Ex parte In the matter of The STATE OF LOUISIANA, petitioner. June 1, 1921. Motion for leave to file petition for a writ of mandamus herein denied.

No. —, original. NORTH DAKOTA ex rel. LEMKE v. C. N. W. RAILWAY COMPANY. June 1, 1921. Motions for leave to file original bill of complaint, and amendment to said original bill, granted and process ordered to issue returnable on Monday, October 3, 1921. Motion for an interlocutory injunction, to stay proceedings pending suit, denied.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U.

S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Mr. S. P. Freeling, of Oklahoma City, Okl., for the State of Oklahoma. Messrs. C. W. Taylor, of Austin, Tex., and Orville Bullington and A. H. Carrigan, both of Wichita Falls, Tex., for the State of Texas. On application of A. E. Pearson and others, claimants of certain lands. Order granted authorizing the receiver to sink a well for oil and gas upon said lands.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. On motion of Luther Eoff, claiming to be owner of an oil and gas lease on a certain tract of land. Order granted authorizing the receiver to sink a well for oil and gas upon said land.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. On motion of J. R. Armstrong and others. Order appointing Frederick S. Tyler, Esq., special master to hear and report on the claims upon a certain fund in the hands of the receiver.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Upon considering the fifth report of the receiver. Order made instructing receiver as to development work, as to advertising for claims, etc.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Order appointing Frederick S. Tyler, Esq., commissioner, to take evidence of the parties respecting special issues joined upon the intervening petitions of E. Everitt Rowell, A. E. Pearson and others, the Burk Divide Oil Company, Consolidated, and the Mellish Consolidated Placer Mining Association, and the special issues raised by the State of Oklahoma as owner of certain school sections; and to report the evidence to the Court without findings or conclusions.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. On consideration of the fifth report of the receiver. Order made directing the judge of the United States District Court for the Northern District of Texas to show cause why a writ of prohibition should not be issued commanding him to desist from further entertaining jurisdiction of an action commenced by the Casa Oil Company against the receiver.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Order authorizing receiver to reimburse certain operators or drillers of wells their actual cost of such work.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Order appointing Frederick S. Tyler, Esq., commissioner, to take and report the evidence of the parties as to what constitutes the south bank of Red River, as to where along that bank the true boundary line is between the State of Oklahoma and the State of Texas and as to the proper mode of locating the same upon the ground.

(256 U. S. 602)

No. 23, original. The STATE OF OKLAHOMA, complainant, v. The STATE OF TEXAS, defendant; The United States of America, intervener. June 1, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 539, 65 L. Ed. —. Order directing that no petition in intervention be filed hereafter except upon special leave of the Court.

(256 U. S. 684)

No. 288. The HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, plaintiff in error, v. The CITY OF ENNIS et al. June 1, 1921. In error to the Court of Civil Appeals, Fifth Supreme Judicial District, State of Texas. For opinion below, see 201 S. W. 256. Messrs. Jesse Andrews, of Kansas City, Mo., J. L. Gammon, of Waxahachie, Tex., and H. M. Garwood, of Houston, Tex., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction, upon the authority of section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1136) as amended by the act of September 6, 1916, c. 448, § 2 (39 Stat. 726 [Comp. St. § 1214]). See writ of certiorari denied (252 U. S. 583, 40 Sup. Ct. 393, 64 L. Ed. 728).

No. —, original. Ex parte In the matter of the STATE OF NEW YORK. Edward S. WALSH, Superintendent, etc., et al., petitioners. Nov. 22, 1920. See, also, 256 U. S. 490, 41 Sup. Ct. 588, 65 L. Ed. —. Motion for leave to file petition for a writ of prohibition and/or a writ of mandamus herein granted, and rule to show cause awarded returnable Monday, December 13 next.

(256 U. S. 685)

No. 318. The DWELLING BUILDING & LOAN ASSOCIATION et al., appellants, v. Winfield S. MacHENRY, Trustee in Bankruptcy. June 1, 1921. Appeal from the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 263 Fed. 702. Mr. Joseph Gilfillan, of Philadelphia, Pa., for appellants.

PER CURIAM. Dismissed for want of jurisdiction, upon the authority of the act of January 28, 1915, c. 22, § 4, as amended by the act of September 6, 1916, c. 448, § 3 (39 Stat. 727 [Comp. St. 1120a]).

No. 365. Rensselaer L. CURTIS, Receiver, etc., appellant, v. John J. CONNLY et al. June 1, 1921. For opinion below, see 264 Fed. 650. Mr. Edward F. McClennen, of Boston, Mass., for appellant. Mr. Arthur M. Allen, of Providence, R. I., for respondents. Death of Arthur W. Dennis, one of the appellees herein, suggested and motion for an order of publication granted, on motion of Mr. Lucien H. Boggs for the appellant.

No. 369. AMERICAN COLUMN & LUMBER COMPANY et al., appellants, v. The UNITED STATES of America. June 1, 1921. See, also, 40 Sup. Ct. 588. Mr. L. C. Boyle, of Washington, D. C., for appellants. The Attorney General, for the United States. Motion for stay of part of injunction denied.

No. 451. SANTA FÉ PACIFIC RAILROAD COMPANY, appellant, v. John Barton PAYNE, Secretary of the Interior;

No. 452. SANTA FÉ PACIFIC RAILROAD COMPANY, appellant, v. John Barton PAYNE, Secretary of the Interior; and

No. 693. John Barton PAYNE, Secretary of the Interior, plaintiff in error, v. The UNITED STATES of America ex rel. W. T. MOSIER et al. June 1, 1921. For opinions below, see (App. D. C.) 267 Fed. 653, Id., 656, and 269 Fed. 871. Mr. F. W. Clements, of Washington, D. C., for appellant. Albert B. Fall, successor to John Barton Payne as Secretary of the Interior, substituted as a party appellee and plaintiff in error herein on motion of Mr. Alexander Britton in that behalf.

(256 U. S. 701)

No. 875. PRINCESS AMUSEMENT COMPANY, petitioner, v. Jake WELLS. June 1, 1921. For opinion below, see 271 Fed. 226. Messrs. T. T. McCarley, W. C. Cherry and J. G. Stephenson, all of Nashville, Tenn., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(256 U. S. 701)

No. 885. Alexis GEORGIAN, petitioner, v. Byron H. UHL, Acting Commissioner of Immigration, etc. June 1, 1921. For opinion below, see 271 Fed. 676. Mr. Walter Nelles, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 701)

No. 893. Jacques ROUSSO, petitioner, v. Harry SOLOMON. June 1, 1921. For opinion below, see 271 Fed. 799. Mr. Joshua R. H. Potts, of Washington, D. C., for petitioner. Mr. William F. Hall, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(256 U. S. 701)

No. 896. HERMAN & HERMAN, Inc., petitioner, v. THE Steamship OWEGO, her engine, etc. June 1, 1921. For opinion below, see 270 Fed. 967. Mr. Homer L. Loomis, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 701)

No. 897. Cuno H. RUDOLPH et al., Commissioners, etc., et al., petitioners, v. Mollie SCHWARTZ. June 1, 1921. For opinion below, see Schwartz v. Brownlow, 270 Fed. 1019. Mr. F. H. Stephens, of Washington, D. C., for petitioners. Mr. W. Gwynn Gardiner, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(256 U. S. 702)

No. 900. WALKER BROS. COMPANY, petitioner, v. W. & H. WALKER, Inc., et al. June 1, 1921. For opinion below, see 271 Fed. 395. Messrs. Odin Roberts, Robert Cushman, Charles D. Woodberry, and Isaac E. Simons, all of Boston, Mass., for petitioner. Messrs. Dunbar, Nutter & McClennen, of Boston, Mass. (George R. Nutter and Jacob J. Kaplan, both of Boston, Mass., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(256 U. S. 687)

No. 901. SOUTHERN PACIFIC COMPANY et al., petitioners, v. OLYMPIAN DREDGING COMPANY. June 1, 1921. For opinion below, see 270 Fed. 384. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(256 U. S. 702)

No. 903. J. E. SISTRUNK, petitioner, v. J. T. PENDLETON, Judge. June 1, 1921. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied.

(256 U. S. 701)

No. 905. Mrs. Addie PROHASKA, widow, etc., et al., petitioners, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY. June 1, 1921. For opinion below, see 270 Fed. 91. Messrs. John D. Grace and M. A. Grace, both of New Orleans, La., for petitioners. Messrs. Terriberry, Rice & Young, of New Orleans, La. (George H. Terriberry, of New Orleans, La., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. —, Original. The STATE OF TEXAS, complainant, v. The INTERSTATE COMMERCE COMMISSION. June 6, 1921. Motion for leave to file bill of complaint herein granted, and process ordered to issue returnable on Monday, October 3, next.

(256 U. S. 706)

No. 5. The UNITED STATES, appellant, v. AMERICAN CAN COMPANY et al. June 6, 1921. Appeal from the District Court of the United States for the District of Maryland. For opinions below, see 230 Fed. 859, 234 Fed. 1019. Mr. Solicitor General Frierson, for the United States. Dismissed, on motion of Mr. Solicitor General Frierson for the appellant.

No. 23, Original. The STATE OF OKLAHOMA, complainant, v. The STATE of TEXAS. June 6, 1921. See, also, 256 U. S. 602, 41 Sup. Ct. 621, 65 L. Ed. —. Motion for leave to file petition in intervention of D. D. Brunson granted.

(256 U. S. 706)

No. 308. Henry ALBERS, petitioner, v. The UNITED STATES of America. June 6, 1921. For former opinion, see 256 U. S. 706, 41 Sup. Ct. 536, 65 L. Ed. —. Messrs. James B. Kerr and Charles H. Carey, both of Portland, Or., for petitioner. The Attorney General, for the United States. Motion for leave to intervene and present a petition for rehearing denied.

No. 707. Sarah F. DONLEY, petitioner, v. Erwin Ray VAN HORN; and

No. 708. Sarah F. DONLEY, petitioner, v. Prescott WEST. June 6, 1921. Motions to postpone the submission of petitions for writs of certiorari until the hearing on the writs of error in Nos. 831 and 832 denied.

(256 U. S. 702)

No. 711. Marie E. SCHEUERLE, Administratrix, etc., petitioner, v. ONEPIECE BIFOCAL LENS COMPANY. June 6, 1921. Mr. Arthur E. Paige, of Philadelphia, Pa., for petitioner. Mr. V. H. Lockwood, of Indianapolis, Ind., for respondent. Petition for a writ of certiorari to the District Court of the United States for the District of Indiana denied.

(256 U. S. 685)

No. 801. McKITTRICK OIL COMPANY, plaintiff in error, v. SOUTHERN PACIFIC RAILROAD COMPANY. June 6, 1921. In error to the District Court of Appeal, Second Appellate District, Division No. 1, of the State of California. For opinion below, see 194 Pac. 80. See, also, 256 U. S. 695, 41 S. Ct. 536, 65 L. Ed. —. Messrs. George E. Whitaker, of Bakersfield, Cal., and Fred Dennett, of Washington, D. C., for plaintiff in error. Mr. Frank Thunen, of San Francisco, Cal. (Mr. A. A. Hoehling, Jr., of Washington, D. C., of counsel), for defendant in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1136) as amended by the act of September 6, 1916 (c. 448, § 2, 39 Stat. 726 [Comp. St. § 1214]).

(256 U. S. 702)

No. 871. The STATE TAX COMMISSIONER OF THE STATE OF NEW YORK, petitioner, v. The PEOPLE OF THE STATE OF NEW YORK ex rel. ALPHA PORTLAND CEMENT COMPANY. June 6, 1921. For opinion below, see People ex rel. Alpha Portland Cement Co. v. Knapp, 132 N. E. 870, which denied reargument of 230 N. Y. 48, 129 N. E. 202, which reverses 191 App. Div. 262, 181 N. Y. Supp. 32. Mr. Charles D. Newton, Atty. Gen. (Mr. C. T. Dawes, of Albany, N. Y., of counsel), for petitioner. Mr. Louis H. Porter, of New York City, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(256 U. S. 688)

No. 898. The UNITED STATES of America, petitioner, v. Wesley L. SISCHO. June 6, 1921. For opinion below, see 270 Fed. 958. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(256 U. S. 703)

No. 908. OLD DOMINION BEVERAGE CORPORATION, petitioner, v. The COCA COLA COMPANY. June 6, 1921. For opinion below, see 271 Fed. 600. Messrs. Scott & Buchanan, of Richmond, Va., and William L. Symons, of Washington, D. C., for petitioner. Messrs. Harold Hirsch, of Atlanta, Ga., and Edward S. Rogers, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(256 U. S. 703)

No. 909. W. E. HAMILTON et al., petitioners, v. DE CAMP GLASS CASKET COMPANY et al. June 6, 1921. For opinion below, see 272 Fed. 558. Mr. Chas. C. Moore, of Chattanooga, Tenn. (Messrs. Tatum, Thach & Lynch and Moore & Lynch, all of Chattanooga, Tenn., of counsel), for petitioners. Mr. J. B. Sizer, of Chattanooga, Tenn. (Messrs. J. Read Voigt, Strang & Fletcher, and Sizer, Chambliss & Chambliss, all of Chattanooga, Tenn., of counsel), for defendants. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(256 U. S. 688)

No. 911. John P. KLINE et al., as the Board of Improvement, etc., petitioners, v. BURKE CONSTRUCTION COMPANY. June 6, 1921. For opinion below, see 271 Fed. 605. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(256 U. S. 703)

No. 914. Lou FRAZIER, Administratrix, etc., petitioner, v. INTERSTATE RAILROAD COMPANY. June 6, 1921. For opinion below, see 273 Fed. 181. Mr. William H. Werth, of Tazewell, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(256 U. S. 703)

No. 916. Gustav H. JACOBSON, petitioner, v. The UNITED STATES of America;

No. 917. Albert H. WEHDE, petitioner, v. The UNITED STATES of America, and

No. 918. George Paul BOEHM, petitioner, v. The UNITED STATES of America. June 6, 1921. For opinion below, see 272 Fed. 399. Messrs. Henry W. Freeman and Michael L. Igoe, both of Chicago, Ill., for petitioner. Messrs. Robert P. Stewart, Asst Atty. Gen., and C. Herron, for the United States. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 704)

No. 921. LEHIGH VALLEY RAILROAD COMPANY, petitioner, v. John LYSAGHT, Limited. June 6, 1921. For opinion below, see 271 Fed. 906. Messrs. Lindley M. Garrison and Edgar H. Boles, both of New York City, Geo. S. Hobart, of Newark, N. J., and Charles A. Boston, of New York City, for petitioner. Messrs. W. Kintzing Post and Henry W. Hayden, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 704)

No. 922. LEHIGH VALLEY RAILROAD COMPANY, petitioner, v. ALLIED MACHINERY COMPANY OF AMERICA. June 6, 1921. For opinion below, see 271 Fed. 900. Messrs. Lindley M. Garrison and Edgar H. Boles, both of New York City, Geo. S. Hobart, of Newark, N. J., and Charles A. Boston, of New York City, for petitioner. Mr. Hartwell Cabell, of New York City (Mr. Edwin G. Marks, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 704)

No. 923. Ike APPLEBAUM, petitioner, v. The UNITED STATES of America. June 6, 1921. Mr. Chester H. Krum, of St. Louis, Mo., for petitioner. For opinion below, see 274 Fed. 43. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(256 U. S. 688)

No. 925. FEDERAL TRADE COMMISSION, petitioner, v. The CURTIS PUBLISHING COMPANY. June 6, 1921. For opinion below, see 270 Fed. 881. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(256 U. S. 704)

No. 930. William GREEN, petitioner, v. Thomas B. FELDER, Receiver, etc., et al. June 6, 1921. For opinion below, see In re Leslie-Judge Co., 272 Fed. 886. Mr. Francis M. Scott, of New York City (Mr. William J. Hughes, of Washington, D. C., of counsel), for petitioner. Mr. Frederick R. Kellogg, of New York City, for respondents Doubleday, Page & Co. and West Virginia Pulp & Paper Co. Mr. Arthur J. Baldwin, of New York City, Amicus Curiæ. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(256 U. S. 688)

No. 931. FEDERAL TRADE COMMISSION, petitioner, v. WINSTED HOSIERY COMPANY. June 6, 1921. For opinion below, see 272 Fed. 957. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(256 U. S. 689)

No. 933. Fred BROWNE, plaintiff in error, v. Charles B. THORN et al., Partners, etc. June 6, 1921. For opinion below, see 272 Fed. 950. Petition for a writ of certiorari herein granted.

(256 U. S. 667)

No. 984. HANS HOHNER v. FRANCIS P. GARVAN, as Alien Property Custodian, et al. Aug. 21, 1920. Mr. A. W. Lafferty, of New York City, for appellant. The Attorney General, for appellees. Appeal from the District Court of the United States for the Southern District of New York. Dismissed pursuant to the twenty-eighth rule.

(256 U. S. 220)

STATE OF NORTH DAKOTA v. STATE OF MINNESOTA.

(Argued January 3 and 4, 1921. Order Entered April 18, 1921.)

No. 14, Original.

In Equity.

Mr. M. H. Boutelle, of Minneapolis, Minn. (Messrs. William Langer, Atty. Gen., of North Dakota, John Lind, of Minneapolis, Minn., and I. C. Pinkney, of Peoria, Ill., on the brief), for complainant.

Messrs. John E. Palmer, of Minneapolis, Minn., and Egbert S. Oakley, of St. Paul, Minn. (Messrs. Clifford L. Hilton, Atty. Gen., of Minnesota, and Montreville J. Brown, of Minneapolis, Minn., on the brief), for defendant.

Order.

PER CURIAM. To afford an opportunity for the taking of supplemental proof deemed by the court necessary to an adequate consid- *221 eration and disposition of the cause, *it is ordered that the case be restored to the docket, to the end that the parties may proceed promptly to take the testimony of not exceeding three engineering experts on each side as to the possibility, within the limits of a reasonable expenditure, of doing away with or ameliorating the flood conditions along the Bois de Sioux river by means other than the injunction prayed for in the bill herein, the testimony thus to be taken to be particularly directed, among other things, to the possibility and effect and estimated cost of any of the following projects: (a) The construction of detaining basins for drainage water throughout the watershed of the Mustinka river for the purpose of withholding a part of the spring waters until the flood period is past; (b) the construction of a sluice dam at any point in Lake Traverse for the purpose of increasing its capacity as a detaining basin; (c) artificial improvement in the channel of the Bois de Sioux river, in order to improve its capacity as an outet for the waters of Lake Traverse in times of flood, so as to prevent overflow and the inundation of the Bois de Sioux valley, the works to include a sluice dam at the foot of Lake Traverse, if necessary, in order to maintain its level in times of normal flow; (d) lowering the level of Lake Traverse by means of an outlet to Big Stone Lake, controlled by a sluice dam, with a view to increasing its capacity as a detaining basin during the flood period; (e) by diverting some of the drainage water from the so-called Delta Zone, in order to discharge the same down the Mustinka river, to the Rabbit river.

It is further ordered that the parties may take the testimony of not exceeding three witnesses on each side concerning the proper equitable basis for apportioning the expense of any feasible project among the states drained by the Lake Traverse-Bois de Sioux watershed, taking into account, among other considerations, the amount of water discharged by each *222 state into Lake *Traverse or the Bois de Sioux river and the benefit conferred by the improvement.

It is further ordered that testimony shall be taken sufficient to advise the court as to the flood conditions which have prevailed, since the filing of the bill herein, in the area claimed to have been flooded by the action of the state of Minnesota.

Before the taking of the testimony on the subject above referred to and the resubmission of the cause, the court will entertain a motion in this case and the case of State of South Dakota v. State of Minnesota, No. 15, Original, to consolidate that case with this, if counsel are so advised, to the end that the possibility may be considered of alleviating flood conditions in Lake Traverse and along the Bois de Sioux river by other means than the injunction prayed for in that case and to permit South Dakota to take testimony at the hearing now ordered in this case.

END OF CASES IN VOL. 41

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